

How does the Draft Convention complement existing initiatives?

HSDC Briefing Paper 2

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Introduction

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The Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring, or Using Biological or Chemical Weapons (“Draft Convention”) seeks to create an international legal regime establishing individual criminal liability for offences involving biological and chemical weapons (BCW). The Draft Convention would complement existing initiatives by creating a comprehensive and unified system for monitoring and eradicating BCW violations and by removing any jurisdictional inconsistencies that currently exist between States.

Resolution 1540

As a response to concern regarding the potential misuse by terrorists of weapons of mass destruction, the United Nations Security Council adopted resolution 1540 on 28 April 2004. The resolution “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 biological or chemical weapons”. Resolution 1540 in effect does not require BWC or CWC member States to go beyond adopting measures over and above their existing obligations under those treaties with regard to the commission of relevant offences.

“The Draft Convention would complement existing initiatives by creating a comprehensive and unified system for monitoring and eradicating BCW violations”

While Resolution 1540 is an important measure designed to address the proliferation of weapons of mass destruction to non-State actors, it does not negate the need for the Draft Convention and falls short of it in several important respects:

“The Draft Convention would substantially further the stated aim of Resolution 1540 and would undoubtedly assist Member States in fulfilling aspects of their legal obligations therein”

1. The Resolution seeks to strengthen national criminal law rather than to create international criminal law, which would result in further legislative heterogeneity between States.
2. The Resolution requires that States “in accordance with their national procedures, shall adopt and enforce appropriate effective laws,”¹ but unlike Article V(1)(a-f) of the Draft Convention, it does not set out provisions pertaining to jurisdiction.
3. In contrast to the Draft Convention, Resolution 1540 contains no provision dealing with matters of extradition, legal assistance, protection of the accused, etc
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”.

The Draft Convention would substantially further the stated aim of Resolution 1540 and would undoubtedly assist Member States in fulfilling aspects of their legal obligations therein through developing a more comprehensive international regime to combat the proliferation and use of biological and chemical weapons

Rome Statute

The Rome Statute of the International Criminal Court 1998 (hereinafter “Rome Statute”) includes elements to punish individuals for the war crimes of employing “poison or poisoned weapons” or “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices”.

However, the Rome Statute requires that these acts must be “committed as part of a plan or policy *or as part of a large-scale commission of such crimes*” (emphasis added) in order to fall within the prohibition against war crimes

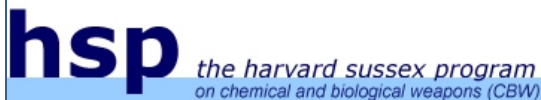
The Rome Statute therefore differs significantly from the Draft Convention in that it does not separately criminalize the use of poisons, but only criminalizes them if their use constitutes a “war crime”. Hence, the use of a threshold minimum under the Rome Statute serves the purpose of creating a war crime. The Draft Convention, however, seeks to criminalize the use of chemical and biological weapons *per se*, and therefore, any justification for a minimum threshold is much weaker.

Additionally, the Rome Statute addresses only the actual *use* of the weapons, whereas the Draft Convention extends the scope of impermissible activity to include the development, production, acquisition, stockpiling, and transfer of such weapons.

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Coordinated Efforts

Effective legislation is core in controlling the spread of dual-use threats and the Draft Convention supports and extends existing initiatives to this end. The Draft Convention also seeks to improve the coordination and cooperation of States in order to eliminate these weapons globally and to prevent the hostile exploitation of dual-use technologies in the biological and chemical fields.



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