

INTERNATIONAL CRIMINALIZATION OF BIOLOGICAL AND CHEMICAL WEAPONS

A PROPOSAL FROM THE
HARVARD SUSSEX PROGRAM
20 August 1996

SUMMARY. The Harvard Sussex Program proposes to develop and then to seek international consideration of a draft convention making it a crime under international law for any individual knowingly to participate in the development, production, acquisition, transfer or use of biological or chemical weapons.

The Biological Weapons Convention of 1972 (BWC) and the Chemical Weapons Convention of 1993 (CWC) prohibit States Parties from developing, producing, acquiring, retaining or transferring chemical or biological weapons. Each State Party is also obliged to prohibit these activities anywhere on its territory or in any other place under its jurisdiction.

Nevertheless, no international legal instrument exists to deal with the case in which activities prohibited by the BWC or the CWC take place in a state that does not prosecute the offender, either because of that state's complicity in the prohibited activities, its failure to detect or apprehend the offender or for any other reason. The proposed convention addresses this problem by making activities prohibited by the BWC and the CWC "crimes under international law", subject to universal jurisdiction. A person who, for example, produces biological weapons in state A would then be subject to prosecution or extradition should that person subsequently be found in state B. The offender would be unable to travel outside the country where the offence was committed without facing the risk of apprehension and punishment.

The proposed convention includes an article obliging States Parties either to prosecute or extradite offenders found on their territory, regardless of where the offenses were committed and regardless of the citizenship of the offender. The same obligation, *aut dedere aut judicare* (either extradite or prosecute), is included in international conventions now in force for the suppression and punishment of aircraft highjacking and sabotage (1970; 1971), crimes against internationally protected persons (1973), theft of nuclear materials (1979), hostage taking (1979), crimes against maritime navigation (1988) and torture (1984).

The proposed convention also includes provisions obliging States Parties to provide assistance to one another in the investigation and adjudication of offenses and to guarantee fair treatment and due process of law in all proceedings.

The proposed convention would provide a new dimension of constraint against biological and chemical weapons by applying

international criminal law to hold individual offenders responsible and punishable wherever they may be and regardless of whether they act under or outside of state authority. The norm against biological and chemical weapons would be strengthened and deterrence of potential offenders, both official and unofficial, would be enhanced.

In order to prepare a discussion draft of the proposed convention and then to promote its international consideration, the Harvard Sussex Program seeks support for the following plan of action:

1. Research and drafting by Meselson and Robinson. This was begun in January 1996 and has led to the enclosed draft of 20 August, patterned on existing conventions dealing with international crimes. It will require further research and communication between Meselson and Robinson and redrafting after review by authorities in international law.
2. Consultations and meeting with international law authorities. The draft convention has been given for comment and advice to Professors Thomas Buergenthal (George Washington University), Abram Chayes (Harvard University), Anne-Marie Slaughter (Harvard University) and Philip Heymann (Harvard University). It will also be given to Professor Oscar Schachter (Columbia University), Professor Theodore Meron (New York University) and others in the United States and abroad. After revisions are made on the basis of individual responses, it is planned to have at least one working meeting of legal authorities to discuss various technical issues and to produce a revised draft for circulation to governments. This will be accompanied by an explanatory article-by-article commentary.
3. Consultations to formulate plans for obtaining international governmental consideration. The revised draft convention will be discussed with a number of individuals in the United States and abroad in order to formulate plans to obtain high-level consideration of the convention in a number of countries whose support would be especially influential in bringing the convention before the world community for negotiation and adoption. At this stage, an international steering group of eminent persons will be established to foster high-level consideration of the convention.
4. Presentations to leaders and senior officials in selected countries, as deemed appropriate following step 3. The objective will be to seek governmental support and sponsorship for the convention in preparation for its introduction into an appropriate international negotiating body.
5. Presentation of the revised draft treaty to an international organization or other international body for negotiation, further revision and adoption. A number of alternative routes will

be considered. One possibility is submission by a group of sponsoring states to the United Nations General Assembly, to be referred by the UNGA to an appropriate negotiating body. The negotiated convention could then be reported back to the UNGA for commendation and a call for ratifications, leading to the convention's entry into force.

The Harvard Sussex Program (HSP), established in 1988, is an international collaborative program of research and communication regarding public policy problems posed by biological and chemical weapons. Directed from Harvard University by Matthew Meselson and from the University of Sussex by Julian Perry Robinson, the Program publishes the quarterly Chemical Weapons Convention Bulletin, maintains a large and unique data base at Sussex, conducts and publishes research, organizes international workshops including the annual HSP/Pugwash workshops on biological and chemical weapons topics and has students, researchers and interns at Harvard and Sussex universities and with the Provisional Secretariat of the Chemical Weapons Convention in The Hague and in Brussels. In addition, HSP undertakes specific initiatives, the most recent of which is the international criminalization of biological and chemical weapons as described in this proposal. Through its two co-directors and its international advisory board, HSP maintains working contacts throughout the international community of scholars, officials, parliamentarians and others concerned with biological and chemical weapons matters. For additional information about the Harvard Sussex Program, please see the accompanying brochure.

ATTACHMENTS:

- (1) Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring or using biological or chemical weapons, 20 August 1996.
- (2) Brochure: The Harvard Sussex Program, November 1995.
- (3) Chemical Weapons Convention Bulletin, issues no. 31 & 32 (March & June, 1996).

17 December 1996

Dear ,

I am glad to report that the W. Alton Jones Foundation has decided to support our effort to develop and promote a convention to criminalize biological and chemical weapons. This makes it possible for us to proceed to the next step, a working meeting to discuss and refine the draft convention and to chart the way ahead.

Accordingly, we invite you to a working meeting in Cambridge on Tuesday, 14 January from 10:00 AM to 4:00 PM and to dinner the night before.

Enclosed please find the present draft of the proposed convention, a summary of the project, a schedule for the meeting and copies of a number of relevant international conventions. In about a week, I will send a list of questions for discussion at the meeting.

Sincerely yours,

Matthew Meselson

CRIMINALIZATION OF BIOLOGICAL AND CHEMICAL WEAPONS
A PROJECT OF THE HARVARD SUSSEX PROGRAM
AND THE
CENTER FOR SCIENCE AND INTERNATIONAL AFFAIRS
HARVARD UNIVERSITY

WORKING MEETING
13-14 JANUARY 1997

SCHEDULE

MONDAY, 13 JANUARY

6:30 PM

DINNER

PRIVATE DINING ROOM, THE INN AT HARVARD

1201 MASSACHUSETTS AVENUE

CAMBRIDGE, MA 02138

(617) 491-2222

OVERNIGHT

THE INN AT HARVARD (OUT OF TOWN PARTICIPANTS)

TUESDAY, 14 JANUARY

10:00 AM TO 4:00 PM

WORKING MEETING

AMERICAN ACADEMY OF ARTS AND SCIENCES

136 IRVING STREET, CAMBRIDGE, MA. (617) 576-5000

INVITED PARTICIPANTS

William Alford

Thomas Buergenthal+

Abram Chayes+

Marie Chevrier+

Rolf Ekeus

Louis Henkin

Philip Heymann+

Theodor Meron

Matthew Meselson+

Julian Robinson+

Oscar Schachter

Anne-Marie Slaughter+

Justin Smith+

Frank Vogel+

+ participation confirmed

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A PROJECT OF THE HARVARD SUSSEX PROGRAM
AND THE
CENTER FOR SCIENCE AND INTERNATIONAL AFFAIRS
HARVARD UNIVERSITY

SUMMARY. The Harvard Sussex Program and the Harvard Center for Science and International Affairs propose to develop and then to seek international consideration of a draft convention making it a crime under international law for any individual knowingly to participate in the development, production, acquisition, stockpiling, retention, transfer or use of biological or chemical weapons.

The Biological Weapons Convention of 1972 (BWC) and the Chemical Weapons Convention of 1993 (CWC) prohibit States Parties from developing, producing, acquiring, stockpiling, retaining or transferring chemical or biological weapons. Each State Party is also obliged to prohibit these activities anywhere on its territory or in any other place under its jurisdiction.

Nevertheless, no international legal instrument exists to deal with the case in which an activity prohibited by the BWC or the CWC takes place in a State that does not prosecute the offender, either because of that State's complicity in the prohibited activity, its failure to detect or apprehend the offender or for any other reason. The proposed convention addresses this problem by making activities prohibited by the BWC and the CWC subject to universal jurisdiction and by obliging States Parties to take such measures as may be necessary in accordance with their constitutional processes to establish jurisdiction over such offenses, regardless of the citizenship of the offender or the place where the offense was committed. A person who, for example, produces biological weapons in State A would face the risk of apprehension, prosecution and punishment should that person subsequently be found in State Party B.

The proposed convention includes an article obliging States Parties either to prosecute or extradite offenders found on their territory. The same obligation, *aut dedere aut judicare* (either extradite or prosecute), is included in international conventions now in force for the suppression and punishment of aircraft hijacking and sabotage (1970; 1971), crimes against internationally protected persons (1973), theft of nuclear materials (1979), hostage taking (1979), torture (1984) and crimes against maritime navigation (1988).

The proposed convention also includes a provision obliging States Parties to provide assistance to one another in the adjudication of offenses and to guarantee fair treatment and due process of law in all proceedings.

The proposed convention would provide a new dimension of constraint against

biological and chemical weapons by applying international criminal law to hold individual offenders responsible and punishable wherever they may be and regardless of whether they act under or outside of state authority. The norm against biological and chemical weapons would be strengthened and deterrence of potential offenders, both official and unofficial, would be enhanced.

The following plan of action is envisaged to develop an appropriate draft of the proposed convention and to promote its international consideration:

1. Continued research and drafting by Meselson and Robinson. This was begun in January 1996 and is represented by the enclosed draft convention of 15 December. It is patterned largely on modern conventions dealing with international crimes and incorporates suggestions from authorities who have been consulted individually. Further research is needed to compile and evaluate relevant constitutional provisions, statutes and case law in various countries and to revise the present draft after wider consultation with authorities in international law.
2. Working meeting of international law authorities. At least one working meeting of legal authorities, including individuals familiar with differing world legal systems, will be held to discuss issues raised by the proposed convention and to produce a revised draft for circulation to governments. Such a meeting is planned for 14 January, 1997 in Cambridge Massachusetts.
3. Explanatory commentary. An article-by-article commentary with citations to selected statutes and case law will be prepared to accompany the convention.
4. Planning for consideration by governments. The revised draft convention will be discussed with knowledgeable individuals in several countries in order to obtain advice on how to make effective high-level contact with governments whose support would be especially influential in bringing the convention before the world community. It may be desirable to hold a further working meeting to address issues of drafting and presentation that may arise.
5. Presentations to national leaders and senior officials. The support of a number of governments will be sought to present the draft convention to the United Nations General Assembly. It is envisioned that an initial group of sponsoring States and additional co-sponsors would agree on a draft text for submission to the appropriate committee of the UNGA. The intention would be to obtain a resolution of the full Assembly endorsing the purpose of the convention and referring it to an appropriate body for further consideration and negotiation. The resolution would include a mandate to report the negotiated convention back to the General Assembly. Upon commendation by the UNGA, the convention would be opened for signature and ratification, leading to its entry into force.