

Resolution 1540: At the crossroads

The Harvard Sussex Draft Convention as a complement to Resolution 1540

Introduction

The Harvard Sussex Draft Convention is an initiative developed by the Harvard Sussex Program on Chemical and Biological Weapons (CBW)¹ to examine the contributions that international criminal law might make to strengthening the regime against CBW. Building on existing legal precedents and international agreements, it is proposed that a new international treaty be created, one which would confer on national courts jurisdiction over individuals present in their national territory, regardless of their nationality or official position, who order, direct, or knowingly render substantial assistance to the use of biological or chemical weapons anywhere. Such a treaty would specifically define acts involving biological or chemical weapons as international crimes, like aircraft hijacking or torture, thereby creating a new dimension of constraint against biological and chemical weapons. This paper explores the ways in which the Harvard Sussex Draft Convention (hereafter “Draft Convention”) can complement and extend the stated aim of resolution 1540.

Relationship to Resolution 1540

Resolution 1540 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 nuclear, chemical or biological weapons and their means of delivery”.² However, resolution 1540 does not require BWC or CWC member States to go beyond their existing obligations under those treaties with regard to national implementation measures.³ Effective legislation is core in controlling the threat of CBW and while resolution 1540 is an important

¹ www.sussex.ac.uk/Units/spru/hsp See also Matthew Meselson and Julian Robinson. "A draft convention to prohibit biological and chemical weapons under international criminal law", *The Fletcher Forum of World Affairs*, vol 28 no 1 (Winter 2004), pp 57-71; Matthew Meselson and Julian Robinson. "A draft convention to prohibit biological and chemical weapons under international criminal law", in *Treaty Enforcement and International Cooperation in Criminal Matters: with Special Reference to the Chemical Weapons Convention*, Rodrigo Yepes-Enriquez and Lisa Tabassi (eds), The Hague: TMC Asser Press, 2002, pp 457-69.

² United Nations Security Council, document S/RES/1540 (2004), adopted by the Security Council at its 4956th meeting on 28 April 2004.

³ Although both the BWC and CWC require each State Party to outlaw 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 nationals elsewhere.

step towards this goal, it does not negate the need for the Draft Convention for several important reasons:

1. Resolution 1540 seeks to strengthen national criminal law rather than to create international criminal law, which would result in further legislative heterogeneity between States. 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 CBW. In particular, the Draft Convention provides guidelines for how States threatened by the use of CBW can proceed when other States are unwilling to enforce these prohibitions or do not recognize these actions as crimes under their domestic laws.
2. Resolution 1540 requires that States “in accordance with their national procedures, shall adopt and enforce appropriate effective laws,” but, unlike the Draft Convention, it does not set out provisions pertaining to jurisdiction. Article V(1)(a-f) of the Draft Convention would require each State Party to establish jurisdiction with respect to crimes involving CBW according to established principles of international law, including the principles of territoriality, nationality, protection, and passive personality, and, in cases involving actual use of biological or chemical weapons, universality.⁴ The exercise of universal jurisdiction is the best means for the international community to regulate the perpetration of serious international crimes and would 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.
3. Resolution 1540 does not contain provisions dealing with matters of extradition and protection of the accused. However, the Draft Convention contains provisions designed to ensure the rights of the accused to seek assistance from his or her state of nationality (Article VI(3)) and provides for extradition under circumstances in which

⁴ With respect to the actual use of biological or chemical weapons, each State Party would be required to establish jurisdiction over all persons found on its territory regardless of their nationality or the territory in which the offence was committed.

States Parties may or may not have pre-existing extradition treaties with each other (Article VII(1-3)). The mechanism of extradition is essential to the international co-operative enforcement of criminal justice.

4. Resolution 1540 only applies as against non-state actors, while the Draft Convention applies additionally to those acting in an “official capacity, under the orders of a superior, or otherwise in accordance with internal law” (Article II(3)). 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 offences involving CBW. 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. Article II(3) also establishes strict limitations on the availability of the defence of superior orders. 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).

The adoption of the Draft Convention would thus assist Member States in implementing aspects of their legal obligations pertaining to resolution 1540. It is worth noting in this regard that resolution 1540 “calls upon all States to promote the universal adoption and full implementation, and, where necessary, strengthening of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons [...]”⁵ The Draft Convention would certainly support this aim by reinforcing the regime against CBW. Furthermore, international criminalization would serve to place the problem of chemical and biological weapons 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.

Establishing the Draft Convention

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

⁵ *Supra* note 2 at paragraph 8(a).

a similar draft in the form of a resolution for consideration by the UN General Assembly, seeking its referral to the Sixth (legal) Committee of the Assembly for negotiation and preparation of an agreed text. This might be completed in a year, in time for the following session of the Assembly. Following a resolution of commendation by the Assembly, the agreed convention would be opened for signature. After ratification by a specified number of states, it would enter into force. Alternatively, a regional or other grouping of states might convene a diplomatic conference with a view to producing an agreed text that could then be opened for signature and ratification by any state wishing to do so.

Adoption and widespread adherence to the Draft Convention would create a new dimension of constraint against biological and chemical weapons. By employing international criminal law the Draft Convention would 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 chemical and biological weapons would be strengthened, deterrence would be enhanced, and international co-operation in suppressing the prohibited activities would be facilitated.

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Appendix

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 multicomponent 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 multicomponent 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].