

CBW CRIMINALISATION AND UNIVERSAL JURISDICTION

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

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

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

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

What is needed is a new treaty, one that defines specific acts involving biological or chemical weapons as international crimes, like piracy or aircraft hijacking. Such a treaty would oblige states to establish jurisdiction over offenders who are present in their territory, regardless of their nationality and regardless of where the offence was committed. Treaties defining international crimes are based on the concept that certain crimes are particularly dangerous or abhorrent to all, and that all states therefore have the right and the

responsibility to combat them. Certainly in this category, threatening to the community of nations and to present and future generations, are crimes involving the hostile use of disease or poison and the hostile exploitation of biotechnology.

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

The proposed convention would oblige each State Party: (i) to establish jurisdiction with respect to the specified crimes extending to all persons in its territory, regardless of either the place where the offence is committed or the nationality of the offender; (ii) to investigate, upon receiving information that a person alleged to have committed an offence may be present in its territory; and (iii) to prosecute or extradite any such alleged offender if it is satisfied that the facts warrant this. The same obligations, to establish jurisdiction and to extradite or adjudicate (*aut dedere aut judicare*), are included in international conventions now in force for the suppression and punishment of international crimes including aircraft hijacking and sabotage (1970 and 1971), crimes against internationally protected persons (1973), hostage taking (1979), theft of nuclear materials (1980), torture (1984), and crimes against maritime navigation (1988). It was on the basis of the 1984 Torture Convention that Britain asserted jurisdiction in the case of Spain's request for the extradition of former Chilean President Augusto Pinochet.

The proposed convention defines biological and chemical weapons as they are defined in the BWC and the CWC, on the basis of a general purpose criterion. Thus, Article I of the BWC defines biological weapons as:

(1) *microbial or other biological agents, or toxins whatever*

their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;

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

Recently, however, there have been indications that an effort may be made to create international criminal law which is applicable only to the actual use of biological weapons, and then only if such weapons are used with "lethal intent". If adopted, this narrow standard would act to legitimise the use for hostile purposes of so-called "non-lethal" or "less than lethal" biological weapons. Such a development would be at total variance with the BWC and the CWC, and would risk the eventual destruction of the essential norm against the hostile exploitation of present and future biotechnology. In conformity with the clearly stated general purpose criteria of the BWC and the CWC, the criterion for what is to be criminalised must be "hostile intent", not "lethal intent".

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

The proposed convention includes provisions intended to guarantee due process and fair proceedings, and requiring that any dispute between states concerning the interpretation or application of the convention be submitted, at the request of one of them, to arbitration or to the International Court

of Justice in The Hague. There are also provisions requiring States Parties to cooperate in investigations, and to provide legal assistance to one another in the adjudication of offences.

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

The adoption of, and widespread adherence to, such a convention would create a new dimension of constraint against biological and chemical weapons by applying international criminal law to hold individual offenders responsible and punishable should they be found in the territory of any state that supports the convention. Such individuals would be regarded as *hostes humani generis*, enemies of all humanity. The norm against chemical and biological weapons would be strengthened, deterrence of potential offenders would be enhanced, and international cooperation in suppressing the prohibited activities would be facilitated.

NOTE

The full text of this draft convention can be found on the website of the Harvard Sussex Program at: <http://www.fas.harvard.edu/~hsp>.

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