

# A DRAFT CONVENTION TO PROHIBIT BIOLOGICAL AND CHEMICAL WEAPONS UNDER INTERNATIONAL CRIMINAL LAW

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

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

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

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

What is needed is a new treaty, one that defines specific acts involving biological or chemical weapons as international crimes, like piracy or aircraft hijacking, obliging states to establish jurisdiction over offenders who are present in their territory, regardless of their nationality and regardless of where the offence was committed. Treaties defining international crimes are based on the concept that certain crimes are particularly dangerous or abhorrent to all and that all states therefore have the right and the responsibility to combat them. Certainly in this category, threatening to the community of nations and to present and future generations, are crimes involving the hostile use of disease or poison and the hostile exploitation of biotechnology.

The Harvard Sussex Program on CBW Armament and Arms Limitation, with advice from an international group of

legal authorities, has prepared a draft convention that would make it a crime under international law for any person knowingly to develop, produce, acquire, retain, transfer or use biological or chemical weapons or knowingly to order, direct or render substantial assistance to those activities or to threaten to use biological or chemical weapons. Any person who commits any of the prohibited acts anywhere would face the risk of prosecution or extradition should that person be found in the territory of a state that supports the proposed convention.

The proposed convention would oblige each state party: (i) to establish jurisdiction with respect to the specified crimes extending to all persons in its territory, regardless of the place where the offence is committed or the nationality of the offender; (ii) to investigate, upon receiving information that a person alleged to have committed an offence may be present in its territory and (iii) to prosecute or extradite any such alleged offender if satisfied that the facts so warrant.

The same obligations, to establish jurisdiction and to extradite or adjudicate (*aut dedere aut judicare*), are included in international conventions now in force for the suppression and punishment of international crimes including aircraft hijacking and sabotage (1970 and 1971), crimes against internationally protected persons (1973), hostage taking (1979), theft of nuclear materials (1980), torture (1984) and crimes against maritime navigation (1988). It was on the basis of the 1984 Torture Convention that Britain asserted jurisdiction in the case of Spain's request for extradition of former Chilean president Augusto Pinochet.

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

- (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
- (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Recently, however, there have been indications that an effort may be made to create international criminal law applicable only to the actual use of biological weapons, and then only if such weapons are used with "lethal intent". If adopted, this narrow standard would act to legitimize the use for hostile purposes of so-called "non-lethal" or "less than lethal" biological weapons. Such a development would be at total variance with the BWC and the CWC and would risk

eventual destruction of the essential norm against hostile exploitation of present and future biotechnology. In conformity with the clearly stated general purpose criteria of the BWC and the CWC, the criterion for what is to be criminalized must be “hostile intent”, not “lethal intent”.

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

The proposed convention includes provisions intended to guarantee due process and fair proceedings and requiring that any dispute between states concerning the interpretation or application of the convention be submitted, at the request of one of them, to arbitration or to the International Court of Justice in The Hague. There are also provisions requiring states parties to cooperate in investigations and to provide legal assistance to one another in the adjudication of offences.

Following the procedure by which other international criminalization conventions have come into being, a group

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

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

## **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].

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*The above draft of the proposed convention was prepared by a working group consisting of James Crawford (Cambridge University), John Dugard (Leiden University), Philip Heymann (Harvard University), Matthew Meselson (Harvard University) and Julian Robinson (University of Sussex). It is based on an earlier Harvard Sussex draft and on discussions at a Harvard Sussex workshop on criminalizing biological and chemical weapons held during 1-2 May 1998 at the Lauterpacht Research Centre for International Law at Cambridge University (see below).*

## Workshop Participants, Lauterpacht Research Centre for International Law, University of Cambridge, 1-2 May 1998

Dr. Awn Al-Khasawneh, Member, International Law Commission.  
Amman, Jordan

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Kathleen Corken, Senior Trial Attorney, Terrorism and Violent  
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Professor James Crawford, Director, Lauterpacht Research  
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Mr. Rajesh De, Harvard Law School, Cambridge, USA

Professor John Dugard, University of Witwatersrand; Member,  
International Law Commission. Johannesburg, South Africa

Ambassador Rolf Ekéus, Ambassador of Sweden to the US;  
Executive Chairman of the United Nations Special Commission  
for Iraq, 1991-1997. Washington, DC, USA

Professor Philip Heymann, Harvard Law School; Deputy Attorney  
General, Department of Justice, 1993-94. Cambridge, MA, USA

Dr. Marie Jacobsson, Deputy Director, Division for International  
Law and Human Rights, Ministry for Foreign Affairs. Stockholm,  
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Mr. Stuart Maslen, Legal Advisor to the Mines/Arms Unit,  
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Mr. Paul O'Sullivan, Minister and Deputy Chief of Mission,  
Embassy of Australia. Washington, DC, USA

Dr. Graham Pearson, Director, Chemical & Biological Defense  
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*All of the above persons participated in their personal  
capacities only.*

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