

DRAFT

COMMENTARY TO THE DRAFT CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF DEVELOPING, PRODUCING, ACQUIRING, STOCKPILING, RETAINING, TRANSFERRING OR USING BIOLOGICAL OR CHEMICAL WEAPONS

SYNOPSIS

The Purpose of the Draft Convention

1. The Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring, or Using Biological or Chemical Weapons (“Draft Convention”) seeks to create an international legal regime establishing individual criminal liability for offences involving biological and chemical weapons. Adoption and widespread adherence to the Draft Convention would create a new dimension of constraint against biological and chemical weapons by employing international criminal law to provide a new level of jurisdiction to national courts against individual offenders where they are present in the territory of any State Party to the convention. The norm against biological and chemical weapons would be strengthened, deterrence would be enhanced, and international co-operation 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 as a threat to the security of individual States but also a menace, now and in the future, to all humanity. Existing international conventions that prohibit these weapons are

directed primarily at the actions of States and address individual responsibility to only a limited degree. The three multilateral conventions that specifically govern this field are the Geneva Protocol 1925¹ (hereinafter “GP”), the Biological Weapons Convention 1972² (hereinafter “BWC”), and the Chemical Weapons Convention 1993³ (hereinafter “CWC”). Additionally, the Rome Statute of the International Criminal Court 1998⁴ (hereinafter “Rome Statute”) includes elements to punish individuals for the war crimes of employing “poison or poisoned weapons” or “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices”. Furthermore, aspects of these conventions can be considered to form part of customary international humanitarian law.

2. The Draft Convention builds upon the GP, BWC and CWC by providing a comprehensive framework for criminalizing the activities prohibited by these conventions. Although both the BWC and CWC require each State Party to prohibit activities on its territory that are prohibited under the conventions, only the CWC explicitly requires each State Party to enact penal legislation to this effect, applicable also to the activities of its

¹ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 1925, 94 L.N.T.S.65, entered into force 8 February 1925 (134 States Parties and 1 Signatory State as of April 2008, International Committee for the Red Cross online repository for international humanitarian law enclosing a list of States Parties at <http://www.icrc.org/ihl.nsf>).

² Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972, 1015 U.N.T.S.163, entered into force 26 March 1975 (161 States Parties, 14 Signatory States and 20 Non-Signatory States as of April 2008, United Nations Office at Geneva, www.unog.ch/bwc).

³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993, 1974 U.N.T.S. 3, entered into force 29 April 1997 (183 States Parties, 5 Signatory States and 7 Non-Signatory States as of 29 February 2008, Organisation for the Prohibition of Chemical Weapons, 21 October 2004, Facts and Figures found at <http://www.opcw.org/factsandfigures/index.html#participation>)

⁴ Rome Statute of the International Criminal Court 1998, 2187 U.N.T.S. 90, entered into force 1 July 2002, see Art. 8, §§ 2(b)(xvii)-(xviii).

nationals elsewhere.⁵ The BWC and CWC both stop short of requiring a State Party to establish criminal jurisdiction over foreign nationals present on its territory who have used biological or chemical weapons outside of its territorial jurisdiction, and neither convention contains provisions addressing extradition. UN Security Council resolution 1540, *infra*, also places no requirement on States to establish such jurisdiction⁶. The Draft Convention would therefore help to remove any jurisdictional inconsistencies that currently exist between States when dealing with BCW violations.

3. The deficiencies of the GP, BWC and CWC with respect to penal legislation are not remedied by the provisions on biological and chemical weapons in the Convention for the Suppression of Terrorist Bombing 1998⁷ (hereinafter “Terrorist Bombing Convention”), by the Rome Statute, or by UN Security Council resolution 1540. The Terrorist 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 a State official’s use of biological or chemical weapons against people in his own State. The Rome Statute criminalizes the use of chemical weapons, as defined in the GP only in connection with the charge of war crimes. Additionally, The GP and the Rome Statute address only the actual *use* of the weapons to which they apply, whereas the BWC, CWC, and this Draft Convention extend the scope of

⁵ The Third Review Conference of the Parties to the BWC urged States Parties to consider a broader approach to jurisdiction to encompass their nationals regardless of where the offence took place, which would bring the BWC into line with the jurisdictional obligations of the CWC. This recommendation was reaffirmed in the 2006 Sixth Review Conference. Article IV of both the ‘Final Declaration of Third RevCon’ and ‘Final Document of Sixth RevCon’ found at <http://www.opbw.org> Article 9 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction has a similar obligation to that of Article VII of the CWC with regards to the extra-territorial jurisdiction over nationals.

⁶ Nevertheless, State practice is beginning to evolve: in implementing its obligations under the Biological Weapons Convention, section five of Australia’s Crimes (Biological Weapons) Act 1976 extends its extra-territorial jurisdiction to any acts ‘*done or omitted to be done by Australian citizens outside Australia*’.

⁷ International Convention for the Suppression of Terrorist Bombings 1998, U.N. Treaty Reg. No. 37517, entered into force on 23 May 2001 during the writing of the Commentary.

impermissible activity to include the development, production, acquisition, stockpiling, and transfer of such weapons.⁸

4. Discordant attempts by individual States to enact national legislation addressing biological and chemical weapons can be no substitute for concerted efforts towards international criminalization. Such crimes are often international in scope, and consequently, effective prosecution and enforcement will often require international efforts, especially when the national States of such offenders are unable or unwilling to prosecute them. These efforts are complicated by a lack of harmony among national statutes criminalizing biological and chemical weapons and the lack of consensus regarding the establishment of jurisdiction over alleged offenders and the assurance that there is uniformity between States in the legal foundations under which criminal proceedings can commence.⁹ This lack of harmony and consensus is symptomatic of the disparate and general requirements that States enact relevant domestic criminal legislation. Moreover, national criminal statutes do not convey the universal condemnation implicit in international criminal law.¹⁰

⁸ Recent legal developments suggest that the charge of complicity in war crimes may facilitate the prosecution of those that supply components that could be used to manufacture chemical weapons. As an adjunct to violations of the Geneva Conventions committed by the Iraq regime during its conflict with Iran in the 1980s, the Dutch national Frans van Anraat was successfully prosecuted in the Netherlands for complicity in war crimes after knowingly supplying chemicals to Iraq that would be used to make chemical weapons. For an overview see http://www.opcw.org/docs/publications/cdq_dec2006.pdf at pp. 19-31

⁹ For a survey of domestic legislation criminalizing the production and use of chemical weapons, see OPCW, Survey of National Implementing Legislation: Extracts from National Implementing Legislation for the CWC, S/259/2001, pp. 28-80 (extracts of penal legislation).

¹⁰ Even within a single State's domestic legislature, there exists disparity between the sanctions imposed upon breaching either the CWC or the BWC. Section 14 of the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act (1987) provides a maximum sentence of ten years for breaching the prohibition on the use of biological weapons. Section 6 of the Chemical Weapons (Prohibition) Act provides a maximum sentence of life imprisonment for similar violations involving chemical weapons.

5. As a response to concern regarding the potential use by terrorists of weapons of mass destruction, the United Nations Security Council adopted resolution 1540 on 28 April 2004.¹¹ The resolution “calls upon all States to adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use biological or chemical weapons”¹². Resolution 1540 in effect does not require BWC or CWC member States to go beyond adopting measures already encompassed in their existing obligations under those treaties with regard to the commission of relevant offences. While resolution 1540 is an important measure designed to address the proliferation of weapons of mass destruction to non-State actors,¹³ it does not negate the need for the Draft Convention and falls short of it in several important respects. Firstly, the resolution seeks to strengthen national criminal law, which can result in further legislative heterogeneity between States, rather than to create international criminal law. Secondly, the resolution requires that States “in accordance with their national procedures, shall adopt and enforce appropriate effective laws,”¹⁴ but unlike Article V(1)(a-f) of the Draft Convention, it does not set out provisions pertaining to jurisdiction. Thirdly, in contrast to the Draft Convention, resolution 1540 contains no provision dealing with matters of extradition, legal assistance, protection of the accused, etc. Fourthly, resolution 1540 only applies as against non-State actors, while the Draft Convention applies additionally to those acting in an “official capacity, under the

¹¹ United Nations Security Council, document S/RES/1540 (2004), adopted by the Security Council at its 4956th meeting on 28 April 2004.

¹² *Ibid.*

¹³ Resolution 1540, cl.5 requires that all UN member States “in accordance with their national procedures shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.” The resolution also establishes “for a period of no longer than two years, a Committee [...] consisting of all members of the Security Council, which will [...] report to the Security Council for its examination, on the implementation of [the] resolution.” Furthermore, all States were required to present a report to the Committee, no later than six months from the adoption of the resolution, on “steps they have taken or intend to take to implement [the] resolution.”

¹⁴ *Ibid.*

orders of a superior, or otherwise in accordance with internal law". In short, the Draft Convention would substantially further the stated aim of resolution 1540 through developing a more comprehensive international regime to combat the proliferation and use of biological and chemical weapons.¹⁵

6. The Draft Convention would make it a crime under international law for any person, regardless of official position, to develop, produce, acquire, stockpile, retain, transfer, or use biological or chemical weapons; to assist, encourage, induce, order, or direct anyone to engage in any such activities; or to threaten or engage in preparations to use such weapons. Each State Party would be required, *inter alia*, (i) to establish jurisdiction with respect to such crimes according to the principles of territoriality, nationality, protection, and passive personality; (ii) where the State has jurisdiction, to submit those cases to competent authorities for the purpose of prosecution or extradition, "if it is satisfied that the circumstances so warrant"; and (iii) with respect to the actual use of biological or chemical weapons, to establish jurisdiction over all persons found on its territory regardless of their nationality or the territory in which the offence was committed.

7. By establishing these actions as international crimes and providing a framework within which States Parties can exercise jurisdiction over such crimes, the Draft Convention creates a more comprehensive and unified system for monitoring and eradicating the development, production, acquisition, stockpiling, retention, transfer and use of biological and chemical weapons. In particular, the Draft Convention provides guidelines for how States threatened by the use of biological and chemical weapons can proceed when other

¹⁵ The mandates under UNSC Resolution 1540 were further extended by subsequent UNSC Resolutions 1673 and 1810, which in addition to extending the life span of the 1540 Committee, reiterated States' obligations under the original resolution.

States are unwilling to enforce these prohibitions or do not recognize these actions as crimes under their domestic laws. The Draft Convention respects the sovereignty and territorial integrity of such States by leaving it to the State in question to apprehend alleged offenders found on its territory only “if it is satisfied that the circumstances so warrant”, whereupon it will have the discretion to extradite or prosecute. First, however, the State would, as required under the Draft Convention, have to have established jurisdiction over such individuals.¹⁶

Origins of the Draft Convention

8. The Draft Convention is an initiative of the Harvard Sussex Program on Chemical and Biological Weapons.¹⁷ The project began in 1996 and the Draft Convention was developed with advice from an international group of legal authorities through workshops held at Harvard University in 1997, at the Lauterpacht Research Centre for International Law at the University of Cambridge in 1998, and in subsequent consultations.¹⁸ This Commentary is

¹⁶ Four examples of when a threatened State Party may establish jurisdiction over individuals include:

- (1) State A develops chemical or biological weapons and threatens their use against its neighbor State B. State B would be entitled to request extradition, establish jurisdiction over, and prosecute any such individuals under the protective personality principle, *see* Draft Convention, Art. V(1)(d). Any States Parties would be obligated to establish custody and extradite such persons to State B upon a request from that State.
- (2) Any seller of material or expertise in State C who knowingly provides substantial assistance to the offending State A in its development of such weapons will similarly be subject to extradition from any State Party for prosecution in State B.
- (3) Any State Party would be entitled to establish jurisdiction over and prosecute any individuals found in its territory who knowingly used or ordered the use of biological or chemical weapons in another State, even if the use of such weapons occurred entirely within the borders of the other State and harmed no nationals of any other States, *see* Draft Convention, Art. V(1)(f), V(2).
- (4) Persons or groups that seek to acquire biological or chemical weapons and are tolerated by their State of residence are subject to prosecution if found on the territory of any State Party whose territory they use as part of their efforts, *see* Draft Convention, Art. V(1)(a).

¹⁷ The Harvard Sussex Program on Chemical and Biological Weapons is an international non-governmental research and public awareness program designed to promote the understanding of public policy issues associated with biological and chemical weapons. The Harvard Sussex Program is directed from Harvard University in the United States by Professor Matthew Meselson and from the University of Sussex in the United Kingdom by Professor Julian Perry Robinson.

¹⁸ Lauterpacht Research Centre for International Law, University of Cambridge, 1-2 May 1998: Dr Awn Al-Khasawneh, Member, International Law Commission, Amman, Jordan; Professor Igor Blichchenko, Faculty of Law, Peoples' Friendship University of Russia, Moscow, Russia; Kathleen Corken, Senior Trial Attorney, Terrorism and Violent Crime Section, Justice Department, Washington, DC, USA; Professor James Crawford, Director, Lauterpacht Research Centre for International Law, Member, International Law Commission,

intended to serve as a guide to the main substantive provisions of the Draft Convention, highlighting areas that may deserve special attention. Where relevant, comparisons are made to seven multilateral conventions, in force at the time of writing this Commentary, that establish international crimes and were used as models for the Draft Convention.¹⁹ The

Cambridge, UK; Rajesh De, Harvard Law School, Cambridge, USA; Professor John Dugard, University of Witwatersrand, Member, International Law Commission, Johannesburg, South Africa; Ambassador Rolf Ekeus, Ambassador of Sweden to the USA, Executive Chairman of the UN Special Commission for Iraq, 1991-1997, Washington, DC, USA; Professor Philip Heymann, Harvard Law School, Deputy Attorney-General, Department of Justice 1993-94, Cambridge, Massachusetts, USA; Dr Marie Jacobsson, Deputy Director, Division for International Law and Human Rights, Ministry for Foreign Affairs, Stockholm, Sweden; Mr Stuart Maslen, Legal Advisor to the Mines/Arms Unit, International Committee of the Red Cross, Geneva, Switzerland; Dame Anne McLaren, Wellcome/CRC Institute of Cancer and Development Biology, Cambridge, UK; Professor Matthew Meselson, Co-Director, Harvard Sussex Program, Department of Molecular & Cellular Biology, Harvard University, Cambridge, Massachusetts, USA; Paul O'Sullivan, Minister and Deputy Chief of Mission, Embassy of Australia, Washington, DC, USA; Dr Graham Pearson, Director, Chemical & Biological Defence Establishment, Porton Down, 1984-95, HSP Advisory Board, Wiltshire, UK; Dr J P Pretorius, Deputy Attorney-General, Ministry of Justice, Pretoria, South Africa; Professor Julian Perry Robinson, Co-Director, Harvard Sussex Program, Senior Fellow, Science Policy Research Unit, University of Sussex, Brighton, UK; Professor Valentin Romanov, Moscow Institute of International Relations, Advisor to the Foreign Ministry of Russia, Moscow, Russia; Professor Emma Rothschild, Director, Centre for History and Economics, King's College, Cambridge, UK; Dr Remi Russbach, Executive Director, The Geneva Foundation to Protect Health in War, Geneva, Switzerland; Paul Schulte, Director, Proliferation and Arms Control Secretariat, Ministry of Defence, London, UK; Noala Skinner, Research Associate, Common Security Forum, King's College, Cambridge, UK; Mr Justin Smith, US Courthouse, Washington, DC, USA; and Dr John Walker, Principal Research Officer, Arms Control and Disarmament Research Unit, Foreign and Commonwealth Office, London, UK.

¹⁹ The seven model conventions are:

- i. Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (hereinafter "Hijacking Convention"), 860 U.N.T.S. 105, entered into force 8 March 1973.
- ii. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 ("hereinafter "Sabotage Convention"), 974 U.N.T.S. 177, entered into force 18 July 1975.
- iii. Convention on the Prevention of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1973 ("hereinafter "Internationally Protected Persons Convention"), 1035 U.N.T.S. 167, entered into force 20 February 1977.
- iv. International Convention Against the Taking of Hostages 1979 (hereinafter "Hostage-Taking Convention"), 1316 U.N.T.S. 205, entered into force 3 June 1983.
- v. Convention on the Physical Protection of Nuclear Material 1980 (hereinafter "Nuclear Material Convention"), 1456 U.N.T.S. 1986, entered into force 23 February 1987.
- vi. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (hereinafter "Torture Convention"), 1465 U.N.T.S. 85, entered into force 26 June 1987.
- viii. Convention for the Suppression of Unlawful Acts Against the Safety of Marine Navigation 1988 (hereinafter "Marine Navigation Convention"), 1678 U.N.T.S. 221, entered into force 1 March 1992.

In addition, the following two conventions were also important reference points for the drafters:

- i. Convention on the Prevention and Punishment of the Crime of Genocide 1948 (hereinafter "Genocide Convention"), 78 U.N.T.S. 277 entered into force 12 January 1951).
- ii. International Convention on the Suppression and Punishment of the International Crime of Apartheid 1973 (hereinafter "Apartheid Convention"), 1015 U.N.T.S. 243, entered into force 18 July 1976.
- iii. International Convention for the Suppression of the Financing of Terrorism 1999 (hereinafter "Terrorism Financing Convention"), UN doc. A/54/49 (1999), entered into force 10 April 2002.

similarity (or lack thereof) of the language employed is important because such comparisons may provide a basis for future interpretation of the Draft Convention.

9. Two States have publicly taken note of the Draft Convention. The 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. A few months later, international criminalization was included as one of eleven measures proposed for consideration in the UK's consultation (Green) paper on biological weapons.²⁰ Later in 2002, a further statement from the UK government, indicating its support for the measure, was contained in a Foreign and Commonwealth Office memorandum.²¹

Implementation

10. 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

²⁰ UK Foreign and Commonwealth Office *Strengthening the Biological and Toxin Weapons Convention: Countering the Threat from Biological Weapons*, issued on 29 April 2002):

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 for 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).

²¹ Memorandum from the Foreign and Commonwealth Office to the Foreign Affairs Committee of the House of Commons, dated 18 November 2002, as published in UK House of Commons [Session 2002-03], Foreign Affairs Committee, *The Biological Weapons Green Paper*, House of Commons Paper 150):

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).

Assembly, seeking its referral to the Sixth (legal) Committee of the Assembly for negotiation and preparation of an agreed text. Upon completion, the agreed text could be submitted to a subsequent session of the Assembly and, 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.²²

²² For example, following the adoption of UN General Assembly resolution 51/45S in December 1996, which called upon all countries to conclude a new international agreement on anti-personnel mines, the government of Austria circulated a draft treaty to all governments and many international organizations. As a result, a diplomatic conference was convened in Oslo from 1-18 September 1997, resulting in 89 States adopting the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997, which entered into force on 1 March 1999.

COMMENTARY

Preamble

11 The Preamble of the Draft Convention recognizes that responsibility for activities involving biological and chemical weapons ultimately rests with individual persons. To this end, the second clause of the preamble states, “any development, production, acquisition or use of biological or chemical weapons is the result of the decisions and actions of individual persons, including government officials...”. This phrase foreshadows the provision in Article II(3) that explicitly denies government officials and employees who violate the Draft Convention the defence that they were acting in their official capacities. The focus on individual responsibility is a central objective of the Draft Convention – namely, to deter not only non-State actors but also government officials and those who knowingly assist them in the development, production, acquisition or use of biological and chemical weapons through the threat of criminal indictment and prosecution either at home or abroad.

11.1 The reference to ‘development’ in the Preamble, and in later provisions of the Draft Convention is to be understood as having the same meaning as under the BWC and CWC. In *Reform of the 1972 Convention on Biological and Toxin Weapons: Issues Arising for the Second Review Conference*, Nicholas Sims states: “The distinction [between research and development] observed in the [BWC] is ... a distinction in line with other treaty regimes. It is a familiar pattern in arms control negotiations that development, but not research, is banned. Whether it makes technological sense or not to split the R&D process in two, the necessities of negotiation (imposed in turn by the limits of verifiability) require a suspension of disbelief

sufficient to allow the line to be drawn down the middle of R&D.”²³ Walter Krutzsch and Ralf Trapp state in *A Commentary on the Chemical Weapons Convention* that reference to ‘develop’ in the CWC is said “by virtue of its purpose” to mean “the preparation of the production of chemical weapons as distinct from permitted research”. Accordingly, it may be apparent in deciding whether a certain activity constitutes development or a permitted activity, such as research, by having regard to the “specific equipment used and methods applied”.²⁴

12. The Draft Convention seeks to support and strengthen the existing worldwide norm against biological and chemical weapons established under several international agreements already in force. Specifically, the Preamble of the Draft Convention refers to the GP, BWC and CWC.²⁵ The fact that an overwhelming majority of States are parties to two or more of these multilateral conventions is indicative of the widely shared and long established norm upon which the Draft Convention seeks to build.²⁶

13. The second clause of the Preamble recognizes that the development, production, acquisition or use of biological and chemical weapons are within the capability of “other entities and individuals”. Clearly, non-State entities – such as corporations, associations, rebel armies, militias, cults, and individuals – may possess the capacity to develop and use biological and chemical weapons. As the third clause affirms, “all persons and entities”

²³ Nicholas Sims, Department of International Relations, London School of Economics and Political Science, University of London, *Reform of the 1972 Convention on Biological and Toxin Weapons: Issues Arising for the Second Review Conference*, dated June 1985.

²⁴ Walter Krutzsch and Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, at p 13, 1994 Kluwer Academic Publishers.

²⁵ *Supra* Para. 1.

²⁶ *See Ibid.*

should be prohibited from engaging in such activities and should be subject to effective penal sanctions in order to enhance the effectiveness of existing international agreements.

14. The Preamble reaffirms that any use of disease or poison for hostile purposes is “repugnant to the conscience of mankind” (fourth clause) and considers biological and chemical weapons to pose a threat to all humanity, including “future generations” (fifth and eighth clauses). Moreover, the sixth and seventh clauses indicate a resolution to use scientific knowledge for the “health and well-being of humanity” and a desire to protect scientific advances in biotechnology from “hostile exploitation.” These clauses reflect the universal concern that biological and chemical weapons present a threat to the preservation of present and future humanity, while recognizing the unprecedented potential for the “peaceful and beneficial advance and application” (seventh clause) of biology, chemistry, and medicine.

Article I

15. Article I states that any person who “knowingly” (see paragraphs 22 for related discussion of the scienter element) engages in one of the listed activities commits an offence proscribed by the Draft Convention. Paragraphs (a-e) closely parallel the language of Article I of the CWC.²⁷ Article I(1)(a-e) prohibit any person from knowingly: developing, producing, acquiring, stockpiling, retaining, or transferring any biological or chemical

²⁷ Article I of the CWC (“General Obligations”), *supra* note 3, states:

1. Each State Party to this Convention undertakes never under any circumstances:
 - (a) to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
 - (b) to use chemical weapons;
 - (c) to engage in any military preparations to use chemical weapons;
 - (d) to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

weapons; using or engaging in preparations to use any such weapon; constructing, acquiring or retaining any facility intended for the production of biological or chemical weapons; or assisting, encouraging, or inducing anyone to engage in any of these activities.

16. Article I(f) prohibits any person from ordering or directing anyone to engage in any of the prohibited activities.²⁸ This prohibition is limited by Article II(1), which allows, *inter alia*, for peaceful work on biological and chemical weapons to continue as specified under the BWC and CWC. Although prohibition of ordering or directing such activities might be inferred from the other sections of Article I or from general principles of criminal liability, the explicit language emphasizes that a central concern of the Draft Convention is to deter persons in positions of power and responsibility from directing others to engage in prohibited activities involving biological and chemical weapons. See also Article II(2) and (3), *infra*, for related discussion regarding this concern.

17. Article I(1)(g) prohibits the attempt to commit any of the previously mentioned offences.²⁹ An attempt to commit a criminal act commonly requires the accused to have the requisite *mens rea* for the underlying violation, and to have taken action, which goes beyond mere preparation, intended to accomplish the act.³⁰ The Draft Convention therefore provides for the prosecution of persons who have attempted to commit any of the crimes enumerated

²⁸ This language, taken together with Article I(1)(e), is consistent with Article 25(3)(b) of the Rome Statute, which recognizes individual criminal responsibility for crimes falling within its jurisdiction as applying to anyone who “orders, solicits or induces the commission of such a crime which in fact occurs or is attempted.” This language is also consistent with US Code, Title 18, Part 1, Chapter 10 (Biological Weapons) and Title 18, Part 1, Chapter 11B (Chemical Weapons).

²⁹ All of the model conventions, *supra* note 19, except the Torture Convention include “attempt” as a separate crime. The Marine Navigation Convention, Art. 3(2)(a); Nuclear Material Convention, Art. 7(f); Hostage-Taking Convention, Art. 1(2); Internationally Protected Persons Convention, Art. 2(d); Sabotage Convention, Art. 1(2)(a); and the Hijacking Convention, Art. 1. The Terrorist Bombing Convention also prohibits attempt, Art. 2(2).

under Art I(1)(a)-(f), but have thus far either not completed or unsuccessfully completed the crime.

18. Article I(1)(h) prohibits anyone from knowingly threatening the use of biological or chemical weapons. To determine whether a threat had been made, a court would have to ascertain whether the conduct in question had met the *mens rea* and *actus reus* requirements, as defined under the applicable law.³¹ Presumptively, non-credible or frivolous threats would be outside the scope of Article I(1)(h) as they would fail to meet the basic elemental requirements in any applicable law. Further, Article II(2) expressly provides a defence for the person who “reasonably believed” that the conduct in question was not prohibited by the Draft Convention. One who makes an obviously frivolous or non-credible threat would most likely have reasonably believed such action not to be criminal.

19. As presently drafted, Article I does not make it an offence to *conspire* to commit any of the crimes listed. In light of the diverse perspectives of various legal systems concerning the legitimacy of a separate offence of conspiracy, adding such a provision to the Draft Convention could be politically challenging.³² Although there seems to be growing recognition of conspiracy under international law, none of the seven model conventions explicitly refer to the act of conspiring to commit one of the primary offences.³³

³⁰ See, e.g., US Model Penal Code § 5.01. There are a number of ways to define more precisely the extent of the action that must be completed before an “attempt” has been committed.

³¹ For example, US federal law recognizes a crime of issuing a threat when a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm (the *mens rea*) and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the *actus reus*). See 18 U.S.C. § 875(c).

³² However, conspiracy charges have been applied in international contexts. See 37 I.L.M. 1318 (charging Augusto Pinochet with, among other charges, conspiracy to torture and conspiracy to take hostages).

³³ The growing recognition of conspiracy under international law can be seen in Article 3(b) of the Genocide Convention, *supra* fn. 17, which explicitly lists “conspiracy to commit genocide” as a punishable offence. Also,

20. Article I makes no mention of any minimal threshold regarding the scale of a prohibited offence.³⁴ Although the Draft Convention does not contain such language, its exclusion is based on the understanding that the State Party exercising jurisdiction over the alleged offenders will decide whether an offence is “trivial” or, instead, indicative of attempt, and prosecute accordingly (*see* Article VIII). In contrast, requiring a minimal threshold scale for offences could undermine the application of the Draft Convention by providing a “safe harbor” for any person deliberately limiting production below the threshold level.

Article II

21. Article II(1) states that “Nothing in this Convention shall be construed as prohibiting activities permitted under [the BWC or the CWC]”. This provision is intended to support the understanding that, like these conventions, the Draft Convention serves to protect peaceful

Article 3(a) of the Apartheid Convention, *supra* fn.17, makes it a crime to “commit, participate in, directly incite or conspire in the commission” of prohibited acts. Art. 2(3)(c) of the Terrorist Bombing Convention, *supra* fn.17, appears to provide for an offence of conspiracy without explicitly using the term, i.e. a person commits an offence if that person “in any other way contributes to the commission of one or more offences... by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.” Finally, the Rome Statute, *supra* fn. 4, imputes criminal responsibility without using the term conspiracy to a person who “aids, abets or otherwise assists in its commission or its attempted commission” or “in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.”

³⁴ By contrast, Article 8 of the Rome Statute, *supra* fn. 4, requires that acts of “employing poison or poisoned weapons” or “employing asphyxiating, poisonous or other gases, or all analogous liquids, materials or devices” must be “committed as part of a plan or policy or as part of a large-scale commission of such crimes” (emphasis added) in order to fall within the prohibition against war crimes. The Rome Statute, however, differs significantly from the Draft Convention in that the Rome Statute does not separately criminalize the use of poisons, but only criminalizes them if their use constitutes a “war crime.” Hence, the use of a threshold minimum under the Rome Statute serves the purpose of creating a war crime. The Draft Convention, however, seeks to criminalize the development and use of chemical and biological weapons *per se*, and therefore, any justification for a minimum threshold is much weaker.

activities involving biological and chemical agents and technology, including work directed at defending against biological or chemical weapon use.³⁵

22. It is important to note that although the BWC does not expressly prohibit the “use” of biological weapons,³⁶ it cannot reasonably be understood as *permitting* their use. Firstly, the BWC states that “nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State”³⁷ under the GP, which does expressly prohibit “use”.³⁸ Secondly, the BWC expressly prohibits the “development, production, stockpiling, acquisition or retention”³⁹ of such weapons, which logically precludes their use. Consequently, in order to simplify the language of the Draft Convention, Article II(1) has been written based on the fact that the BWC implicitly prohibits the use of biological weapons. Article II(1) also indicates that nothing in the Draft Convention shall be construed as prohibiting activities “directed toward the fulfillment of a State’s obligations under either Convention and are conducted in accordance with its provisions.”

23. Article II(2) states that it shall be a defence for a person accused of an Article I offence to have “reasonably believed that the conduct in question was not prohibited” by the Draft Convention. This important qualification to the scienter requirement of Article I – that

³⁵ “[P]eaceful activities” are allowed under the BWC, *supra* fn. 2, at Article I. The CWC, *supra* fn. 3, more explicitly states in Art. II(9): “Purposes Not Prohibited under this Convention” means: (a) Industrial, agricultural, research, medical, pharmaceutical, or other peaceful purposes; (b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons; (c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; (d) Law enforcement including domestic riot control purposes.

³⁶ BWC, *supra* fn. 2, Article I.

³⁷ BWC, *supra* fn. 2, Article VIII.

³⁸ GP, *supra* fn.1. The BWC prohibits States Parties from the “development, acquisition, stockpiling, acquisition, or retention of [biological weapons].” BWC, *supra* fn. 2, Article IV.

³⁹ BWC, *supra* fn. 2, Article IV.

a person “knowingly” engaged in any of the proscribed activities – is meant to protect the participant who might otherwise be covered by the Draft Convention. This defence is designed to prevent the unfair imposition of criminal liability on persons who reasonably believed that their conduct was legal. With regard to a person acting in an official capacity, it is important to note, however, that a reasonable belief defence is not satisfied by mere reliance upon superior orders, as Article II(3), makes clear. Article II(2-3) together reflect the Draft Convention’s relatively greater concern with those in positions of power and authority as opposed to unwitting subordinates.

24. Article II(3) takes the position that “[i]t is *not* a defence that a person charged with an offence set forth in Article I acted in an *official capacity*... .” (emphasis added). The official capacity defence has likewise been denied in other international settings. The 1945 Nuremberg Charter⁴⁰ provides the first example in international law of the official capacity defence being removed with respect to certain offences.⁴¹ Additionally, the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) repudiates the official capacity defence by stating that “[t]he official position of any accused person, whether as head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”⁴² This position is echoed under the Rome Statute.⁴³ Of the seven model conventions, only the Torture Convention eliminates

⁴⁰ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal 1945 (hereinafter “Nuremberg Charter”), 82 U.N.T.S. 279.

⁴¹ Article 7 of the Nuremberg Charter provides that “[t]he official position of defendants, whether Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”

⁴² See Article 7(2) of the Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY Statute”), 1993, U.N. S.C. Res. 827, amended by U.N. Doc. S/RES/116 (1998).

⁴³ Article 27 of the Rome Statute, *supra* fn. 4, states: “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as Head of State or Government, a member

the official capacity defence, implicitly through the definition of torture itself, which can only be committed by “a public official or other persona acting in an official capacity.”⁴⁴ Similar to the Torture Convention, other multilateral conventions have expressly named public officials as potential subjects.⁴⁵

25. The denial of the “official capacity” defence, however, should not be construed as extending to heads-of-State or certain senior officials while they are in office, where such an extension would amount to serious interference with the conduct of their official duties.⁴⁶ In this regard, Article II(3) seeks to clarify the position of the Draft Convention in an area where State practice is varied and consequently, national courts are left to assess jurisdiction purely on the basis of customary international law.⁴⁷ For example, the UK House of Lords in the

of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

⁴⁴ Torture Convention, *see supra* fn. 17, at Article 1.

⁴⁵ Genocide Convention, *supra* fn. 17, at Article 4, provides that “[p]ersons committing genocide or any of the other acts enumerated...shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals.”; Apartheid Convention, *supra* fn. 17, at Article 3, states that “International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and *representatives of the State*, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they: (a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in Article II of the present Convention; (b) Directly abet, encourage or cooperate in the commission of the crime of apartheid.” (emphasis added).

⁴⁶ Article 31 of the Vienna Convention on Diplomatic Relations 1961, 500 U.N.T.S. 95, 112 (1972) entered into force 24 April 1994), provides that “a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State...”. Article 1 defines a “diplomatic agent” as “the head of the mission or a member of the diplomatic staff of the mission”. See also *US Restatement (Third) of Foreign Relations Law* (hereinafter “*US Restatement (Third)*”) §464, comment i (1987).

⁴⁷ Judgment by the International Court of Justice (ICJ) in *The Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), 2002 ICJ General List No. 121 (Feb. 14, 2002) (hereinafter “*Arrest Warrant Case*”) held that current heads-of-state (or heads-of-government) and current foreign ministers are entitled to *temporary* procedural immunity: “Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility,” see “*Arrest Warrant Case*” paras. 53-55 and 60-61. Despite the ICJ decision being clear that the jurisdictional immunity is obtained as function of office, the German federal prosecutor maintained that *former* Chinese President Jiang was entitled to immunity on counts of genocide and torture. Additionally, dicta from the ICJ proceedings limited the scope of this jurisdiction to crimes committed in a *private* capacity during the term of office, not those that were State-sponsored (*à titre privé*) (para. 61).

Pinochet case relied on the provisions of the Torture Convention to preclude the use of this defence by a *former* head-of-State.⁴⁸

26. If the “official capacity” defence were not explicitly prohibited by the Draft Convention, it could lead to differing interpretations by national courts as to whether *former* heads-of-State or officials with special diplomatic protection recognized under international law would retain immunity from prosecution in foreign countries for Article I offences.⁴⁹ Article II(3) thus removes any doubt by making it clear that States Parties to the Draft Convention have jurisdiction to prosecute or extradite *former* heads-of-State and government officials.

27. In addition to denying the official capacity defense, Article II(3) also states that “[i]t is not a defense that a person charged with an offence set forth in Article I acted ... under the orders or instructions of a superior, or otherwise in accordance with internal law”. Other international tribunals have also rejected this defence, namely, the Nuremberg trials of former Nazis accused of war crimes and crimes against humanity, and the *ad hoc* tribunals for the former Yugoslavia⁵⁰ and Rwanda.⁵¹ Moreover, the Rome Statute establishes strict

⁴⁸ *Ex Parte Pinochet*, 2 W.L.R. 827, 38 I.L.M. 581 (United Kingdom 1999) (opinion of Lord Brown-Wilkinson). Where provided for under the provisions of the statutes under which they are established, international tribunals have jurisdiction to hear cases brought against heads-of-State, e.g., see ICTY, *Prosecutor v. Slobodan Milosevic et al*, case no. IT-99-37, 24 May 1999, where head-of-State immunity did not confer protection from prosecution on Slobodan Milosevic for alleged crimes committed whilst in office; and ICTR, *Prosecutor v. Kambanda*, case no. ICTR-97-23-S, September 4, 1998 and ICTR-97-23-1, October 19, 2000 (former prime minister charged after leaving office for crimes committed during the Rwandan Genocide).

⁴⁹ See Article 4 of the Convention of the Privileges and Immunities of the United Nations 1946, 1 U.N.T.S. 15, 20 (1970), entered into force 17 September 1946. See also, Article 31 of the Vienna Convention on Diplomatic Relations, fn. 36 *supra*.

⁵⁰ Article 7(4) of the ICTY Statute, *supra* fn. 32, which states: “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”

⁵¹ Article 6(4) of the ICTR Statute states “The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the [Tribunal] determines that justice so requires.”

limitations on the availability of the defence of superior orders.⁵² The Torture Convention is unique among the seven model conventions in that it eliminates the defence of acting “under the orders or instructions of a superior.”⁵³ Any concern about the unreasonable prosecution of soldiers or other unwitting subordinates is addressed by the reasonable belief defence provided by the Draft Convention in Article II(2).

Article III

28. Article III(1-4) defines biological and chemical weapons consistently with the definitions employed in the BWC and CWC. For the sake of simplicity and uniformity, the text of the Draft Convention incorporates the exact defining language of Article I of the BWC and Article II of the CWC. These definitions have been formulated using the “General Purpose Criterion” approach – that is, in determining whether an activity involving biological or chemical agents, toxins, or associated equipment is prohibited, the fundamental criterion to be applied is *the purpose of the activity*.⁵⁴ The General Purpose Criterion, by focusing on the purpose of the relevant activity rather than the identity or nature of the substance or equipment *per se*, provides two significant advantages over other possible defining formulations: (1) it protects against technological change by anticipating the development of new agents, weapons, and means of delivery; and (2) it protects legitimate uses of agents,

⁵² Art. 33(1) of the Rome Statute, *supra* fn. 4, states that the defence of superior orders is not available unless (a) the person was under a legal obligation to obey orders of the Government or the superior in question, (b) the person did not know that the order was unlawful, or (c) the order was not manifestly unlawful. Finally, the Rome Statute eliminates the availability of the defence of superior orders entirely for charges of genocide and crimes against humanity because such orders are “manifestly unlawful.”

⁵³ Article 3 of the Torture Convention, *supra* fn.13, explicitly prohibits a defence of superior orders by stating that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.”

⁵⁴ For example, part of the BWC definition of “biological weapons” incorporated into Article III(1)(a) of the Draft Convention: “[M]icrobial or other biological agents of types and in quantities *that have no justification for prophylactic, protective, or other peaceful purposes*.” (emphasis added).

toxins, and equipment – including those the intention of which is to provide protection – by accommodating the dual-use character of many substances and items of equipment.

29. Article III(5) of the Draft Convention defines the term “person” as “any natural person or, to the extent consistent with internal law as to criminal responsibility, any legal entity.” A legal entity such as a corporation may be considered a legal “person” and thus subject to criminal prosecution in many contexts.⁵⁵ The practice of conferring criminal responsibility on non-natural legal entities though widespread is none the less contingent upon national legislation.⁵⁶

Article IV

30. Article IV(a) requires States Parties to incorporate Article I offences into their domestic penal codes. Typically, a State is free to take whatever measures it deems necessary to fulfill its international obligations in good faith.⁵⁷ In the criminal law context, however, direct incorporation of specific crimes into the national penal code is preferable to avoid any ambiguity as to whether a domestic court would apply the relevant international criminal law standards. This ambiguity might arise because of the different practices States follow regarding the automatic incorporation of treaty law into their domestic law, that is,

⁵⁵ See, e.g., *US Model Penal Code* §2.07 (1962) (“Liability of Corporations, Unincorporated Associations and Persons Acting, or Under a Duty to Act, in Their Behalf”).

⁵⁶ See, e.g., the US case of *Linder v. Portocarrero*, 963 F.2d 332, 336-37 (11th Cir. 1991) (Contras). In the United States, corporations have also been held civilly liable for criminal offences under international law through the Alien Tort Claims Act, 28 U.S.C. §1350; In addition to the United States, courts in Japan, Germany, the United Kingdom, and Canada have found that corporations could be criminally liable for violations of international law or human rights norms. See Jordan J. Paust, *Sanctions Against Non-State Actors for Violations of International Law*, 8 *ILSA Journal of International & Comparative Law* 417 (2002).

⁵⁷ International Law Commission, Declaration of Rights and Duties of States, Art. 13 (1949); see also Vienna Convention on the Law of Treaties 1969, 1155 U.N.T.S. 331. See also, *US Restatement (Third)* §311(3).

whether a treaty is 'self-executing'. Under the 'dualist' system, municipal and international law operate on two separate planes.⁵⁸ Consequently, international law can only be applied in municipal courts if international law has been explicitly incorporated into municipal law. Under a 'monist' system, international and municipal law are considered as part of the same system, and therefore municipal courts may apply international law without its explicit incorporation into municipal law.⁵⁹ Most States fall between these two extremes.⁶⁰ The requirement to incorporate Article I crimes into domestic law required by Article IV(a) allows this problem to be avoided entirely.

31. Additionally, the requirement by the Draft Convention of incorporation of Article I offences into their domestic penal codes effectively harmonizes the various pre-existing national criminal laws relating to biological and chemical weapons,⁶¹ which is important for

⁵⁸ For example, Article 253 of the constitution of India, adopted 26 January 1950 (as amended on 30 August 1995) states: "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body"; and, the United Kingdom, which does not have a written constitution.

⁵⁹ For example, Article 25 of the constitution of the Federal Republic of Germany, adopted 23 May 1949 (as amended up to and including 20 December 1993) states: "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory"; Article 15(4) of the constitution of Russia, adopted 12 December 1993 (as amended on 9 January 1996) states: "The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation are a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty apply."

⁶⁰ In the United States, for example, commentators have stated that international crimes must be incorporated into domestic legislation to be enforceable by US courts. See, *US Restatement (Third)* remarks about the United States that "it has been assumed that an international agreement creating an international crime (e.g., genocide) or requiring States Parties to punish certain actions (e.g., hijacking) could not itself become part of the criminal law of the United States, but would require Congress to enact an appropriate statute before an individual could be tried or punished for the offence." At §111, Comment I (but see *US Restatement (Second) of the Foreign Relations Law of the United States* § 154(1) (1965) (suggesting that whether a treaty is self-executing depends on the intent of the signatories); see also *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979) (announcing the same "intent" rule)). These conflicting approaches within United States law highlight the advantages to defining specifically whether a treaty is meant to be self-executing.

⁶¹ Article 4 of the BWC, *supra* fn. 2 and Article 7 of the CWC, *supra* fn. 3, both provide for domestic penal legislation, creating the possibility that different countries have enacted differently-worded versions of such crimes.

purposes of extradition (see Article VII). By requiring States to adopt the crimes listed in Article I directly, this article addresses the problem that could arise under the “double criminality” requirements that many States have under their national laws regulating extradition. Under the doctrine of double criminality, a State will not extradite an individual unless the crime for which that individual is being extradited is a crime in both States at the time when it was committed.⁶² Although generally, minor variations in the language of the criminal statutes of two States would not preclude extradition for an offence, requiring States Parties to make uniform reference to the same standard (i.e. the crimes enunciated under Article I(1)) avoids this potential problem.

32. Pursuant to Article IV(b), States Parties are to make those activities proscribed under Article I “punishable by the appropriate penalties which take into account their grave nature.” This clause is designed to prevent the case in which a State might become a Party to the Draft Convention, but enact domestic legislation carrying only a nominal punishment. Without an accompanying sentence of at least a year, the risk arises that the crimes in question may not be considered extraditable offences under the national law of States Parties (see Article VII).⁶³ This clause is also important to ensure that the normative force of the prohibition against the development and use of biological and chemical weapons is not undermined by intentionally inadequate enforcement by States Parties. Similar language is used in all seven model conventions.⁶⁴

⁶² For a description of double criminality, see Damrosh et al, *International Law* (4th ed. West Group 2001), at 1179; see also *Regina v. Bartle*, 2 All ER 97, 2 WLR 827 (H.L. 1999) (Ex Parte Pinochet) (Opinion of Lord Browne-Wilkinson).

⁶³ For a description of extradition and the one-year requirement, see commentary to *US Restatement (Third)* §415 (“Extradition between States: The Basic Rule”).

⁶⁴ See, *supra* fn.13, Marine Navigation Convention, Article 5; Torture Convention, Article 4; Nuclear Material Convention, Article 7(2); Hostage-Taking Convention, Article 2; Internationally Protected Persons Convention, Article 2(2); Sabotage Convention, Article 3; and Hijacking Convention, Article 2.

Article V

33. Article V sets forth the obligation of States Parties to establish jurisdiction over those offences proscribed under Article I. Article V(1)(a-d) incorporates three standard bases of jurisdiction generally accepted under the following principles of international law:⁶⁵

- (1) The territoriality principle, which is based upon the place where the offence occurs, is embodied in Article V(1)(a) which states “when the offence was committed in the territory of that State or in any other place under its jurisdiction as recognized by international law”;
- (2) The nationality principle, which is based upon the nationality of the offender, is embodied in Article V(1)(b), which states “when the alleged offender is a national of that state,” and Article V(1)(c), which states “when, if that State considers it appropriate, the alleged offender is a stateless person whose habitual residence is in its territory”;
- (3) The protective principle, which is based upon the actual or threatened harm against the State asserting jurisdiction, is embodied in Article V(1)(d), which states “when the offence was committed with intent to harm that State or its nationals or to compel that State to do or abstain from doing any act.”

Article V(1)(e-f) incorporates two further grounds of jurisdiction where, under customary international law, State practice varies as to their acceptability as valid bases of jurisdiction:

- (1) The passive personality principle, which is based on the nationality of the victim of the offence, is embodied in Article V(1)(e), which states “when the offence was committed with intent to harm that State or its nationals or to compel that State to do or abstain from doing any act”; and Article V(1)(f), which states “when the offence involved the intentional use of biological or chemical weapons against any persons, irrespective of their nationality”. Language implicating passive personality jurisdiction is included in three of the model conventions.⁶⁶
- (2) The principle of universal jurisdiction, which does not rely on any of the aforementioned grounds but on the nature of the offence in question, is embodied to a limited extent under Article V(1)(f), which states “when the offence involved the intentional use of biological or chemical weapons against any person, irrespective of their nationality.” Resort to universal jurisdiction in this limited sense is consistent with emerging trends in international law to extend universal jurisdiction to egregious crimes.⁶⁷

⁶⁵ For further explanation of these bases of jurisdiction, see generally *US Restatement (Third)* §402; see also Antonio Cassese, *International Criminal Law* 277-284 (Oxford University Press 2003).

⁶⁶ See *supra* fn. 17, Maritime Navigation Convention, Article 6(2)(b); Torture Convention, Article 5(1)(c); and Hostage-Taking Convention, Article 5(1)(d).

⁶⁷ The principle of subsidiarity provides that the territorial state has priority over individuals accused of international crimes, should that state be able and willing to prosecute the offenders. UN Secretary-General ‘Rule of Law and Transition Justice,’ para. 48 “...this exceptional form of jurisdiction [universal] is rightly reserved for the prosecution of only the most serious crimes and only in cases where the justice system of the country that was home to the violations is unable or unwilling to do so.”

34. Article V(1)(f) requires States Parties to exercise universal jurisdiction in the limited case where individuals have knowingly *used* biological or chemical weapons on the basis that States have an obligation *erga omnes* to ensure that perpetrators of the intentional use of biological or chemical weapons are brought to justice, regardless of where the offence was committed, the nationality of the offender or the nationality of the victim. While Article V(1)(f) requires States Parties to take measures to exercise jurisdiction for any perpetrators of an Article I(1)(b) offence involving “use” found on their territory, it should not be understood to imply anything about the rights of States Parties to exercise the option of establishing universal jurisdiction over other offences proscribed in Article I where compatible with international law (see Article V(3)). The doctrine of universal jurisdiction attempts to answer the question of when a State may prosecute an individual when there is no traditional nexus between the prosecuting State and the crime,⁶⁸ and is an area of international law currently undergoing significant development.⁶⁹ Prior international conventions criminalizing international activities, including the model conventions, endorse the exercise of universal jurisdiction.⁷⁰ The national legislation of some States, such as

⁶⁸ One of the first codifications of universal jurisdiction can be identified in Common Articles 49, 50, 129 and 146 of the Geneva Conventions I-IV, respectively: “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.” This provision is now considered to form part of customary international law. Also, see *Attorney-General of the Government of Israel v Eichmann*, District Court of Jerusalem, 36 I.L.R.5 (1961).

⁶⁹ In October 2005 the District Court of The Hague (Rechtsbank ‘s Gravenhage) sentenced two Afghani nationals, Heshamuddin Hesam and Habibulla Jalalzoy, in relations to war crimes and torture under the universal jurisdiction principles contained within the Geneva Conventions and the Torture Convention. Both individuals were present and had requested asylum in the Netherlands, a process that triggered the investigations into their activities during the communist regime in Afghanistan. Since 2000, a Swiss court has sentenced a Rwandan national for war crimes; Yugoslavian refugees in Germany and Denmark have been convicted by courts in both countries and a Spanish judge convicted a Argentinean military officer to life in prison.

⁷⁰ Here we must distinguish ‘conditional’ universal jurisdiction, which requires that jurisdiction is exercisable on the condition that the alleged offender is present on a State’s territory before that State can exercise jurisdiction, from ‘absolute’ universal jurisdiction, which does not require the presence of the alleged offender on the State’s territory. There is little, if any, state practice or *opinio juris* supporting the latter form of jurisdiction. In his separate opinion in the *Arrest Warrant Case*, see *supra* fn. 41, President of the ICJ Guillaume

Germany, Austria, Switzerland, and Sweden, have codified the exercise of universal jurisdiction, especially when the accused cannot be extradited to a State that may have one or more traditional nexus to the accused for prosecution, thus making the application of universal jurisdiction a practical reality.⁷¹ Universal jurisdiction is the best means for the international community to regulate the perpetration of serious international crimes when their collective interests in preventing the crimes outweigh any concerns of the territorial or national State in preventing another State from exercising jurisdiction. Traditionally, piracy has been the prime example of an international crime meriting universal jurisdiction.⁷² The list has expanded to include the slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and possibly certain acts of terrorism.⁷³ Given the repeated international

stated: “[I]nternational law knows only one true case of universal jurisdiction [i.e. ‘absolute’ jurisdiction]: piracy. Further, a number of international conventions provide for the establishment of subsidiary universal jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country. Universal jurisdiction *in absentia* as applied in the present case is unknown to international law.” For conventions that make reference to the use of conditional universal jurisdiction include, see *supra* fn.13, Torture Convention, Article 7; Hijacking Convention, Article 7; Sabotage Convention, Article 7; Hostage-Taking Convention, Article 8; and Marine Navigation Convention, Article 7

⁷¹ Establishing universal jurisdiction only after the refusal to prosecute by States with a traditional nexus to the accused is often called “subsidiary universal jurisdiction”, see Cassese, *supra* fn. 55, at p 287. For a discussion of national laws, see Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives*, 2003 (Oxford), at p 81. National laws include: Austria Penal Code 65.1.2 (applying Austrian criminal law to offences committed abroad, provided that the act was punishable in the place where committed and that the accused cannot be extradited to another State); German Criminal Code §6.9 (applying German criminal law to foreigners who have committed offences made punishable under treaties to which Germany is a party); §7(2)2 (applying German criminal law to foreigners only if they cannot be extradited); Swiss Military Penal Code §§108, 109 (applying Swiss military penal law to violations of international humanitarian law and the laws and customs of war); Swiss Criminal Code Art. 6 *bis* (applying Swiss criminal law to crimes committed abroad by foreigners when Switzerland is obliged to prosecute such crimes pursuant to a treaty, the act was also a crime in the State where it was committed, and the accused cannot be extradited). The criminal code of Sweden applies to violations of the CWC “even if the crime is committed abroad and irrespective of the perpetrator’s nationality.” Extracts from the National Implementing Legislation for the CWC (Annex to the Swedish Criminal Code Ch. 2 § 3).

⁷² While the designation of piracy as an international crime meriting universal jurisdiction has long-standing and widespread acceptance, the particular context in which that crime occurs makes drawing analogies to other crimes problematic. Namely, the requirements that the pirates are found on high seas, where by definition, no State has jurisdiction and that the pirates must be private, not State, actors, does not obtain in the context of most other international crimes. See Luc Reydam, *supra* fn. 59, at p 58.

⁷³ *US Restatement (Third)* at §423 (“Jurisdiction To Adjudicate In Enforcement Of Universal And Other Non-Territorial Crimes”).

condemnations of biological and chemical weapons, the intentional use of such weapons would merit the exercise of universal jurisdiction.⁷⁴

35. Article V(2) requires that each State Party shall take appropriate measures to establish jurisdiction when an alleged offender of the crimes set forth in Article I “is present in its territory⁷⁵ and it does not extradite such person pursuant to Articles VII and VIII.”⁷⁶ Under Article VIII, barring extradition, each State Party is obligated “to submit the case without delay to competent authorities for the purpose of prosecution through proceedings in accordance with the laws of that State” whenever an alleged offender is physically present in its territory and the State Party has jurisdiction over the offender under Article V(1)(a-f). The purpose of Article V(2) therefore is not to add any other grounds of jurisdiction, but rather to ensure that where a State Party judges that the circumstances merit prosecution of an alleged offender then there will be legislation in place to enable prosecution.⁷⁷

36. Article V(3) states that the Draft Convention “does not exclude any criminal jurisdiction exercised in accordance with internal law, including any internal law giving effect to Article I.” This provision is meant to ensure that the obligations of the Draft Convention are in no way interpreted to hinder the effective reach of domestic laws of States Parties. The final phrase, “including internal law giving effect to Article I,” emphasizes the

⁷⁴ See e.g., GP, *supra* fn. 1; BWC, *supra* fn. 2; and the CWC, *supra* fn. 3.

⁷⁵ See, e.g., *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995) (jurisdiction over defendant kidnapped in Honduras in order to bring him to the US to stand trial was upheld.); and *United States v. Pelaez*, 930 F.2d 520 (6th Cir. 1991), (the fact that the defendant had been brought under the district court’s jurisdiction by forcible abduction did not offend due process or require dismissal of indictment).

⁷⁶ The duty to extradite or prosecute, expressed by the principle of *aut dedere aut judicare*, is discussed under Article VIII.

⁷⁷ In some States, universal jurisdiction may be restricted to only ‘conditional’ jurisdiction as a result of strict presence requirements that must be met before prosecution of a suspect may be initiated. Denmark, France and the Netherlands require the presence of the individual on their territory before an investigation can be initiated;

right of States to implement domestic legislation giving full effect to the broadest interpretation of jurisdictional obligations under the Draft Convention.

37. The Draft Convention permits the exercise of criminal jurisdiction over legal entities such as multinational corporations where compatible with national law regarding criminal responsibility (see Article III(5)). Traditionally, a State may exercise jurisdiction over a legal entity in circumstances closely analogous to that of individuals, when (1) that entity has its registered office or regularly conducts business in the prosecuting State (nationality jurisdiction); (2) when the criminal activity in question occurred within the prosecuting State (territorial jurisdiction); or (3) when the entity has conducted activities outside the State that have a substantial and foreseeable impact within the State (protective or territorial principal).⁷⁸ However, it is also recognized that determining jurisdiction over legal entities poses special problems because of the possibility that many States may be able to claim jurisdiction on the basis of nationality or territoriality.⁷⁹ Universal jurisdiction over legal entities has limited support in the *opinio juris*, although it remains contentious.⁸⁰

the United Kingdom requires the presence or anticipated presence of the accused before an arrest warrant can be issued. Spain does not have any presence requirements before opening an investigation or charging a suspect.

⁷⁸ *US Restatement (Third)* at §421(e), (h), (i), (j).

⁷⁹ See, e.g., *US Restatement (Third)* at §414 (listing bases of prescriptive jurisdiction over legal entities: “multinational enterprises do not fit neatly into the traditional bases of jurisdiction...such enterprises may not be nationals of one State only and their activities are not limited to one State's territory”). *Id.* at §414, Comment (a).

⁸⁰ See, e.g., Andrew Clapham, ‘The Question of Jurisdiction Under International Criminal Law over Legal Persons’ in *Liability of Multinational Corporations under International Law* 141 (Menno Kamminga and Saman Zia-Zarifi, eds. 2000): “[W]e can therefore consider that corporations commit international crimes, including war crimes and that these corporations may be tried, in some circumstances outside the jurisdiction where the crime took place. In other words, the ‘Pinochet phenomenon’ is applicable in the sphere of corporate international crimes.” See also American Association of Jurist and Europe – *Third World Center, The Activities of Transnational Corporations (Seminar Conclusions)*, Art. 4(b) (2001), encouraging exercise of universal jurisdiction over multinational corporations to increase corporate responsibility.

In the United States, at least, this endorsement only extends principally to civil suits brought under the Alien Tort Claims Act alleging damages for breaches of international criminal law. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). In *Wiwa*, plaintiffs, who were Nigerian émigrés, sued the Royal Dutch Petroleum Co., a British corporation, for actions allegedly committed by a wholly-owned subsidiary, Shell Petroleum Development Company of Nigeria, Ltd. (Shell Nigeria) under the Alien Tort Claims Act, 28 U.S.C. §1350. *Id.* at 92. The plaintiffs alleged that they and their kin were imprisoned, tortured, and killed by

38. Article V(4) provides that “Jurisdiction with respect to the offences set forth in Article I may also be exercised by any international criminal court that may have jurisdiction in the matter in accordance with its Statute.” International criminal tribunals have been established to address specific instances when universal jurisdiction crimes, particularly war crimes and genocide, have been committed. Examples include the International Military Tribunal at Nuremberg and more recently, the ICTY and ICTR. None of these tribunals, however, had or presently have specific jurisdiction over Article I offences. Further, the jurisdiction of the International Criminal Court (hereinafter “ICC”) extends only to the war crime of “employing poison or poisoned weapons” and the war crime of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” and its Statute makes no explicit mention of biological weapons.

Article VI

39. Article VI (1-3) provide standard provisions requiring States Parties, if “satisfied that the circumstances so warrant”, to take alleged offenders into custody, investigate facts, ensure specific rights, and notify other concerned nations of their findings and intentions regarding prosecution or extradition of the offender. Article VI(3) is designed to ensure the rights of the accused to seek assistance from his or her State of nationality. Article VI(4) is meant to ensure that domestic laws of the custodial State, while they may afford greater

the Nigerian government on behalf of Shell Nigeria for the plaintiff’s political opposition to Shell Nigeria’s oil exploration in contravention of the law of nations. *Id.* The Second Circuit found personal jurisdiction over Royal Dutch Petroleum Co., and reversed the district court’s finding of *forum non conveniens*, stating that the interests of the plaintiffs in litigating the lawsuit in the Southern District of New York outweighed any advantages that might be gained from moving the lawsuit to another forum. *Id.* See also Torture Victim Act, 28 U.S.C. §1350 (creating civil liability under United States law for any foreigners or US citizens alleging torture in a foreign State).

protections than those explicitly mentioned by the Draft Convention, do not, at the very least, hinder exercise of the those rights guaranteed in VI(3). Finally, Article VI(5) specifies more precisely the lines of communication which must be established to ensure that all interested States Parties are notified of the apprehension of an accused person. Similar provisions can be found in all of the model conventions.⁸¹

Article VII

40. Article VII addresses the relationship between the Draft Convention and extradition treaties. The language in Article VII(1-4) is essentially the same as that in all seven model conventions.⁸² The mechanism of extradition is essential to the international co-operative enforcement of criminal justice.⁸³ This article is necessary because extradition is not required by customary international law,⁸⁴ and the extradition laws of many States allow extradition only pursuant to their treaty obligations.⁸⁵

41. Article VII(1-3) provides for extradition under circumstances in which States Parties may or may not have pre-existing extradition treaties with each other. Article VII(1) serves to expand existing extradition treaties between States Parties to provide for extradition in reference to the crimes listed in Article I. For States that do not have an extradition treaty

⁸¹ See *supra* fn. 17, Marine Navigation Convention, Article 7; Torture Convention, Article 6; Nuclear Material Convention, Article 9; Hostage-Taking Convention, Article 6; International Protected Persons Convention, Article 6; Hijacking Convention, Article 6, and Sabotage Convention, Article 8.

⁸² See *supra* fn. 17, Hijacking Convention, Article 8; Sabotage Convention, Article 8; Internationally Protected Persons Convention, Article 8; Hostage-Taking Convention, Article 10; Marine Navigation Convention, Article 11; Torture Convention, Article 8.

⁸³ See generally Lyal S. Sunga, *The Emerging System of International Criminal Law* 257-261 (1997).

⁸⁴ *US Restatement (Third)* §475, Comment A.

⁸⁵ *US Restatement (Third)* §475, Comment B.

with the requesting State, Article VII(2) enables those requested States Parties to consider the Draft Convention as providing the legal basis for extradition if they so choose. Finally, Article VII(3) requires States Parties whose extradition laws are not conditional on the existence of a treaty to recognize the offences in Article I as extraditable, subject to the procedural requirements of the requested State.

42. Article VII(4) requires that, for the purpose of extradition, States Parties shall consider Article I offences to have been carried out not only in the place where they actually occurred, but also on the territory of those parties required to assert jurisdiction under Article V(1). This provision, similar to provisions included in all seven model conventions, addresses the concern that many existing extradition treaties allow extradition only for crimes that were committed on the territory of the requesting State.⁸⁶ Article VII(4) allows existing extradition treaties to be interpreted to include the other traditional bases of jurisdiction (nationality, passive personality principle, the protective principle, and, in the case of use of biological or chemical weapons, universal jurisdiction).

43. Finally, Article VII(5) states that all existing extradition treaties between Parties “shall be deemed modified... to the extent that they are incompatible with this Convention.”⁸⁷

⁸⁶ See *supra* fn. 17, Marine Navigation Convention, Article 11(4); Torture Convention, Article 8(4); Nuclear Material Convention, Article 11(4); Hostage-Taking Convention, Article 10(4); International Protected Persons Convention, Article 8(4); Sabotage Convention, Article 8(4); and Hijacking Convention, Article 8(4). For an explanation of this provision developed for the Hijacking Convention, see Paust *et al*, *International Criminal Law* 499 (1996).

⁸⁷ For similar language, see Marine Navigation Convention, *supra* fn.13, Article 11(7).

44. Since it is extremely rare for a situation to arise where two or more States Parties seek extradition of an individual present in the territory of a third State Party, the Draft Convention does not contain any specific provisions relating thereto. Jurists have noted that in general, there is no established mechanism for determining which State's assertion of jurisdiction should take precedence in such circumstances..⁸⁸ Of the model conventions, only the Marine Navigation Convention addresses the situation of multiple requests for extradition by assigning priority to the "interests and responsibilities" of the State whose flag the ship in question was flying.⁸⁹ The "competing jurisdiction" provision of the Rome Statute provides one example of a system for handling multiple extradition requests,⁹⁰ but its consent regime has also been criticized for its predominant focus on preserving State sovereignty rather than giving the ICC the full scope of jurisdiction in accordance with customary international law.⁹¹

Article VIII

45. The duty either to extradite or prosecute alleged offenders, also known as *aut dedere aut judicare*, is set forth explicitly under Article VIII. Upon finding an alleged offender in its

⁸⁸ See, e.g., *Arrest Warrant Case*, *supra* fn. 37, Concurring Opinion of President G. Guillaume at para. 15.

⁸⁹ Article 11(5) of the Marine Navigation Convention, *supra* fn. 5, states: "A State Party which receives more than one request for extradition from States... and which decides not to prosecute shall, in selecting the State to which the offender or alleged offender will be extradited, pay due regard to the interests and responsibilities of the States Party whose flag the ship was flying at the time of the commission of the offence."

⁹⁰ See Rome Statute, *supra* fn. 4, Article 90 on 'competing requests'. The Rome Statute requires States Parties to give the ICC's request for extradition preference if both the ICC and the competing requesting jurisdiction seek extradition for the same offence and the ICC has determined that it has jurisdiction over the offence. If the ICC has not determined jurisdiction, the Rome Statute obliges States Parties to refrain from extraditing the accused until the ICC has made a determination that it does not have jurisdiction. If the ICC and the requesting State seek extradition of the accused for different offences, States Parties are obliged to consider the competing requests based on a series of factors including: (1) the dates of the requests; (2) the interests of the requesting State; and (3) the possibility of subsequent surrender between the requesting State and the ICC.

⁹¹ See Leila Nadya Sadat and Richard Cohen, *The New International Criminal Court: An Uneasy Revolution*, 88 *Georgetown Law Journal* 381 (2000).

territory, a State Party “shall, if it does not extradite such person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to competent authorities for the purpose of prosecution....” Again, similar language is included in each of the model conventions.⁹² This clause, in stating that “authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State” also implies that extradition requests may be refused by authorities when the evidence is plainly insufficient to warrant prosecution under national practice. Article VIII also provides that the authorities of the State in which the alleged offender is found “shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.” Each of the model conventions, with minor variations, contains the same obligation.⁹³

Article IX

47. Article IX(1) requires that States Parties “afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in Article I, including assistance in obtaining evidence at their disposal necessary for the proceeding.” All of the model conventions include similar language (except that the Hijacking Convention does not include the additional phrase clarifying the requirement as “including assistance in obtaining evidence at their disposal necessary for the proceeding”).⁹⁴

⁹² See *supra* fn. 17, Marine Navigation Convention, Article 10(1); Torture Convention, Article 7(1)-(2); Nuclear Material Convention, Article 10; Hostage-Taking Convention, Article 8(1); International Protected Persons Convention, Article 7; Sabotage Convention, Article 7; and Hijacking Convention, Article 7.

⁹³ See commentary accompanying Article IV, *supra*.

⁹⁴ See *supra* fn. 17, Marine Navigation Convention, Article 12(1); Torture Convention, Article 9(1); Nuclear Material Convention, Article 13(1); Hostage-Taking Convention, Article 11(1); International Protected Persons Convention, Article 10(1); Sabotage Convention, Article 11(1); and Hijacking Convention, Article 10(1).

However, this clause should not be read to imply that States are obligated to share sensitive information.

48. Article IX(2) provides that States Parties shall carry out their obligations under the first clause “in conformity with any treaties or other arrangements on mutual legal assistance” that already exist, and in the absence of such, “in accordance with their internal law”.

Article X

49. Article X, not derived from any of the model conventions, follows the language of the Terrorist Bombing Convention⁹⁵ and the Terrorism Financing Convention⁹⁶ in stating that no Article I offence shall be regarded “for purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence inspired by political motives.” Article X therefore denies States Parties the right to refuse extradition or assistance on the grounds that the alleged offender had a legitimate political objective. Such denial is based on the principle that an offence under Article I involving biological or chemical weapons is not a pure political act, and that such an act can never be justified on political grounds.⁹⁷ Although none of the seven model conventions explicitly restricts use of the political offence exception, there was a proposal to include such a provision in the Hijacking Convention so as to prevent the proscribed activities from being considered political offences. Ultimately, the provision was not included, but the phrase “without exception whatsoever” under Article VII of the Hijacking Convention is understood to require a State

⁹⁵ Article 11, International Convention for the Suppression of Terrorist Bombings 1998, *supra*, fn.6.

⁹⁶ Article 14, Terrorism Financing Convention 1999, *supra*, fn.17.

⁹⁷ This position follows, *inter alia*, from the section of the Preamble that states: “Reaffirming that any use of disease or poison for hostile purposes is repugnant to the conscience of humankind.”

declining to extradite on the basis of the political offence exception to submit the case for prosecution within its national courts, and not to recognize political motive as a defence.⁹⁸

The language “without exception whatsoever” appears in the six subsequent model conventions within the articles that set forth the obligation *aut dedere aut judicare*.

50. Although there is a longstanding tradition of refusing to extradite for solely political offences,⁹⁹ this principle has waned in recent years with the rise of concern regarding terrorism.¹⁰⁰ Restrictions on the political offence exception can be found as far back as the Genocide Convention. Article VII thereof states: “Genocide and the other acts enumerated ... shall not be considered as political crimes for the purpose of extradition.” Moreover, Article V of the Terrorist Bombing Convention explicitly rejects the political offence exception for terrorist bombings.¹⁰¹ Article X of the Draft Convention would similarly prevent States Parties from labeling a prohibited act as a political offence and then using such a characterization to evade the duty to extradite or prosecute.¹⁰² State practice has also demonstrated a trend towards the restriction of the political offence exception.¹⁰³

⁹⁸ See *US Restatement (Third)* at §475, Note 5 (citing Lowenfield, *Aviation Law*, Ch. VIII §§3.3-3.6 (2d ed. 1981).

⁹⁹ *Oppenheim’s International Law* (Sir Robert Jennings, ed., 9th ed. 1992), at 963.

¹⁰⁰ Damrosh *et al*, *supra* fn. 52, at 1182-1183.

¹⁰¹ Article 10 of the Terrorist Bombing Convention, *supra* fn. 6, states: “Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature and are punished by penalties consistent with their grave nature.”

¹⁰² See *US Restatement (Third)* §476 Comment (g) and notes 4 and 5. This distinguishes between a “pure” political act such as an exercise of free speech, for which denial of extradition is permissible, and a so-called “relative” political offence, which is an ordinary crime undertaken with a political motive, for which denial of extradition is not permissible.

¹⁰³ For example, the United States and the United Kingdom in 1986 adopted a Supplementary Extradition Treaty expressly excluding from the political offence exception serious offences typically committed by terrorists. Excluded offences include: aircraft hijacking, aircraft sabotage, crimes against internationally protected persons,

Additionally, in 1986 the United Nations General Assembly passed a resolution urging States “not to allow any circumstances to obstruct the application of law enforcement measures provided for in the relevant convention to which they are party to persons who commit acts of international terrorism covered by those conventions.”¹⁰⁴ This resolution effectively suggested that countries not invoke the political offence exception in response to requests to prosecute or extradite alleged terrorists.

Article XI

51. Article XI states that nothing in the Draft Convention shall be interpreted as imposing an obligation to extradite or afford mutual legal assistance if there are “substantial grounds” for believing that the request for extradition or mutual assistance “has been made for the purpose of punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons.” This clause is designed to protect against discriminatory prosecutions undertaken on any of the proscribed bases.

Article XII

hostage-taking, murder, manslaughter, malicious assault, kidnapping, abduction, false imprisonment or unlawful detention, and specified offences relating to the use of explosives, firearms, or ammunition. Supplementary Treaty to the Extradition Treaty of June 8, 1972, Signed in Washington, June 25, 1985. T.I.A.S. 12050 (entered into force on December 23, 1986). *See also US Restatement (Third)* §476, Note 6. Also, the Council of Europe Convention on the Prevention of Terrorism, signed on 16 May 2005 in Warsaw, states: “None of the offences referred to in Articles 5 to 7 and 9 of this Convention, shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence, an offence connected with a political offence, or as an offence inspired by political motives...”

¹⁰⁴ *US Restatement (Third)* at §476 Note 5 (quoting G.A.Res. 61, 40 U.N. G.A.O.R. Supp. No. 53).

52. Article XII requires that States Parties cooperate to prevent Article I offences from being committed. This requirement obliges States Parties to cooperate by “(a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories”; and “(b) exchanging information and coordinating the taking of administrative and other measures as appropriate to prevent commission of those offences.” This language has been adopted from the Marine Navigation, Hostage-Taking, and Internationally Protected Persons Conventions.¹⁰⁵

53. The Article XII requirement that States Parties take measures to prevent preparations of Article I offences and cooperate through the exchange of information and coordination of efforts are already covered to a certain extent under the BWC and the CWC.¹⁰⁶ Article XII, however, goes further in that it requires cooperation among States Parties to prevent the commission of offences, as specifically defined under Article I of the Draft Convention, either “within or outside” their territories and to exchange information and coordinate “the taking of administrative and other measures as appropriate to prevent commission of those offences.”

Article XIII

54. Article XIII requires States Parties to provide information regarding implementation measures and alleged offences to the Secretary-General of the United Nations. Creation of an effective means for the collection and distribution of such information is essential for a regime that mandates jurisdiction for multiple States. States may need to assess whether the

¹⁰⁵ See *supra* fn. 17, Marine Navigation Convention, Article 13(1); Hostage Taking Convention, Article 4; and International Protected Persons Convention, Article 4.

¹⁰⁶ See, e.g., BWC, Article 4 (prevention) and Article 5 (cooperation); and CWC, Article 7 (cooperation).

State in which an alleged offender is present has the ability to take proper action in accordance with the Draft Convention. Further, a State may need to know what action has been taken by other States with respect to the alleged offender in order to determine whether an extradition request should be submitted. Article XIII establishes the Secretary-General as the central locus for communication of all such information.

55. Article XIII(1) requires States Parties to inform the Secretary-General of the United Nations of any legislative and administrative implementation measures and of any jurisdiction established under national law pursuant to Article V(3), as well as of any changes. Article XIII(2) obligates States Parties to provide the Secretary-General with any information concerning: “(a) the circumstances of any offence over which it has established its jurisdiction pursuant to” Article V(1) or (3); and “(b) the measures taken in relation to the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.” Article XIII(3) requires that the State in which an alleged offender is prosecuted to “communicate the final outcome of the proceedings” to the Secretary-General, who in turn shall transmit the information to all other States Parties. Thus, each State Party shall be informed of the results from all prosecutions for offences proscribed by the Draft Convention, and the Secretary-General will possess other relevant information (as to the circumstances of the offence or measures taken in relation to the alleged offender) into which States may wish to inquire. Finally, Article XIII(4) obligates each State Party to designate a “contact point” within its government for communication with other States over relevant matters, and to make known that designation to the Secretary-General.

56. The model conventions establish a variety of reporting obligations.¹⁰⁷ The Marine Navigation, Hostage-Taking, Internationally Protected Persons, and Hijacking Conventions all include provisions that require the reporting and transmission of information regarding offences committed, measures taken with respect to the alleged offender, and final prosecutorial action.

Article XIV

57. Article XIV sets forth that disputes between States Parties, if not settled by negotiation, shall be submitted to arbitration. Such a dispute resolution mechanism is vital to the stability of any international regime as it is likely that specific disagreements or issues of interpretation will eventually arise that were not anticipated in advance. If the organization for the arbitration is not agreed to within six months, any of the States Parties in dispute may refer the matter to the International Court of Justice (ICJ). Almost identical language is included within all the model conventions.¹⁰⁸ However, the model conventions all have a second provision that enables Parties to declare at the time of signature, ratification, acceptance, approval of the Draft Convention, or accession thereto, that they will not be bound by the established dispute settlement provisions. Most significantly, States Parties that exercise this option are refusing to commit in advance to resolve disputes in an ICJ forum when negotiation and arbitration fail. The model conventions further add that with respect to a dispute with any State Party that has made such a reservation, the dispute resolution provisions shall not bind the other Parties.

¹⁰⁷ See *supra* fn. 17, Marine Navigation Convention, Article 15; Nuclear Material Convention, Article 14; Hostage-Taking Convention, Articles 6(2) and 7; Internationally Protected Persons Convention, Article 11; Sabotage Convention, Article 13; and Hijacking Convention, Article 11.

Article XV

58. In accordance with Article XV, a Conference of States Parties shall be convened ten years after the entry into force of the Convention, or earlier if proposed to the Secretary-General of the United Nations by a majority of the States Parties, to review the operation of the Draft Convention with a view towards assuring that its objectives are being realized. The Conference of States Parties will convene every seven years thereafter, unless otherwise decided.

59. Periodic review of the effectiveness of the regime is necessary to ensure its efficacy. As the threat of biological and chemical weapons may fluctuate and as national and international institutions mandated to address this threat develop, States Parties will need to determine how best to respond to criminal activity involving chemical and biological weapons within an evolving international regime.

Article XVI

60. Article XVI(1) specifies the date upon which the Draft Convention shall be open for signature at United Nations headquarters in New York. Articles XVI(2) and (3) state that the Draft Convention shall be subject to ratification, acceptance, approval, or accession and that all instruments shall be deposited with the Secretary-General of the United Nations.

Article XVII

¹⁰⁸ See *supra* fn. 17, Marine Navigation Convention, Article 16; Torture Convention, Article 30(1); Nuclear

61. Article XVII details the number of States that must initially deposit instruments of ratification, acceptance, approval or accession for the Draft Convention to enter into force. The Draft Convention will enter into force on the thirtieth day thereafter, and similarly for each additional State depositing such an instrument.

Article XVIII

62. Article XVIII states that the Draft Convention shall not be subject to reservation.

Article XIX

63. Article XIX provides that the original text shall be deposited with the Secretary-General of the United Nations, who shall send certified copies to all States, and that Arabic, Chinese, English, French, Russian, and Spanish texts are equally authentic.

Material Convention, Article 17(1); Hostage-Taking Convention, Article 16; International Protected Persons Convention, Article 13(1); Sabotage Convention, Article 14(1); and Hijacking Convention, Article 12(1).

DRAFT CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF DEVELOPING, PRODUCING, ACQUIRING, STOCKPILING, RETAINING, TRANSFERRING OR USING BIOLOGICAL OR CHEMICAL WEAPONS

PREAMBLE

The States Parties to this Convention,

Recalling that States are prohibited by the Geneva Protocol of 1925, the Biological Weapons Convention of 1972 and the Chemical Weapons Convention of 1993, and other international agreements, from developing, producing, stockpiling, acquiring, retaining, transferring or using biological and chemical weapons, and that these prohibitions reflect a worldwide norm against these weapons;

Recognizing that any development, production, acquisition or use of biological or chemical weapons is the result of the decisions and actions of individual persons, including government officials, and that these activities are within the capability not only of States but also of other entities and of individuals;

Affirming that all persons and entities should be prohibited from engaging in these activities, and should be subject to effective penal sanctions, thereby enhancing the effectiveness of the Geneva Protocol, the Biological Weapons Convention and the Chemical Weapons Convention;

Reaffirming that any use of disease or poison for hostile purposes is repugnant to the conscience of humankind;

Considering that biological and chemical weapons pose a threat to the well-being of all humanity and to future generations;

Resolving that knowledge and achievements in biology, chemistry and medicine should be used exclusively for the health and well-being of humanity;

Desiring to encourage the peaceful and beneficial advance and application of these sciences by protecting them from adverse consequences that would result from their hostile exploitation;

Determined, for the sake of human beings everywhere and of future generations, to eliminate the threat of biological and chemical weapons;

Have agreed as follows:

ARTICLE I

1. Any person commits an offence who knowingly:

- (a) develops, produces, otherwise acquires, stockpiles or retains any biological or chemical weapon, or transfers, directly or indirectly, to anyone, any biological or chemical weapon;
- (b) uses any biological or chemical weapon;
- (c) engages in preparations to use any biological or chemical weapon;
- (d) constructs, acquires or retains any facility intended for the production of biological or chemical weapons;
- (e) assists, encourages or induces, in any way, anyone to engage in any of the above activities;
- (f) orders or directs anyone to engage in any of the above activities;
- (g) attempts to commit any of the above offences;
- (h) threatens to use biological or chemical weapons.

ARTICLE II

1. Nothing in this Convention shall be construed as prohibiting activities that are permitted under:

- (a) the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, of 10 April 1972, or
- (b) the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris on 13 January 1993, or that are directed toward the fulfillment of a State's obligations under either Convention and are conducted in accordance with its provisions.

2. In a prosecution for an offence set forth in Article I, it shall be a defence that the accused person reasonably believed that the conduct in question was not prohibited under this Convention.

3. It is not a defence that a person charged with an offence set forth in Article I acted in an official capacity, under the orders or instructions of a superior, or otherwise in accordance with internal law.

ARTICLE III

For the purposes of the present Convention:

1. **Biological weapons** means:

(a) 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;

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

2. **Chemical weapons** means the following, together or separately:

(a) toxic chemicals and their precursors, except where intended for:

(i) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(ii) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

(iii) military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;

(iv) law enforcement including domestic riot control purposes,

as long as the types and quantities are consistent with such purposes.

(b) munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;

(c) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

3. **Toxic chemical** means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

4. **Precursor** means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multi component chemical system, that is to say, the precursor which plays the most important role on determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multi component system.

5. **Person** means any natural person or, to the extent consistent with internal law as to criminal responsibility, any legal entity.

ARTICLE IV

Each State Party shall adopt such measures as may be necessary:

- (a) to establish as criminal offences under its internal law the offences set forth in Article I;
- (b) to make those offences punishable by appropriate penalties which take into account their grave nature.

ARTICLE V

1. Each State Party to this Convention shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article I in the following cases:

- (a) when the offence was committed in the territory of that State or in any other place under its jurisdiction as recognized by international law;
- (b) when the alleged offender is a national of that State;
- (c) when, if that State considers it appropriate, the alleged offender is a Stateless person whose habitual residence is in its territory;
- (d) when the offence was committed with intent to harm that State or its nationals or to compel that State to do or abstain from doing any act;
- (e) when the offence involved the intentional use of biological or chemical weapons and a victim of the offence was a national of that State;
- (f) when the offence involved the intentional use of biological or chemical weapons against any persons, irrespective of their nationality.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article I in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to Articles VII and VIII.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law, including any internal law giving effect to Article I.

4. Jurisdiction with respect to the offences set forth in Article I may also be exercised by any international criminal court that may have jurisdiction in the matter in accordance with its Statute.

ARTICLE VI

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence as set forth in Article I may be present in its territory, a State

Party shall take such measures as may be necessary under its internal law to investigate the facts contained in the information.

2. If it is satisfied that the circumstances so warrant, a State Party in the territory of which an alleged offender is present shall take that person into custody or shall take such other measures as are necessary to ensure the presence of that person for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a Stateless person, the State in the territory of which that person habitually resides;

(b) be visited by a representative of that State;

(c) be informed of that person's rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, provided that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. When a State Party, pursuant to the present Article, has taken a person into custody, it shall promptly notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with Article V, paragraph 1, subparagraphs (a) through (e), and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 of the present Article shall promptly inform those States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

ARTICLE VII

1. The offences set forth in Article I shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include those offences as extraditable offences in every extradition treaty subsequently concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, if it decides to extradite, consider this Convention as the legal basis for extradition in respect of the offences set forth in Article I. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in Article I as extraditable offences as between themselves subject to the conditions provided by the law of the requested State.

4. The offences set forth under Article I shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1, subparagraphs (a) through (e) of Article V.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in Article I shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention.

ARTICLE VIII

The State Party in the territory of which the alleged offender is found shall, if it does not extradite such person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

ARTICLE IX

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article I, including assistance in obtaining evidence at their disposal which is necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their internal law.

3. States Parties may request technical assistance from competent international bodies in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article I.

ARTICLE X

None of the offences set forth in Article I shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

ARTICLE XI

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in Article I or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

ARTICLE XII

States Parties shall cooperate in the prevention of the offences set forth in Article I, particularly by:

- (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories;
- (b) exchanging information and coordinating the taking of administrative and other measures as appropriate to prevent commission of those offences.

ARTICLE XIII

1. Each State Party shall inform the Secretary-General of the United Nations of the legislative and administrative measures taken to implement this Convention. In particular, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established under its internal law in accordance with paragraph 3 of Article V. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

2. Each State Party shall, in accordance with its national law, promptly provide to the Secretary-General of the United Nations any relevant information in its possession concerning:

- (a) the circumstances of any offence over which it has established its jurisdiction pursuant to paragraph 1 or paragraph 3 of Article V;
- (b) the measures taken in relation to the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

3. The State Party where an alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

4. Each State Party shall designate a contact point within its government to which other States Parties may communicate in matters relevant to this Convention. Each State Party shall make such designation known to the Secretary-General.

ARTICLE XIV

Any dispute between States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice.

ARTICLE XV

1. Ten years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Secretary-General of the United Nations, a Conference of States Parties shall be held at [Geneva, Switzerland], to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized.

2. At intervals of seven years thereafter, unless otherwise decided upon, further sessions of the Conference may be convened with the same objective.

ARTICLE XVI

1. This Convention shall be open for signature by all States from [DATE] until [DATE] at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XVII

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the [NUMBER] instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the [NUMBER] instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

ARTICLE XVIII

The Articles of this Convention shall not be subject to reservation.

ARTICLE XIX

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on [DATE].