UNEDITED DRAFT – PLEASE DO NOT QUOTE OR CIRCULATE

WORKSHOP ON INTERNATIONAL CRIMINALIZATION OF BIOLOGICAL AND CHEMICAL WEAPONS LAUTERPACHT RESEARCH CENTRE FOR INTERNATIONAL LAW CAMBRIDGE UNIVERSITY 1-2 MAY 1998

[MORNING SESSION]

Title/Preamble

One participant suggested the addition of "toxin" to the term "biological or chemical weapons" in the title. [Walker]

Another participant suggested that the title of the Draft Convention be amended to include language to the effect of "on the furtherance of preventing and punishing the crime of…" to reflect that it is not a pioneering enterprise but rather a continuation of prior efforts. [Romanov] In response, it was noted that while the 1972 Convention obligates states, the Draft Convention does something new and distinct by criminalizing individual conduct. [Crawford]

A question was raised as to the limitation of the term "weapons" in light of the possibility that a government might deploy (for example) a biological or chemical device that would manipulate the mindset of a mass population; a device of this kind might not technically be called a "weapon," but should perhaps be prohibited. The same participant also noted that individual responsibility was the key feature of the Draft Convention and suggested a reference to that effect in the title or Preamble. [Russbach]

Noting the subjectivity of criminal law, one participant recognized the possible link to nuclear weapons. As a matter of principle, if the nature of biological and chemical weapons is the reason for criminalization, then nuclear weapons may be considered equally indiscriminate. The potential parallel to nuclear weapons must be kept in mind. [Al-Khasawneh] Another participant suggested that such criminalization might stir the underlying political emotion of non-nuclear states, some of which may consider possession of chemical weapons as a balance to nuclear force, against a perceived illegitimate use of hegemonic power by the nuclear bloc. The participant warned of the importance of being sensitive to the potential unforeseen consequences of this sentiment. [Schulte] In response, it was noted that chemical and biological weapons should already be prohibited in most countries under the 1972 and 1993 Conventions. While nuclear weapons may be equally horrible, the focus should be on the Draft Convention as an extension of these existing treaties from state duties to individual responsibility. As such, the Draft Convention would not be subject to the criticism that nuclear weapons are just as bad as those under its prohibitions since no analogous treaties outlaw nuclear weapons outside the non-proliferation and test-ban context. [Heymann] (A participant noted that in fact the ICJ has ruled that the use of nuclear weapons is a violation of international law in some situations. [Romanov])

A participant stressed the importance of outlining the proper relationship of the Draft Convention to existing treaties and suggested that a paragraph be added to the preamble about "desiring to contribute to the 1972 and 1993 Conventions…". The participant also commented that the preamble is too ambitious, as for example in the reference to an established "norm" rather than rules against such weapons. It would be better to make the preamble more moderate and present the Draft Convention as a smaller step. [Romanov]

It was also suggested that the preamble should account for the special repugnance against biological and chemical weapons and explain why they are singled out for particular attention by the Draft Convention, perhaps by amending the last paragraph on the first page. [Dugard] One participant recognized that all weapons of mass destruction are referred to in the preamble of the CWC and noted that such a reference might make the Draft Convention more acceptable to non-nuclear states. [Pearson] Agreeing that an additional sentence referring to all weapons of mass destruction would be a good idea, another participant also noted that the stronger the link between the Draft Convention and the 1972 and 1993 Conventions, the more acceptable the Draft Convention will be. The participant suggested that this convention could even be framed as a protocol to the CWC or BWC. [McLaren]

Another participant suggested that the preamble refer to customary international law regarding biological and chemical weapons. Since it is difficult to refer to a general definition for weapons of mass destruction, it would be simpler to refer just to the BWC and CWC. Also, the same participant noted the importance of stressing the international nature of the crimes under the Draft Convention, perhaps in the title. [Blichtchenko]

It was also suggested that presenting the Draft Convention as a nonproliferation treaty, rather than one about disarmament, would make the treaty more acceptable by avoiding the linkage to nuclear weapons. The same participant then asked whether it was clear if the 1972 Convention covered modern biogenetic substances. [Jacobsson]

Responding, one participant noted that such substances were in fact covered by the BWC, as affirmed at the 1986 Review Conference. [Walker]

Another participant expressed concern about the process of amending understandings of prior conventions through successive review conferences, noting that the prohibitions of the Draft Convention should track the developments of the BWC review process. To avoid a time warp created through reference to outdated definitions, it was suggested that the Draft Convention refer to weapons "as defined by the BWC" rather than particular language from, or a particular article in, that Convention. [Pearson]

One participant then noted that defining a crime according to evolving definitions via review conferences may be too vague under the principle of *nullum crimen sine lege.* However, it is important that the Draft Convention take proper account of potential scientific development. [Dugard]

Another participant agreed that there is a potential nullum crimen problem. Returning to the distinction between biological/chemical and nuclear weapons, the same participant noted the difficulty of distinguishing the criminality of one but not the other. The participant also supported a reference to all weapons of mass destruction in the preamble as under the CWC (as proposed by a previous speaker), and suggested that the Preamble include a reference to the UNESCO Declaration on the Human Genome. [Al-Khasawneh]

It was suggested that the issue of the potentially rapid development of biological and chemical weapons need be addressed in the preamble and could also serve as a possible distinction between such weapons and nuclear ones. The same participant also asked whether states in possession of chemical weapons would undercut any claim that there is a customary prohibition against such weapons. [Schulte] A participant noted that certain persons in such governments would be considered to be criminals under the Draft Convention . [Meselson] As

to the question of the existence of a customary norm against chemical and biological weapons, another participant commented that no government has overtly admitted its possession of such weapons and so long as they are unlikely to do so, the problem of undercutting the customary prohibition may never arise. [O'Sullivan]

One participant noted that the use of nuclear weapons may be indirectly criminalized under the Draft Convention in light of their toxic effects. A rhetorical emphasis on technological developments was suggested in light of the troubling aspects of changing the definition of a crime as reality changes. [Rothschild]

It was stated that extensive prohibitions already exist, such as that against genocide, that may themselves be considered to cover the use of nuclear weapons. Maybe the Draft Convention could recognize that other treaties and norms may reach such weapons, but say, as do some drafts of the charter for the international criminal court, that the failure to enumerate a norm does not necessarily deny its existence. [Smith]

A participant then commented that we must be careful not to blur discussion of marketing the Draft Convention with discussion about its content. With respect to marketing it, it would be dangerous to expand the treaty to cover too many weapons, since countries may then not take it seriously. It would be better to err with a narrow approach rather than an expansive one. The same participant noted that in the 1970s developing countries resisted a broad anti-terrorism treaty proposed by the United States, because they saw it as so expansive as to deny them leverage; a narrower approach may be more politically successful. [Dugard]

Currently negotiations in the UN are underway for a convention on nuclear terrorism, it was noted, and there may also be some criticism that the proposed convention overlaps with the Terrorist Bombing Convention. Therefore the Draft Convention should not go too far in the nuclear direction because it may become a source of criticism later. Perhaps a reference to weapons of mass destruction in the preamble is enough. The same participant also expressed skepticism about including references to review conferences in the Preamble. [Corken]

A participant then asked whether the preamble should contain any reference to the Draft Convention having the status of customary international law. [Meselson] It was noted that custom may prohibit use, stockpiling, etc., but it certainly does not include individual criminalization. [Dugard] A participant asked how customary international law can be created. [Meselson] It was noted that preambular language that expresses a hope for universality may help [O'Sullivan], and that the Geneva Protocol takes exactly this approach in its fourth paragraph [Pearson]. A participant commented that the CWC does require criminalization of use by individuals at the national level, and that this, too, might give rise to an international crime. [Walker]

A participant then commented that we must distinguish between the custom of prohibition and that of individual criminalization, as for piracy. Here we are dealing with a prohibition on weapons that may have achieved the status of custom, but only today are we starting on the project of international criminalization. We can thus hardly say that customary international law already criminalizes this conduct. [Dugard] Another participant agreed that this distinction is key because individual international criminalization does not have the status of custom and will have to have its roots in a treaty (even piracy does). [Jacobsson] It was suggested that a sentence be added in the preamble to the effect of "with the hope of looking

forward to the universal adoption of the BWC and CWC…," to signal a hoped-for universal norm. [O'Sullivan]

A participant agreed that there was no harm in expressing the hope that the Draft Convention would serve as a vessel for the development of custom, but noted that to go farther, and claim "instant" custom, might be troublesome. [Al-Khasawneh] Another participant agreed, but noted that any attempt to claim the status of custom for the prohibitions of the Draft Convention would probably be too ambitious and fail. A less ambitious approach would not claim customary status beyond the signatories of the BWC and CWC. [Schulte] A participant suggested that the Draft Convention avoid controversial language about custom that may eventually be used by some countries to frustrate the entire effort. [Romanov]

Article I (Offenses)

A participant asked who the treaty should aspire to reach, and whether footsoldiers be included. [Meselson] It was suggested that there are many people between the lowly footsoldier and the "big fish" that may be suitable targets for criminalization, but that the Draft Convention could be read to exclude such people. Ideally, the Convention should reach everyone (except perhaps the lowliest military officer), including those that run the fermenters and the like. [Walker]

One participant commented that the emphasis on populations leaves out coverage of animals and plants covered under the BWC and questioned whether the language of "civilian population" was too limiting, leaving out military personnel. [Pearson] In response, it was noted that the language comes from the Terrorist Bombing Convention, and that Article 1(b) would reach use against military personnel. [Meselson] Another participant commented that the language of "compel a state" under 1(Convention) would reach military uses of such weapons. [Heymann]

It was noted that the "for hostile purposes" language of the BWC may cover more than "as a method of warfare" under the alternative language suggested for Article I. The same participant agreed that the treaty should address use against animals and plants. [Walker] It was questioned whether "hostile purpose" is sufficiently defined. [Meselson] Another participant noted that similar discussions (about "hostile purposes") will be taking place with the permanent international criminal court and that those discussions should be tracked to ensure that the Draft Convention is consistent. [Maslen]

It was noted that the Draft Convention should be at least as strong as the Landmine Convention, which reaches everyone, whether officer or footsoldier. For instance, soldiers who jerry-rig a landmine would be in violation of the treaty, even if they might be ignorant of the treaty's bar on landmines. [Schulte]

A participant questioned the difference in the scope of coverage of 1(a) and 1(b) and wondered whether 1(b) adequately covers leaders who make threats, given that it only reaches "participation," not the action itself. [O'Sullivan]

Another participant questioned whether there was sufficient widespread agreement on the definitions of the BWC and CWC so that there could be a common understanding of what is criminal under the Draft Convention. With respect to Article I(2), under the usual rule it must be

clear that superior orders on their face are clearly illegal. (War crimes are, of course, always clearly illegal.) It would be best to focus on conduct that is universally agreed to be wrongful to avoid ambiguity. Otherwise, there is a danger that conduct seen as innocent in State A will be treated as criminal in State B and punished. The term "peaceful purposes" is especially ambiguous. [Corken]

It was suggested that in order to properly address mens rea, the phrase "unlawfully and intentionally" should be added to Article I(1) instead of "knowingly" in 1(b) and 1(Convention). [Dugard]

It was noted that it is harder to establish a chain of command in a civilian situation than in a military one. Moreover, it is unclear whether 1(Convention) is intended to cover both military and civilian use of these weapons. This anomaly results from the fact that Article I tries to bridge disarmament and humanitarian law. [Jacobsson]

In response, it was noted that 1(Convention) was so formulated because of disagreement over whether tear gas is a chemical weapon and the Draft Convention was to exempt the domestic use of tear gas for purposes of riot control. [Meselson] It was questioned whether the CWC and hence the Draft Convention would cover domestic uses of tear gas for genocidal purposes. [McLaren] In response, one participant noted that such uses are covered and that the Draft Convention was meant to cover terrorists and tyrants equally. [Meselson]

With respect to the issue of definitional clarity, it was suggested that too much clarity and specificity can be harmful. For example, some countries have argued that the chemicals on the schedules are the only ones limited by the CWC, and have sought to make a similar argument under the BWC. Any such list will, however, necessarily be incomplete, so that a broad definition is preferable. Over the long-run it will be clear when a person is up to no good with biological weapons. [Walker]

Another participant noted that "knowingly" means only that you know what you're doing when you do it, not that you know it's illegal. Maybe a provision needs to be added that the Draft Convention is not meant to cover anything that "reasonably in good faith" is believed to be permitted by the BWC and CWC. Also, Article I(3) should use the phrase "prohibited or agreed to be prohibited" rather than just "prohibited"; this captures the fact that this treaty, unlike the CWC and BWC, reaches individuals and not states. [Heymann]

Concern was expressed that Article I may be too broad by exposing too many people to criminal responsibility. It is important to be as restrictive as possible in the criminal context. Also, language should be added to the effect that "nothing in this Convention is prejudicial to any rule of international law concerning the international responsibility of states." [Romanov]

It was questioned whether people building a dual-purpose facility would be covered by the Draft Convention, if they knew it had prohibited capabilities, but no way of knowing whether they would be used. [Pearson]

[COFFEE BREAK]

It was suggested that thought should be given to the potential loyalty of technical workers and the possibility of providing amnesty in exchange for being a prosecution witness. Otherwise, this regime might discourage defections from the regime. [Schulte]

A participant noted that since biological weapons should have been destroyed by now under the BWC, the Draft Convention may been taken as a license for those activities that it may not reach. [Romanov]

Concern was expressed over making many people guilty of an international crime the moment the Draft Convention comes into effect. [Heymann] In response, it was noted that the Draft Convention would not be applied retroactively but could reach actual existing and continuing conduct. Also, with respect to the issue of state responsibility, reference was made to Article IV of the Draft Code of Crimes Against Mankind, which states that any statements as to individual criminality are without prejudice to the question of state responsibility. Finally, in connection with the "orders or instruction of a State" under Article I(2), express reference should be made to the domestic laws of a State as well. [Dugard]

A participant suggested that a phrase be added so that ignorance of the BWC and CWC could not be used as a defense. Reportedly, many technical personnel involved in BW and CW programs are unaware of the BWC and CWC regimes. This should not be a defense for them. [Walker] It was questioned whether ignorance of law is generally considered a defense under international law. [Al-Khasawneh] A participant responded that it is generally not considered a defense but only a possible mitigating factor. Take for example the Hijacking Convention – though there is not explicit mention of such a defense, it has been assumed that there is no such defense. [Dugard] Another participant noted that criminal law generally only requires knowledge of the nature of one's actions, not the extent to which it is consistent with the laws. However, a defense of "reasonable mistake" or "reasonable belief" might need to added. [Heymann] A participant noted that it might be appropriate to encourage instruction in treaty norms, to minimize the need for parties to assert this defense. [Schulte]

It was suggested that a "reasonable belief" provision would not be adequate and that it would also create tension with the exclusion of any defense on the basis of superior orders under I(2). Moreover, Article I(2) is in tension with I(3) to the extent that that latter might allow for an exception to the former. Article I(3) is also in tension with I(1) because I(1) is broader than either the BWC or the CWC. Further, "conspiracy" should be added as an offense, and Article I(1) should be modeled after the language of the Terrorist Bombing Convention (language that was recently reused in the Nuclear Terrorism Convention). Finally, it was proposed that intentional use be the principal offense, and that assistance, and the like be addressed afterwards. [Corken]

Another participant agreed that there is some potential inconsistency between Article I(1) and I(3) since the prohibitions of the Draft Convention are broader than the BWC and CWC. However, the participant disagreed that I(2) and I(3) were necessarily inconsistent because a superior order would need to be authorized by the BWC or CWC to be an affirmative defense. [Heymann]

Article II (Definitions)

A participant commented that Article II(1) should not try to reformulate the definition of the BWC but rather simply cross-reference the 1972 Convention. [Romanov] In response, it was noted that there has been debate over whether the BWC actually purports to define biological weapons at

all, so that is why the Draft Convention uses the language that it does. [Crawford, Meselson] It was also noted that it is unclear whether the BWC covers means of delivery for biological weapons, therefore the Draft Convention needs to be as explicit as it is . Moreover, it was suggested that the Draft Convention incorporate the textual language of the CWC rather than simply refer to it. [Crawford] It was suggested, then, that at least the word "defined" be eliminated so as to avoid controversy, and that the text just refer to Article I of the BWC. [Romanov] Another participant noted that it is very important to include a clear definition, one that squares with the BWC and CWC, so that national authorities do not have a great deal of room when incorporating implementing legislation into domestic law. [Dugard]

It was suggested that the word "toxin" be added to the definition and that the language of the CWC be incorporated directly into the Draft Convention. [Walker] It was also suggested that the word "defined" be replaced with "as listed in." The same participant noted that the CWC definition is somewhat long, so that a cross-reference is appropriate. [Jacobsson] In response, another participant commented that the notion of a "list" is a bad idea in this context because it would encourage the idea that a finite list can capture all items covered by the CWC and BWC, limiting the future effectiveness of the Draft Convention in light of scientific evolution. [Walker]

It was widely agreed that the phrase "municipal" law from Article II(3) be changed to "domestic" or "national" law. A participant then raised the question as to which country's domestic law Article II(3) refers. [O'Sullivan] Another participant raised the hypothetical of Country A wanting to prosecute a corporation from Country B when B does not allow corporations to be prosecuted at all, but A does. Whose law governs? [Heymann] It was suggested that Article II(3) be removed if there is no similar provision in the model conventions. If there is ambiguity, then it is better left for future resolution; this provision will only complicate matters. [Crawford] Another participant noted, however, that most other international crimes deal with individuals exclusively whereas here there is a clear anticipation of corporate crimes, so that this provision is appropriate. [Dugard] It was suggested that the term "applicable" be substituted for "domestic" or "national" or even "municipal" in Article II(3). [Heymann]

Two participants noted that it may be that multiple states may wish to prosecute the same corporation; but this problem may also arise with individuals. [Jacobsson, Schulte] One participant commented that the Draft Convention is really after individuals, not corporations, and therefore the proper target would be the director of a company rather than the company itself. [Walker] Others disagreed and noted that often corporations can be criminally liable in addition to individuals, at least in Australia and the U.S. [Crawford and Heymann] A participant endorsed the term "applicable" because that may leave the door open for an argument that the prosecuting country can use its own definition of legal persons. [Dugard] As to the
potential complexities of which law applies, a participant noted that the same choice-of-law principles would apply as would apply to any other violation of (say) Australian law by a French entity. [Heymann] A participant also observed that legal persons are referred to in Article VII of the CWC, paragraph 1(a). [Meselson]

A participant noted that a corporation cannot be extradited in the same way that an individual can be [Corken] A participant noted that long-arm statues will, however, apply. [Crawford] Another participant commented that it might still be possible to get a corporation allegedly in violation of the Draft Convention by freezing its assets, in this way avoiding the extradition issue. [Heymann/Dugard]

It was suggested that legal entities other than individuals do not seem to fit into a treaty creating an international crime. [Al-Khasawneh] However, another participant emphasized the importance of ensuring that corporate activity is covered by the Draft Convention. Corporations are acting purely for profit and do not have any morally defensible claim of having acted in self-defense. Moreover, the potential of being branded as an international criminal would be a strong corporate deterrent. [Heymann] A participant also noted that punishing a corporation will provide resources with which to compensate victims, and that the French government has applied this principle in the past with some success. [Russbach]

It was noted that it may ultimately be difficult to show a corporation's intention since it may be involved at an early stage without knowing of the ultimate use of its products. [Crawford] Another participant agreed but commented that the Draft Convention should require knowledge; suspecting that a violation is underway should not be enough. [Heymann]

It was asked whether a director could still be prosecuted if the company was as well. [Jacobsson] A participant answered in the affirmative, at least under U.S. law. [Heymann]

Although this raises the question of how to determine whether a corporation is an "alleged offender", it was suggested that a definition of that term is unnecessary. Only the International Protected Persons Convention (which was drafted by the ILC) contains such a definition; the rest of the models do not. The concept mainly arises in the context of extradition. The concept of a "prima facie" case, which is used in the US and some other legal systems, does not exist in many countries. [Dugard] It was noted that the Terrorist Bombing Convention uses the term "alleged offender" without defining it. [Corken]

Article III (Appropriate Penalties)

It was suggested that the Draft Convention incorporate Article IV of the Terrorist Bombing Convention since it is more comprehensive than the current Article III of the Draft Convention. [Dugard]

It was noted that no provision like Article III of the Terrorist Bombing Convention, the "single state exception", was included in the Draft Convention because the drafters were worried about the domestic actions of a tyrant. [Heymann, Meselson] A participant suggested that there is no reason to volunteer the "single state exception" initially although it may need to be conceded at a later stage in negotiations. [Heymann]

Another participant noted that the rationale for including the exception in the Terrorist Bombing Convention, exempting purely domestic bombings, does not necessarily hold in the case of biological and chemical weapons. Internal use of these weapons may still be relevant to the international community. [Corken] A participant agreed. [Schulte]

Article IV (Jurisdiction)

1. Jurisdiction over Alleged Offenders

It was generally agreed that the term "alleged offender" need not be defined, especially in light of the notification requirement of Article V(4).

There was a debate as to how, when a state finds an alleged offender on its territory and elects to prosecute, it obtains jurisdiction over the crime (assuming that none of the obvious sources of jurisdiction, like nationality or passive personality, exist). Some participants were of the view that jurisdiction would be "universal by treaty," and that this meant that in any case a refusal to extradite itself is sufficient to establish jurisdiction under the Draft Convention [Crawford, Dugard].

Other participants were of the view that, for "universal by treaty" jurisdiction, this refusal might suffice to confer the jurisdictional claims of any other state that had ratified the treaty on the prosecuting state. They questioned, however, what the source of jurisdiction was when no other ratifying state had a traditional basis for jurisdiction. These participants cited the U.S. Restatement of Foreign Relations and Cherif Bassiouni's treatise in support of this view. [Heymann, Meselson] The first group of participants disagreed with this interpretation, noting that a state whose national was prosecuted under such an arrangement might object, but that this is at most a point of courtesy, not of international law. These participants noted, however, that the treaty does not overrule traditional immunities, such as diplomatic immunity. [Crawford, Dugard]

[LUNCH]

[AFTERNOON SESSION]

A participant observed that crimes in purely domestic settings are ordinarily not of interest to other states, but that this is ordinarily not true of crimes involving chemical and biological weapons. For example, a hijacking that is entirely internal to a state might not be of international concern, but a use of chemical weapons might well be. It was suggested that this point be made explicitly in the Draft Convention so that its obligations might apply *erga omnes*, rendering it easier to justify holding even non-signatory states to the standards of the Draft Convention. [Dugard]

Another participant expressed skepticism as to whether it is possible to define in a precise way which crimes are of "international interest," noting that any definition will inevitably have a subjective (that is, political) component. [Al-Khasawneh]

It was suggested that the Convention's obligations be treated in the same way obligations under international humanitarian law are; in that body of law, prosecution is mandatory, not elective. [Jacobsson]

A participant [Heymann] suggested that the Preamble should perhaps say that violations of the principles set forth in the Convention are a source of danger to all states. This would make clear that violations of the Draft Convention are subject to jurisdiction under the protective principle. This would also make clear that even nations with no direct connection to the offense have jurisdiction to prosecute individuals who violate the Convention (clarifying a jurisdictional question that the group had discussed earlier). A second participant [Dugard] proposed that this principle be embodied in the body of the Convention (for instance into Article IV(2)), as well as in the Preamble, so that states could embody it in their national law. The first participant agreed, proposing introduction into Article IV(1)(d). [Professor Heymann also offered to redraft this provision appropriately] There was also a brief discussion of whether the Convention should refer to a threat to humanity as a whole, to individual states, or to both. The first participant observed that including a reference to "states" would help to trigger the protective principle.

It was suggested [Schulte] that the treaty rely on both the protective principle and the idea of obligations *erga omnes*, which appears in human rights treaties. Indeed, the use of chemical weapons by a state against its own population raises both types of concerns, as such use demonstrates both the capability and the inclination to use chemical weapons against other states. A second participant [McLaren] observed that there is also a risk of accidental releases that would affect other states. The first participant noted that there is some tradeoff between the wide acceptability of the treaty and the strength of its provisions, and that it might be appropriate to prepare two sets of provisions, a "weak" and a "strong" version, distinguished with square brackets.

A participant observed that the question of what constitutes a security threat that would trigger the protective principle is inherently subjective. For instance, as to a state's alleged possession of chemical weapons agents, a nearby state may be highly concerned with accidental releases, while a distant state would be more concerned with the intent of the alleged posessor state. [Al-Khasawneh]

It was noted that the human-rights approach to jurisdiction might be preferable, given the controversial status of efforts by the United States (with Helms-Burton, for instance) to extend its jurisdiction overseas on the basis of "effects" tests like the protective principle. [Dugard]

A participant [O'Sullivan or Crawford; notes disagree] suggested the addition of a further clause to Article IV(2), ". . . regardless of the citizenship of the alleged offender." Another participant [Dugard] agreed.

Another participant agreed with those who had pointed to the potentially sensitive nature of the protective principle and commented that the humanitarian approach to jurisdiction is preferable and was reflected in the Preamble. The participant asked whether the group thought that a state could rely on the treaty to demand that a non-state party extradite one of its own citizens for prosecution. [Meselson]

In response, it was noted that binding nonparties to extradite their own nationals would exceed the usual scope of international law [Dugard]. Another participant [Schulte] said that there were three positions available: a "weak" position, under which the Convention would not affect nonparties at all; a "strong" position, under which they would be bound in some respects; and a "very strong" position, under which they would be bound to extradite their own citizens. A third participant [Blichtchenko] said that at least the "strong" position was required.

A participant [Jacobson] observed that States ordinarily have jurisdiction to prosecute offenses occurring in their contiguous waters (to control smuggling, and so forth), and asked whether this jurisdiction should be specifically listed in Article IV(1). Another participant [?] said that such jurisdiction was ordinarily included within the definition of "territorial" jurisdiction.

There was a proposal to add the phrase ". . . or otherwise justifies a protective response by that State" to Article IV(1) in order to support the exercise of protective jurisdiction [Heymann]. Another participant [Al-Khasawneh] suggested that this concept was too discretionary a basis of jurisdiction and that some kind of objective criterion for the exercise of jurisdiction was necessary. The first participant replied that the addition of this language would not enlarge the breadth of jurisdiction under the Draft Convention, but rather only bolster States Parties' preexisting claims to exercise broad jurisdiction.

A participant thought that this concept would be difficult to implement in domestic legislation, given its breadth, and proposed modifying Article IV(2) instead. [Corken]

Another participant proposed amending Article IV(2) to read: "where the alleged offender, *regardless of nationality*, is present in its territory . . . ." [Meselson, implementing O'Sullivan's suggestion].

An inconsistency was recognized in the language of Article IV(1)(d) as the word "committed" occurred both in this provision and in the chapeau. [Jacobsson]

It was suggested that some might perceive an unfairness in allowing a nuclear state to try nationals of a non-nuclear state for chemical weapons-related activities but not allowing non-nuclear states to try nationals of nuclear states for possession of nuclear weapons [Schulte]

A participant [Dugard] endorsed the previous suggestion of including a catch-all basis of jurisdiction in Article IV(1), but suggested that it be based on humanitarian concepts, not on the protective principle. He suggested something along the lines of: ". . or where the crime is committed against non-nationals in circumstances that would amount to undisputed violations of international human rights principles of concern to the international community." The participant who had endorsed the "protective" approach indicated a willingness to withdraw that proposal. A third participant [Meselson] observed that this approach only considers use, and not other violations, and is therefore in fact weaker than other proposed approaches. It was suggested that the new language be broader because of the importance of reaching activities such as stockpiling [Pearson]. Yet another participant [Heymann] noted that the motivations underlying the humanitarian approach are very similar to those underpinning the protective principle, as both are concerned with the violator State's retention of a security threatening weapon that has been universally condemned. Such an understanding would suggest that the treaty should reach preparatory conduct.

2. Multiple Extradition Requests

A participant [Meselson] inquired as to how the Draft Convention would resolve situations in which multiple states could claim the right to extradite an alleged offender. It was noted that there have been repeated efforts to draft "primacy" rules in other conventions but that none has proven successful, although there appears to be some general agreement that the territorial state always has primacy. [It was unclear whether this reference to the territorial state meant the state with possession of the offender or the state in which the offense was committed.] The participant commented that it would be a good development if some primacy rules could be developed. [Al-Khasawneh]

Another participant [Dugard] noted that this very issue is before the International Court of Justice in the *Lockerbie* case, and that it was very difficult. It was also recognized that the Terrorist Bombing Convention negotiations had failed to resolve the issue [Corken]. A participant [Dugard] explained that common-law countries generally prefer to give primacy to the state on whose territory the offense was committed, while civil-law countries prefer to give primacy to the state of nationality. Another participant [Al-Khasawneh] noted hat one approach that has been suggested is "first come, first serve," under which the first extradition request receives priority. Two participants [Dugard, McLaren] suggested that this thorny issue would be best left alone in light of past experience.

A participant [Schulte] raised the problem of a "friendly prosecution," that is, when a state does not press too hard for a conviction (or for a long sentence). Another participant [Blichtchenko] suggested adding the phrase "regardless of citizenship" for extradition purposes.

Concern was expressed as to whether the "extradite or prosecute" language of Article IV(2) is intended to grant jurisdiction to the territorial state regardless of any request for extradition. For instance, suppose a citizen of country A who is alleged to have been involved with manufacturing chemical weapons is found in country B. If none of the listed bases of jurisdiction applies, and no extradition request has been made by country A, how would country B have jurisdiction to prosecute the alleged offender (as it is required to do under Article IV(2))? Is the basis of jurisdiction the *refusal* to extradite, or simply the *failure* to extradite? It was observed that in Germany, a refusal to extradite is the necessary trigger [notes unclear on this point]. [Heymann]

A participant [Dugard] commented that the presence of the alleged offender was enough to grant jurisdiction and that the bases of jurisdiction listed in Article IV(1) were intended only to describe those grounds under which a states could demand extradition of an offender. Another participant [Meselson] agreed that no request was necessary in order to give the territorial state jurisdiction. It was asked whether this point needs to be made clearer in the Draft Convention. [Heymann]

3. Article IV(6) -- International Tribunals

It was asked whether the language of Article IV(6), relating to jurisdiction of international tribunals, was drawn from the Genocide Convention [Dugard]. One of the drafters [Meselson] answered in the affirmative and commented that uncertainty with regard to the jurisdiction and procedures of such international tribunals as may come into being required this provision to be vague.

A participant [Romanov] commented that Article IV(6) might actually be read to create jurisdiction for an international tribunal. Another participant [Corken] expressed concern that granting jurisdiction to an international tribunal (like the proposed International Criminal Court) seemed unnecessary, especially if such a tribunal had primacy over other bodies, and said that this provision might create needless practical difficulties. It was also noted that the issue of whether the ICC would have primacy jurisdiction was unsettled in negotiations in Rome. [Dugard]

A participant [Dugard] observed that including a provision like Article IV(6) would group this treaty with the Genocide and Apartheid Conventions, which have similar provisions. By contrast, it is not clear that hijacking (for instance) is a crime against the peace and security of mankind of the kind that would be within the jurisdiction of an international tribunal, which is why hijacking treaties do not have a similar provision. Another participant [Jacobsson] suggested that it would be appropriate to include a provision of this kind, noting that the Genocide Convention's similar provision was drafted in 1949 and therefore the international community has anticipated an international criminal tribunal for a long time.

Article V (Obligation to Take Alleged Offenders into Custody)

The moderator asked which states should be notified in the event of an arrest of an alleged treaty violator. A participant [Jacobsson] said that judging which were the "interested" states was too subjective a task, and suggested that all states be notified. In the alternative, notice could be given to the Depositary, which would then notify all other states. Another participant [Schulte] spoke in favor of wide notification, noting that it may permit States to detect related offenses occurring within their

own jurisdiction, such as violations of export controls. The participant also noted that the notifying state may not know which states have an interest, again arguing for broad notice.

A participant [Corken] observed that Article XI already provides for notification to the Depositary of information relating to the circumstances of the offense and measures taken in response and suggested that this provision might suffice. Another participant [Heymann] said that the burden of notice is low, and that email might suffice, for instance. Another participant [McLaren] agreed with those endorsing wide notice, noting that this approach is appropriate for violations of human rights. It was recognized that there appeared to be three options: leave the text as it stands; require notice to all states; or require notice to the Depositary, which will give notice to all states [Meselson]. A participant [Schulte] suggested that notice to the OPCW might also be appropriate.

A participant [Meselson] asked what would happen if immediate notice would compromise an investigation. Another participant [Pearson] suggested that the treaty require giving notice "in accordance with national law" to correct this problem, and proposed that all provisions relating to notice be grouped in Article XI. It was then proposed that the Draft Convention explicitly require that notice be given if it would not compromise an investigation [Heymann]. Another participant [Corken] opposed this approach, saying that some states might use it as an excuse for not giving notice.

A participant suggested that the phrase "it considers it" be omitted from Article V(4). [Blichtchenko]

A participant asked whether the reference "establishing jurisdiction" in Article IV referred only to the assertion of jurisdiction or also to the enactment of domestic legislation. [Dugard]

A participant observed that Article V(2) had been omitted from the most recent extradition treaties, as it tended to interfere with maintaining custody over an alleged offender as to whom extradition proceedings had started, but were not yet complete. [Corken]

Article VI (Extradition)

A participant [Al-Khasawneh] said that the reference to the "political exception" in Article VI(2) is unnecessary since it is clear from context. Another participant [Dugard] disagreed. He added, however, that if states are not allowed to invoke the political exception, it will be necessary to include a nondiscrimination clause, like that in Article XII of the Terrorist Bombing Convention. The first participant suggested that the nondiscrimination clauses of the Hostages Convention (Article IX) and the Rome Convention were broader and therefore preferable.

A participant [Blichtchenko] suggested that, as to Article VI(1), the offenses be deemed to be included in *future* extradition treaties as well, or that the Draft Convention itself be denominated an extradition treaty. Another participant [Dugard] said that neither approach was necessary or feasible, given the present language.

Article VII (Duty to Prosecute or Extradite)

A participant [Dugard] noted that this provision only requires that States *consider* prosecuting, not that they actually do so, and suggested that this was too weak. Another participant

[Jacobsson] agreed, raising the problem of the "friendly prosecution," and asked whether there was an exception from *non bis in idem* (or double jeopardy) for this situation. The participant noted that *non bis in idem* does not bar a state from extraditing an offender after considering whether to prosecute and deciding not to do so. Another participant [O'Sullivan] also endorsed strengthening this provision.

A participant [Dugard] suggested that as a practical matter prosecuting authorities must be able to decline to prosecute in some situations, and that there is little alternative to deferring to their decisions. Another participant [Heymann] cited a case in which the United States had successfully intervened to discourage France from giving a friendly prosecution to an accused terrorist. It was observed that there is an assumption of good faith on the part of prosecuting authorities. [Al-Khasawneh]

A participant [Schulte] noted that many treaty offenses were of a continuing nature, so that other states could prosecute on the basis of the continuation of the conduct. The participant also noted that states that do not prosecute adequately could be punished within the treaty regime. Another participant [Dugard] noted that states are reluctant to expel noncompliant states and thereby harm universality, citing the example of North Korea, which was not expelled from human rights treaties or the NPT.

A participant [Meselson] asked whether the principle of *non bis in idem* should be expressly included in the treaty. A participant [Dugard] said that this provision is often thought to be implied, but noted that this might not be true for novel crimes. A participant [Smith] noted that in the Montreal Convention, the participants expressly decided not to include such a clause, deciding instead to rely on national law to resolve these issues.

Article VIII (Mutual Assistance in Connection with Criminal Proceedings)

A participant [Dugard] observed that the Terrorist Bombing Convention expressly provides that there is no political offense exception to mutual legal assistance obligations, and asked whether this Convention should track that language. Another participant [Corken] observed that it is often easy to find some ground for denying assistance, and argued that there should therefore be a nondiscrimination clause only for extradition, not for legal assistance. A participant [Jacobsson] observed that the participant's state strongly objects to the political offense exception. It was observed that the Hostages Convention treats extradition and legal assistance differently [Al-Khasawneh]. Another participant [Dugard] suggested that the two issues should be handled in the same way. A further participant [Heymann] agreed.

A participant observed that the Geneva Conventions and Additional Protocol require cooperation for investigation of grave breaches, and suggested considering this precedent. [Jacobsson]

A participant [Meselson] asked whether assistance should be required to be "timely," and whether any witness-related provisions would be appropriate, noting that these issues had come up in the ICC negotiations. A participant [Romanov] suggested that "timely" must be implied already. Another participant [Heymann] said that witness testimony is included in the reference to "evidence." Several participants [Dugard, Meselson, Smith] observed that it might be best not to go into too much detail here, and that the ICC's applicable provisions might be incorporated in the future.

Article IV (again)

Discussion then returned to the jurisdictional issues associated with Article IV. A participant [Heymann] cited Bassiouni's treatise for the proposition that the duty to prosecute exists independently of any refusal to extradite. A participant [Romanov] said that the principle of "aut dedare aut judicare," extradite or try, should be stated expressly. The first participant agreed that the absolute nature of the obligation should be clarified.

A participant [Dugard --or O'Sullivan?] suggested inclusion of a new Article IV(1)(e), providing jurisdiction over acts committed anywhere that threaten the peace and security of mankind. Another participant [Pearson] observed that there would be great debate over any such standard. A participant [Jacobsson] agreed, noting that this language strengthens the *erga omnes* nature of the obligations under the Draft Convention that the idea of universal jurisdiction over nonparties is so new that it must be clearly signaled and its rationale well explained. A participant [Pearson] noted that this language should cover both threats to human beings directly and those to the environment. A participant [Jacobsson] thought that this would be so broad as to discourage ratification of the treaty.

A participant [Heymann] then laid out three options: the "peace and security" approach, which is narrow but convincing; the "human rights" approach, which may be seen as too far-reaching; and the "protective principle" approach, which seems to be controversial. A participant [Dugard] said that he would present another alternative to the organizers of the session later on.

Article IX (Preventative Cooperation)

A participant [Heymann] observed that the language of this provision is broad, but that the word "practicable" would eliminate concerns about compatibility with national constitutions and legal systems. There was general agreement [led by Schulte] that the reference to preparations was unnecessary, as it is already embraced by Article I. A participant [Romanov] suggested including a reference to the CWC cooperation obligations.

Article X (Entitlement of Fair Treatment for Alleged Offenders)

A participant [Heymann] inquired whether more detailed human rights obligations were necessary. It was agreed [Heymann, Blichtchenko] that a further reference to informing the state of the offender's nationality would be appropriate, even though this is arguably encompassed within Article V. A participant [Romanov] suggested that "human rights standards" might be preferable to "guarantees," because it would be clearer. Other participants [Ekeus, Jacobsson] agreed. A participant [Heymann] endorsed strong human rights protections.

A participant said that it might be appropriate to specify which State is entitled to exercise rights of protection: "the state of nationality, or residence, or any other state entitled to exercise . . . " [Al-Khasawneh]

Article XI (Communication to the Depositary)

A participant [Heymann] suggested that information be transmitted by the Depositary to all States Parties unless there is interference with a pending investigation and confidentiality concerns. (The reference to national law would be omitted.) This proposal met with general approval.

It was proposed [Smith] that the ICC's Prosecutor might serve as Depositary. A participant [Dugard] noted that it is unclear whether this is legally permissible.

Article XII (Dispute Resolution)

There was some discussion as to whether disputes could be submitted to the ICC. It became clear [Dugard] that states would not be appropriate parties before the ICC.

A participant observed that reservations are usually allowed as to submission of disputes to the ICJ. [Corken].

Article XIII (Conference of States Parties)

A participant expressed concern that a review conference might change the treaty in a way that would lead to persons convicted under a previous version of the treaty being freed. [Romanov]

A participant [Pearson] stated his approval of the review provision, noting that the 5-year term fits well with the BWC's similar term. Another participant [McLaren] also endorsed the review provision. Another participant [Heymann] suggested that the treaty provide for revision "in light of technical evolution," or "in light of CWC and BWC review conferences," in order to ensure that the treaty is strengthened, not weakened, during these reviews. A participant [Rothschild] asked whether review is usual in criminal treaties, and asked why customary international law would not be adequate to address any developments.

A participant [Al-Khasawneh] expressed skepticism about the review provision. It was noted that other criminal treaties do not contain similar provisions. He also observed that it undercuts the permanence and generality that one expects from a legal regime. Another participant [Jacobsson] observed that stability is desirable, but that review does not necessitate change. The participant proposed that a review or amendment on the request of a specified number of states might be an appropriate alternative.

A participant observed that there were now three proposals on the table: (1) taking the same approach as other criminal treaties; (2) describe the situations that should trigger review, as in the BWC and CWC; and (3) allow a review conference to be called by a specified number of states. [Heymann]

A participant [Pearson] endorsed the review provision on the grounds that it is a reaffirmation of the purpose of the Convention, a way to ensure that it does not gather dust but remains a living document, and to check that the treaty is being properly implemented. Another participant [Rothschild] suggested that criminal law is different from other international law, and that its norms do not necessarily need frequent reaffirmation. A participant [Heymann] observed that review conferences would permit any gaps to be filled, given that the drafters may be fallible. A participant [McLaren] noted that the "prosecute or extradite" norm of the treaty might in be in

particular need of review. Another participant [Schulte] noted that technical changes could be taken into account by this provision.

Other Issues

A participant [Russbach] observed that it might be helpful to include factfinding procedures in the treaty, as there may be situations in which a government is not in a position to be both judge and party, or in which neutral factfinding help would be of value. A participant [Heymann] agreed, noting that expert help would also be valuable.

A participant [Jacobsson] inquired about the status of the doctrine of head of state immunity under the treaty, noting that it would be unfortunate to exempt both the little fish and the big fish under the treaty. Other participants [Heymann, Crawford] said that only diplomatic missions were entitled to immunity, and not heads of state.

Implementation

The moderator then brought up the subject of placing the treaty on the international agenda, and asked how this might best be done. The moderator noted that governments will doubtless alter the treaty, incorporating their own agendas.

A participant [Dugard] suggested that the treaty required an "angel," either a government or an NGO. The participant suggested the Nordic countries, the Netherlands, Greenpeace, and Amnesty International as possibilities. A participant [Blichtchenko] suggested that a provision granting some form of status to NGOs might be desirable in order to attract NGO interest.

A participant [Crawford] suggested that further drafting would be needed, and that each Article would require an explanatory memorandum. Another participant [Heymann] noted that some details were out of the control of the group, and suggested that drafting was now essentially complete. A participant [Pearson] proposed that there be more information available on the source of the language of each provision, including a cross-reference of sources. Another participant [Al-Khasawneh] expressed a desire to see a copy of the Draft Convention as revised after this meeting.

A participant [Pearson] agreed with the idea that the Nordic countries, and perhaps South Africa, might take the lead.

A participant [O'Sullivan] said that in the present international climate there was not only fatigue as to new treaties, but an actual sense of hostility about Western imposition of norm-creating mechanisms without full participation of developing countries, and observed that South Africa seems to feel this way as well. To make the treaty attractive to developing countries, he suggested emphasizing the regime's benefits to neighbors of CW or BW possessor states; encouraging states to sign and ratify in pairs, by mutual agreement. He proposed that the treaty should "float up quietly," rather than be forced down the throats of developing countries, and suggested that a big group of developing countries be brought on board, including countries from Latin America, the subcontinent, the Koreas, and the like. The UNDC may be a good forum for this; that body seems to be interested in adding to its agenda. Or UNIDIR may also be helpful. Dhanapala's link to UNIDIR might prove helpful. The treaty might also be raised in the CWC/BWC Review Conferences. Involving Dhanapala might be very helpful, although it is not fully consistent with the idea of moving slowly.

A participant [Ekeus] said that there may be less "fatigue" than a crowded agenda. It will be difficult to raise this treaty before the ICC is settled. UNDC is definitely underrated; its openness is an advantage. But working through UNDC will frame the treaty in disarmament terms, not legal terms, and so place it in the jurisdiction of the First Committee, rather than the Sixth Committee. It is unlikely that the First Committee will be able to reach consensus on these issues. The CD is also unlikely to be able to do so (the fissile materials cutoff treaty is stuck there now). The Sixth Committee is better; a group of like-minded states (the Nordics, Australia, Canada, the Netherlands, and some developing countries, especially South Africa and some Latin American countries) should be able to move the issue forward.

A participant [Rothschild] suggested that, given the unusual nature of the undertaking, it might be better to proceed through Amnesty International than Greenpeace. There is also a medical angle; Physicians for Human Rights, or the WHO under Brundtland (perhaps allied with Mary Robinson), might be helpful. Switzerland may also be interested, given its pharmaceutical industry.

A participant [Jacobsson] observed that the centenary of the 1899 Hague Conference is coming up, and due to be celebrated in The Hague, and that the organizers may well be "casting about for agenda items." This would be a good place to launch an effort. This will also be the last year of the Decade of International Law. A lot of heavy organizing will be needed -- the Nordic countries alone will not suffice, since they have spoken often in this field. Medical groups might be very helpful. The ophthalmologists participated in the discussion of blinding weapons, to great effect.

A participant [Blichtchenko] suggested that the Commission on Humanitarian Issues in Geneva has some influence on developing countries, and that the medical and ecological aspects of the issue are strong.

A participant [Al-Khasawneh] expressed some skepticism about the value of the treaty itself. A fragmented approach to these weapons seems problematic. The treaty may only serve to intensify power disparities, rather than enhancing fairness and security. It seems arbitrary to distinguish between chemical and nuclear weapons; there is little difference between death by asphyxiation and by radiation. But there is definitely value to keeping chemical and biological weapons out of the hands of substate actors; it will be necessary to see the treaty as revised before it will be possible to decide whether the treaty's advantages outweigh its disadvantages. The Sixth Commission and the ILC could both be helpful in moving the treaty forward.

A participant said that the United States cannot take a position on this treaty now. The Sixth Committee is now preoccupied with the Nuclear Terrorism treaty and with another terrorism treaty put forward by India. The Sixth Committee might well be appropriate, given that this convention is modeled after treaties developed in that context. But it might also be valuable to have people with substantive knowledge on hand; the nuclear terrorism treaty has raised a similar debate over which committee should take jurisdiction. It might be best to move the treaty forward in several places at once. [Corken]

A participant suggested that the BWC and CWC review conferences might be an appropriate venue for raising this treaty. A further question is how the advisory process embodied in this meeting should continue. [Heymann]

A participant asked whether the proposed convention might be a distraction from the BWC and CWC, or arouse hostility towards them. [McLaren]

A participant suggested that there has already been some dissatisfaction among developing countries with the present push by the US and EU to develop a BWC protocol, so that it would be best to go slow for now. There is a BWC review conference scheduled for 2001; but BWC parties may feel as through things are fast enough in the BWC context already, so that this may not be the best route. Developing countries complain that they have only one person able to do WMD work, so that the work must be limited. The Sixth Committee seems like the best forum, given this disarmament fatigue. [Pearson]

A participant endorsed an informal approach, and suggested that the Australia Group might be one appropriate forum. Caution is best, to avoid a quick negative reaction. [Romanov]

A participant observed that developing countries dislike the Australia Group, so that this approach would be harmful to the treaty's chances. The participant also suggested that UNIDIR might play a useful role, as suggested earlier. [Pearson]

A participant noted that the Australia Group, although not a good venue for negotiation, might be a good place in which to do groundwork for the treaty. [O'Sullivan]

A participant [Heymann] asked whether endorsements from highly prestigious doctors might help raise the treaty's profile in the medical profession. A participant [O'Sullivan] suggested the WHO board, which is made up of physicians. Another [Pearson] suggested the World Medical Association, which has done some work on genetic weapons, and the ICRC. Another participant [Russbach] noted that the World Medical Association is not influential in developing countries.

The organizers said that they would circulate a revised draft, including these proceedings and a revised commentary.