

***Global governance of CBW: criminalization and its
impact on state and non-state actors.***

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Control of chemical and biological warfare (CBW) weapons is normally addressed by developing mechanisms which regulate access to certain chemicals, pathogens and equipment. The idea behind such 'technology denial' is to impede the determined proliferator's acquisition of necessary CBW technologies. However, the natural occurrence of most pathogens that have thus far been weaponised and the dual use nature of the equipment associated with CBW weapons which is also being diffused through legitimate industrial channels, means that control via technology denial only temporarily halts the determined proliferator.

So what happens if a determined proliferator gains access to the necessary technologies to develop CBW weapons? What if this proliferator is a state? What if he is a non-state actor? What happens if CBW weapons are used? Which mechanisms, if any, will come into force? Do these existing mechanisms convey the universal condemnation associated with CBW?

Introduction

When a state joins an international regime, such as the one which governs responses to CBW, it does so because it believes that the long term benefits of joining that regime will outweigh the short term gain of individualistic behaviour.¹ In terms of the CBW regime, the long-term benefits of membership is that CBW will not be used for hostile purposes.

Two international treaties within the CBW regime deal specifically with the issue of CBW weapons - the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention. These two treaties contain provisions which prohibit states from certain actions relating to CBW and which address the issue of criminality should those actions take place. These latter provisions concerning criminality are considered in this paper as being insufficient. As they stand, neither treaty contains provisions that adequately deal with a series of legal issues such as jurisdiction and individual responsibility which will come into play should prohibited actions occur and legal procedures be initiated.

The complexity of issues such as jurisdictional rights and individual responsibility is familiar to those who examine international law. One way of overcoming the current insufficiency is to bring together 'traditional' CBW controls (technology denial) and international law through the additional categorisation of certain *CBW acts* as crimes under international law. By treating certain acts as criminal, rather than those who perform them, this additional categorisation would overcome the legal inadequacies outlined in this paper as contained in the two treaties. Furthermore, categorising such acts as criminal under international law brings with it a universal condemnation appropriate to issues of CBW.

This paper begins by reviewing global governance of CBW. Particular attention is placed on the provisions of the 1972 Biological Weapons Convention (BWC) and the 1993 Chemical Weapons Convention (CWC) as the two treaties that form the normative backbone of the international regime that governs state behaviour on CBW weapons. It then discusses the legal issues of jurisdiction and individual responsibility as potential inadequacies of the current system of global CBW governance and through this

¹Krasner S. "Structural causes and regime consequences" in Krasner S (ed) *International Regimes*, New York: Cornell University Press 1983 p1

proposes that new dimensions of constraint - ones that enhance through complementarity the legal provisions contained within the BWC and CWC - might be relevant. One such extra layer of constraint could be the draft convention to prohibit biological and chemical armaments under international criminal law written by the Harvard Sussex Program. The draft convention defines prohibited acts in accordance to the BWC and CWC and would make it a crime under international law for any person - whether state official or terrorist - to knowingly develop, produce, acquire, retain, transfer or use biological or chemical weapons or to order, direct or knowingly render substantial assistance to those activities or to threaten to use biological or chemical weapons.

1. The current state of global governance of chemical and biological weapons

An ancient regime, based around a cross cultural acceptance that the use of disease or poisons for hostile purposes is abhorrent, exists that governs international responses to the problem of chemical and biological warfare.² Finding its latest and as yet fullest expression in the 1972 Biological Weapons Convention and 1993 Chemical Weapons Convention, treaties to which 147 states and 152 states are party to respectively, this societal norm has been built upon. Consequently these two treaties form the heart, and normative backbone, of the CBW regime.

The centrality of the BWC and the CWC to the international regime comes from their latest expressions of the norm. In the Biological Weapons Convention (BWC) the norm against the use of disease for hostile purposes is expressed in the preamble of the treaty. The rules which enact it are stated in Article 1 where states parties are obliged

never in any circumstances to develop, produce, stockpile, or otherwise acquire or retain:

1. microbial or other biological agents and toxins whatever their origin or method of production of types and in quantities that have no justification for prophylactic protective or other peaceful purposes

²In this setting the concept of regime follows the international relations definition where 'regime' means "a set of principles norms rules and decision making procedures around which [member] expectations converge" Krasner S (ed) *International Regimes*, New York: Cornell University Press 1983 p1. For other readings on the concept of international regimes see Jervis R. "Security Regimes", in Krasner S. (ed) *International Regimes*, New York: Cornell University Press 1983. Müller H. "The internationalization of principles, norms and rules by governments", in Ritterberger V with assistance from P Mayer (eds). *Regime Theory and International Relations*, Oxford: Clarendon Press 1993.

2. Weapons equipment or means of delivery designed to use such agents or toxins for hostile purposes. (emphasis added)³

And in the Chemical Weapons Convention (CWC) the expression of the norm against the use of chemical agents in war is also contained in the preamble and the rules in Article 1 commit states parties to

never under any circumstances

- a) to develop, produce, otherwise acquire, stockpile or retain chemical weapons or transfer, directly or indirectly, chemical weapons to anyone
- b) to use chemical weapons
- c) to engage in any military preparations to use chemical weapons
- d) to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.⁴

In both treaties therefore the societal norm of non-use has been extended to all phases of the armament process: development, production, stockpiling and acquisition of weaponry. The CWC extends the norm yet further by eschewing transfer, military preparation and assistance, as well as encouragement and inducement of anyone to undertake any activity prohibited under the CWC.

Whilst these two treaties form the regime's normative backbone, other legal components are also relevant and strengthen the regime - for example the 1899 and 1907 Hague Regulations Concerning the Laws and Usage of Land Warfare where the use of "poison and poisoned weapons" is "especially prohibited,"⁵ the 1925 Geneva Protocol which prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials and devices" and also of "bacteriological methods of warfare,"⁶ and the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental

³ Article 1. *Convention on the Prohibition of the Development Production and Stockpiling of Bacteriological (Biological) and Toxins Weapons and on Their Destruction*. 10 April 1972.

⁴ Article 1. *Convention on the Prohibition of the Development Production and Stockpiling and Use of Chemical Weapons and on Their Destruction*. 13 January 1993.

⁵ *Declaration (IV,2) concerning Asphyxiating Gases*. The Hague, 29 July 1899, *Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons*. The Hague, 18 October 1907

⁶ *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*. Geneva, 17 June 1925

Modification Techniques (ENMOD) addressing the use of herbicides as weapons of war.⁷ Also embraced are national measures such as national export controls and those that have been harmonised internationally, as is the increasing body of national legislation such as anti-terrorism legislation, aimed directly against chemical and biological armament.

Through their expression of the societal norm and the creation of treaty-based rules and regulations to fulfil their obligations to this norm, states parties agree to refrain from certain behaviour in order to yield substantial long-term benefits. Thus a regime can be thought of as "prescribing behavioural roles by constraining member activity and shaping member expectations with regard to a specific issue-area."⁸

2. *Treaty Enforcement*

International treaties are negotiated by states, signed by states, and therefore concern state behaviour. The extent to which any international treaty applies to the behaviour of non-state actors usually depends upon a system of state-level treaty enforcement, that is a system whereby the state party has to enforce, under national law, its international legal prohibitions. Establishing national laws to enforce treaty obligations depends upon two things: first the enactment of domestic legislation that renders such conduct illegal so that national criminal justice systems can investigate, apprehend and prosecute, if the charge is sound, accused persons and to punish those found guilty. Second, in extraterritorial criminal matters, the system also depends on co-operation between states in matters such as extradition and/or forms of legal assistance.⁹

Both the BWC and the CWC contain provisions for a state-level system of treaty enforcement.

⁷ *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, 18 May 1977

⁸ Levy, M P Haas and R Keohane (eds) *Institutions for the earth: promoting international environmental protection*. Cambridge, Mass: MIT 1992, p13

⁹ These co-operative mechanisms operate only if the conduct is considered a crime in both the requesting and the requested states. This is the principle of dual criminality. In the situation of a treaty, all states parties should regard the same conduct of behaviour as criminal

2.1 The state-level system of treaty enforcement established under the BWC

As well as prohibiting the development, production, stockpiling and retention of biological weapons the BWC requires, under article IV, states parties to “take any necessary measure in accordance with their constitutional process” to enforce the prohibition of activities outlined in Article 1. In practice this article may require states parties to enact or amend national laws, regulations, or any other form of national implementation measure, to ensure that the treaty’s prohibitions are enforceable.

Article IV also directs states parties to establish jurisdiction over such activities “within the territory of such State, under its jurisdiction, or under its control anywhere.”¹⁰ The implication of the wording of this article is that the prohibitions should apply to natural or legal persons - a state being unable to establish jurisdiction over itself. However the nebulous phrase “take all necessary measures” means that such legal subtlety might go unappreciated.

Establishing national penal legislation to enforce article I is not a mandatory requirement under article IV and indeed not all of the 147 current states parties to the BWC have done so. Private research being performed by VERTIC, a UK based non governmental organisation, identifies only 65 states parties - 44% of the total number of states which are party to the treaty - with legislation that serves to enforce some or all of the prohibitions in Article 1. Of those 65 VERTIC research regards only 16 states parties (just over 10% of the whole) as having comprehensive legislation which specifically prohibits all activities in Article 1.

The disparity among the national legislation that has been enacted to enforce the prohibitions of article I is a weakness of the system of state-level treaty enforcement. The BWC does not make the act mandatory and so only directs states parties to take the subjective assessment of implementing “any necessary measure” to enforce the prohibited activities outlined in Article 1. No elaboration is given as to how to construct these national measures and no requirement is made for states parties national legislation to be complementary with one another.

¹⁰Article IV. *Convention on the Prohibition of the Development Production and Stockpiling of Bacteriological (Biological) and Toxins Weapons and on Their Destruction*. 10 April 1972.

Co-operation among states parties to the BWC is covered in Article V, article VI subparagraph (2) and article VII. In article V states parties "undertake to consult one another and to cooperate in solving any problems which may arise in the application of the provisions of the Convention"¹¹. In terms of co-operation among states parties in matters such as investigations into non-compliance, states parties are only obliged under article VI subparagraph (2) to co-operate with any investigations carried out by the United Nations Security Council¹² and are only required to provide support or assistance "to any party of the convention which requests so, if the Security Council decides that such a party has been exposed to danger as a result of the violation of the Convention."¹³

2.2 The state-level system of treaty enforcement established under the CWC

Like the BWC, the CWC also prohibits development, production, stockpiling and retention. However the CWC extends its prohibitions to include the transfer, directly or indirectly, of chemical weapons to anyone, the use of chemical weapons, the military preparation of them and prohibits assisting encouraging or inducing anyone, in any way, to engage in any activity prohibited to a State Party under this Convention. This extension of the prohibition means that the CWC requires its states parties to enact more developed national implementing legislation than that required by the BWC.

Article VII of the CWC relates to domestic implementation. Like the BWC, the article requires each state party to adopt "in accordance with its constitutional processes...the necessary measures to implement its obligations under the convention."¹⁴ However the article then elaborates and requires states parties to:

(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

¹¹Article V. *ibid*

¹²Article VI (2) *ibid*

¹³Article VII, *ibid*

¹⁴Article VII. *Convention on the Prohibition of the Development Production and Stockpiling and Use of Chemical Weapons and on Their Destruction*. on 13 January 1993.

(b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.¹⁵

The underlined passages highlight the more developed obligations of domestic implementation for CWC state parties. The CWC expressly requires states parties to pass penal legislation to prohibit anyone within its jurisdiction from undertaking activities that would violate the treaty if those actions were undertaken by the State and enact legislation that would also establish jurisdiction over persons of that state's nationality anywhere. An obligation also exists that requires states parties to assist and co-operate with other states parties in implementing these obligations, such as facilitating co-operation amongst law enforcement agents. According to Kellman, "the extended jurisdictional provisions of this article mean that it is designed to expand the treaty's prohibition to reach the conduct of private persons and sub national groups"¹⁶

Unfortunately, like the BWC not all 152 states parties to the CWC have fulfilled their requirements with regards to national implementation. The OPCW - the organisation of the CWC - has only received 82 submissions from states parties outlining their implementing legislation.¹⁷ In other words the OPCW only knows about the national implementation measures, including the expressly required penal legislation, of 54% of its states parties.

3. *Potential loopholes*

Although implementing criminal legislation in order to fulfil the obligations of Article 1 of both treaties might not seem to pose a serious threat to the survivability of the regime, a

¹⁵ibid

¹⁶ Kellman, B. "National legislation to implement legal assistance and co-operation", in, Yepes-Enríquez R and L Tabassi (ed) *Treaty enforcement and international co-operation in criminal matters: with special reference to the Chemical Weapons Convention*, TMC Asser Press, 2002, p36.

¹⁷OPCW *Instant Brief*. Figures correct as of 13 May 2003. See <http://www.opcw.org/ib>

threat may occur should a serious violation happen. The national legislation being implemented so far by only a minority of states would generally have no applicability in a case against a foreign national, present in another state, who is suspected of ordering or knowingly rendering substantial support to the production of biological weapons in his home state which, for one reason or another, fails to take legal action. Not only would such a state be unable to prosecute the individual because the crime did not occur there but appeals for extradition would be contingent on the existence of a bilateral extradition treaty between the requesting and requested states.

Because of the dual criminality principle in international law¹⁸ the risk under the present form of the regime is that national criminal legislation could at best present daunting problems of harmonising various provisions regarding the definition of crimes, rights of the accused, dispute resolution, judicial assistance and other important matters, or at worst mean that legal assistance simply cannot be offered because one of the states does not see the act as being criminal.

3.1 The issue of jurisdiction in international law

Another strong reason that can be put forward as consideration of why additional legal measures are necessary concerns the present dealings with the issue of jurisdiction.

The BWC requires that necessary measures be “applicable to persons within the territory of such State, under its jurisdiction, or under its control anywhere”. The CWC obliges states parties to enact jurisdiction that can be applied to “...persons found to be committing such offences anywhere on its territory, or in any other place under its jurisdiction or control”. Both treaties therefore require states parties to exercise jurisdiction over all offences committed in its territory and over all persons committing such persons committing such offences in their territory i.e. territorial jurisdiction.

In its more developed national implementing requirements the CWC also requires states parties to establish jurisdiction that applies to prohibited acts *undertaken anywhere by natural persons, possessing [that state's] nationality*. This sort of jurisdiction is a form of ‘extra territorial jurisdiction’.

¹⁸Dual criminality principle refers to the idea that each state must regard the act as criminal in order for legal co-operation to take place.

In international law there are four basic principles of extra territorial jurisdiction:

- Nationality jurisdiction (or active personality principle): where jurisdiction is based on the nationality of the suspect. Required by the CWC but not the BWC
- Passive personality principle: where jurisdiction is based on the nationality of the victim.
- Effects doctrine (or protective jurisdiction principle): where jurisdiction is based on the harms to a state's own national interests
- Universal jurisdiction: where jurisdiction is not linked to the state where the court resides by the nationality of the suspect, victim, or by the harm the act did to its own national interests.

As can be seen by the jurisdiction requirements of the BWC (the obligation that states parties shall take all necessary measures which can be applied to persons *within the territory of such State, under its jurisdiction, or under its control anywhere*) the treaty does not oblige states parties to establish any form of extra-territorial jurisdiction.

Furthermore, neither the BWC nor the CWC require states parties to establish any form of universal jurisdiction. Under the present regime a nexus must be formed between the crime and the country exercising jurisdiction meaning that criminal courts in state A are presently unable to try a citizen of state B who aided the development of CBW weapons in state C. Thus, if a 'greedy business man' or an 'evil scientists' was to aid a foreign state in their development of CBW weapons there is currently no international legal process in place to ensure those persons are prosecuted.

The CBW regime needs to fill these jurisdictional loopholes in order to become truly effective and provide sanctions that give effect to the detection of non-compliant behaviour.

3.2 The issue of responsibility

Whilst the BWC and CWC constrains state behaviour, and individual behaviour in the form of state-level enforcement, the legal issue of individual responsibility is not adequately addressed in either the BWC or the CWC.

States cannot, by definition, be prosecuted. It is only natural and legal persons who can be and in themselves they are only subject to domestic law of the state that has jurisdiction over them. If a state is a party to an international convention such as the BWC or CWC violates that convention by supporting a state sponsored BW or CW programme (as was the case with the Soviet Union) then that action constitutes a breach of the convention. The violation is not regarded as a criminal act and so is usually settled by diplomacy, international litigation or arbitration, or as a last resort, settled by military action.

However, if one considers that whilst a CBW programme can be supported in the pursuance of state policy and with the active support of the state machinery in reality such policies are conceived planned and committed by individuals (albeit in the name of the state) then the possibility arises for individuals to be held criminally responsible for the actions taken by the state. Precedents for such a reduction from the actions of a state to personal responsibility have been set, at least with respect to international tribunals, by the Nuremberg Military Tribunal and the Tribunals for Rwanda and Yugoslavia. Indeed at the Nuremberg Military International Tribunal of 1946 the presiding judges commented that

crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced¹⁹

So if certain acts in the CBW armament process were to be made into a crime under international law then individuals, whether acting on behalf of the state or on their own, could be tried under international law for the actions of the state.

Coupled with the issue of responsibility of individuals in relation to state policy is the question of legal responsibility when the prohibited CBW act is undertaken by a non-state actor such as a terrorist.

Non-state actors, such as individual terrorists or groups, are increasingly regarded as having access to the necessary technologies to build a CBW capability and therefore being a potential threat. This perception is based on the access to the dual use

¹⁹ International Military Tribunal *The Trial Of German Major War Criminals: Judgement* [Subsection: The law of the Charter] 30th September- 1st October, 1946, p41

technologies associated with CBW weapons.²⁰ Where once it was thought that terrorist groups would not contemplate using CBW weapons to further their cause, the release of sarin in Matsumoto (27th June 1994) and on the Tokyo underground system (March 20th 1995) by members of the Aum Shinrikyo cult and the investigation into these acts that followed, showed that terrorist groups might indeed contemplate their use.²¹ Further, Aum Shinrikyo also showed that terrorist groups did not require any state support in the preparation and development of CBW weapons for use in a 'terrorist capacity'.²²

The CWC entered into force after the Aum Shinrikyo offences were committed. The treaty tried to address the issue of individual criminal responsibility by including the requirement to enact penal legislation which also prohibits individuals from committing any activity prohibited to the state under Article 1. This means that under the CWC individuals, as well as states, are expressly prohibited from the development, production, stockpiling and retention of chemical weapons, the transfer, directly or indirectly, of chemical weapons to anyone, the use of chemical weapons, the military preparation of them and also prohibits any assistance encouragement or inducement to perform these acts.

²⁰Dual use refers to the ability of technology (both tangible and intangible elements) to have current and potential civil and military applications. Molas Gallart J and J P P Robinson. "An assessment of dual use technologies in the context of European security and defence" *Report for the Scientific and Technological Options Assessment (STOA)*, European Parliament, SPRU November 1997 p 16.

²¹On June 27th 1994 members of the Aum Shinrikyo cult used an adapted truck to release the nerve agent sarin over the Japanese town of Matsumoto. According to Olson,

"The area was targeted for a specific reason: the town was the residence of all three judges sitting on a panel hearing a lawsuit over a real-estate dispute in which Aum Shinrikyo was the defendant. Cult lawyers had advised the sect's leadership that the decision was likely to go against them. Unwilling to accept a costly reversal, Aum Shinrikyo responded by sending a team to Matsumoto to guarantee that the judges did not hand down an adverse judgement. A light breeze (3 to 5 knots) gently pushed the aerosol cloud of sarin into a courtyard formed by the buildings. The deadly agent affected the inhabitants of many of the buildings, entering through windows and doorways, left open to the warm night air. Within a short time, seven people were dead. Five hundred others were transported to local hospitals, where approximately two hundred would require at least one night's hospitalization."

On March 20th 1995 the same group spread sarin in the city's underground railway system in trains converging on Kasumigaseki station during the rush hour. The nerve gas had apparently spread by evaporation following the rupture of eleven triple layer plastic bags filled with sarin diluted with diethylaniline. Seven people died and 122 others were seriously injured. The death toll rose to 12 by the end of the fourth week. The apparent motive for this attack was to "aide in the fulfilment of Aum's prophecy of an Armageddon-type battle between the USA and Japan [and] to delay police investigation into the cult."

Taken from Olson, K. "Aum Shinrikyo: Once and Future Threat?" Special Issue of *CDC Emerging Infectious Diseases*, vol 5 no 4 July-August 1999 and Ballard T, J Pate, G Ackerman, D McCauley, and S Lawson. Chronology of Aum Shinrikyo's CBW Activities (last updated 15th March 2001). California: Center for Nonproliferation Studies, http://cns.miis.edu/pubs/reports/aum_chrn.htm

²²By definition the aim of terrorism is to cause terror and so a terrorist weapons, including CBW weapons, do not necessarily require the same high standards of weaponisation associated with military requirements in order for them to be effective in the capacity of 'terror causing.'

However this extension of responsibility into individual acts still relies on state-level enforcement and therefore still suffers from the effects of jurisdiction limitations. Moreover there is no obligation for states parties to lay charges on the individual for violation of article 1. Therefore, if the Aum Shinrykio release of sarin at Matsumoto and on the Tokyo underground were to happen now the CWC is in force, there is nothing in the treaty which obliges Japan to lay additional charges against them other than those originally served.²³

At present individual responsibility with regards to chemical and biological terrorist acts is governed by national criminal legislation. Whilst terrorist use of chemical and biological weapons might be seen as an international crime, under customary international law if the terrorists can be affiliated with a state, other acts of CBW terrorism - e.g. financing, possession, production, acquisition, and transfer - are not regarded as international crimes. As such, laws concerning the majority of CBW terrorist activities are similar to the state-level system of treaty enforcement - reliant upon states enacting adequate national criminal legislation and in cases of extra-territorial events, such as application for extradition, on the pre-existence of co-operative legal mechanisms between states. This latter point in turn depends upon dual criminality principle, i.e. that both states, the requesting and the requested, regarding the terrorist conduct for which extradition is being sought as being criminal.

4. Efforts to categorise CBW an international crime: The Harvard Sussex Program's Draft Convention

The inadequacies in legal components of the BWC and CWC outlined above are not remedied by referring to other international legal treaties applicable to the issue of CBW, for example the 1997 Convention for the Suppression of Terrorist Bombings or in the 1998 Rome Statute of the International Criminal Court. The scope of the neither convention in relation to the CBW issue extends beyond the actual use of CBW weapons. Therefore neither Terrorist Bombing convention nor the Rome Statute is applicable to development, production, acquisition and stockpiling of CBW weapons.

²³Aum Shinrikyo members were charged with a range of offences ranging from murder and attempted murder to illegal production of firearms and psychoactive drugs. "Charges in Japan subway trial", *Reuters from Tokyo*, 1910 hours PDT 20 April 1996.

Considering the potential loopholes in the BWC and CWC outlined previously, and the knowledge that other treaties do not remedy their inadequacies, it would seem appropriate to suggest that a new international legal measure is needed which will complement, not supplant, the BWC and CWC and other legal measures already in place. This measure might include the categorisation of certain CBW acts as criminal under international law.

Categorising certain acts of CBW armament process as an international crime could serve important purposes. Perhaps the most important purpose served is to convey the universal condemnation implicit in an offence covered by international law. Defining an act as criminal in national legislation does not convey the same degree of condemnation as one defined under international law because the criminal act does not have the attached concept of being particularly dangerous and abhorrent to all.

A further purpose which could be served by defining certain acts involving biological and chemical weapons in this way would be to rectify the level of impact that the current system of international CBW constraints have on the actions of non-state actors. If viewed as an international crime, the world would become a much smaller place for the 'greedy business man' or the 'evil professor', mentioned above, who aided foreign development of CBW weapons. Under this system, if such a character was take a holiday or attend a conference in a country which recognised his actions as an international crime then he would face the risk of apprehension, prosecution and punishment or of extradition. As the number of states which view his actions as criminal under international law rises, the places such a character can travel to without fear apprehension diminishes.

One of the earliest efforts to criminalize certain CBW acts, an effort initiated 8 ago, has been put forward by the Harvard Sussex Program (HSP). It has prepared a draft convention that would make certain acts involving biological and chemical weapons crimes under international law. The draft treaty views the problem holistically – for example by defining certain *acts* as prohibited the draft convention does not differentiate between the actions of state and non-state actors. Whoever knowingly commits the prohibited act whether a state official, military personnel or terrorist is held criminally responsible.

The authors of this draft convention have taken as their model conventions which are already in place such as The Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970; Convention for Suppression of Unlawful Acts against Civilian Aviation 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Person including Diplomatic Agents 1973; Protocol Amending the Single Convention on Narcotic Drugs 1972; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988; Convention on the Physical Protection of Nuclear Material 1980 and the International Convention Against the Recruitment, Use, Financing and Trafficking of Mercenaries 1989.

These treaties all impose a duty on their states parties to extradite or prosecute or to exercise universal or other forms of extraterritorial jurisdiction. Such treaties, including the one put forward by HSP, view the act for which they are established as crimes of international concern thereby requiring, under international law, the exercising of universal jurisdiction.²⁴

As well as getting states to see the prohibited acts as criminal under international law, viewing them as such means that, in addition to the universal jurisdiction provisions, an additional obligation is placed on states to exercise jurisdiction in respect of the other four categories of jurisdiction i.e. territorial, nationality, passive personality and effects doctrine.

Presented on the following pages is a table introducing the content of the HSP draft convention. An effort has been made, where necessary, to present explanatory comments on the content of the articles including noting relationships with other international conventions.

²⁴Amnesty International. "The history of universal jurisdiction" *Universal jurisdiction: the duty of states to enact and enforce legislation*, September 2001 p 32.
As downloaded from http://web.amnesty.org/web/web.nsf/pages/legal_memorandum

Draft Convention on the prevention and punishment of the crime of developing producing acquiring stockpiling retaining transferring or using biological or chemical weapons.

ARTICLE	NAME	CONTENT	COMMENTS ON ARTICLE
Preamble		<p>Cites existing treaties prohibiting chemical and biological weapons thereby recapitulating and enhancing the norm that is already widely observed. The preamble also recognises that responsibility of biological and chemical weapons activities prohibited to states by these treaties ultimately rests with individuals.</p>	<p>The use of the word "entity" recognises the potential for non-state entities, such as industry corporations or associations of individuals to possess the capacity to develop chemical and biological weapons.</p> <p>The preamble also reflects the central objective of the draft convention by introducing the concept of "effective penal sanctions" for all persons and entities engaging in these activities</p>
Article 1	Offences	<p>The offences are outlined. The draft convention seeks to make it an offence for <i>any person to knowingly</i></p> <ul style="list-style-type: none"> ➤ Develop, produce acquire stockpile, retain any biological or chemical weapon ➤ Transfer, directly or indirectly to anyone any biological or chemical weapon ➤ To use such weapons ➤ To engage in the preparation of them ➤ To construct or acquire a facility intended to produce these weapons ➤ To assist encourage or induce in any way anyone to engage in such activities outlined above ➤ To order or direct anyone to engage in such activities ➤ To attempt to commit any of these activities ➤ To threaten to use chemical or biological weapons 	<p>The offences which are outlined in the article cover the breadth of the armament process for both chemical and biological weapons. The basis for this article is Article 1 of the BWC and CWC.</p> <p>The emphasis given to those who "assist encourage, induce" and "order or direct" ensures that criminal responsibility to extended to those who are in indirectly involved in the offence</p>

Draft Convention continued

ARTICLE	NAME	CONTENT	COMMENTS ON ARTICLE
Article 2	Defences	<p>The relationship between this convention and the BWC and the CWC is expressed The article also states what is an acceptable and unacceptable defence in this treaty</p> <ul style="list-style-type: none"> ➤ An acceptable defence is that the accused did not know that the actions he was committing were not prohibited under this Convention. ➤ An unacceptable defence for the accused to state that he acted in an official capacity, under orders of a superior or according to internal law. 	<p>The precedent of denying the defense of having acted in an official capacity with regards to international tribunals exists in Article 7 of the Nuremberg Charter which states that "[t]he official position of defendants whether Heads of State or responsible officials in the Government Departments shall not be considered as freeing them from responsibility or mitigating punishment".</p> <p>This precedent also exists in the Statutes of the International Criminal Tribunal for the former Yugoslavia and Rwanda. Similar provisions for the prosecution of "any person" are also found in the Hostage Taking Convention, Sabotage Convention and Hijacking Convention, the Genocide Convention and the Apartheid Convention</p>
Article 3	Definitions	<p>Biological and chemical weapons, munitions, precursors and toxic chemical are defined in line with those definitions given in their respective conventions. A definition of "person" is also given which includes "natural persons" and legal entities</p>	
Article 4	Penalties	<p>States parties are obliged to adopt the measures necessary to establish the offences outlined in article 1 as criminal offences and to make those punishable by "appropriate penalties which take into account their grave nature"</p>	<p>Similar language regarding the strength of the penalties that states parties need to enact e found in Hostage Taking Convention, Sabotage Convention and the Hijacking Convention.</p>
Article 5	Jurisdiction	<p>States parties are required to establish the following jurisdiction with regard to the offences set forth in this convention</p> <ul style="list-style-type: none"> ➤ Territorial jurisdiction ➤ Active personality jurisdiction ➤ Protective jurisdiction ➤ Passive personality jurisdiction ➤ Universal jurisdiction 	<p>The introduction to this article allows states parties that have no connection to the alleged crime to call for prosecution or extradition.</p>

Draft Convention continued

ARTICLE	NAME	CONTENT	COMMENTS ON ARTICLE
Article 5 Continued	Jurisdiction	States parties are also to enact the principle of prosecute or extradite (<i>aut dedere aut judicare</i>) in this matter	Jurisdiction may also be exercised by any international criminal court that has jurisdiction in the matter in accordance to its statute
Article 6	Obligations regarding custody	States parties are obliged to begin an investigation into the offence or alleged offender upon receiving information that the offender is in its territory	
Article 7	Extradition	Relationship between extradition conventions between States parties and this convention is explored in this article. The article provides that the offences outlined in Article 1 should be deemed as extraditable offences in any existing extradition treaties and that parties should undertake to include these offences in any subsequent extradition treaties. The article also allows for this treaty to be a legal basis for extradition amongst states parties without extradition treaties. This article requires that for the purposes of extradition states parties shall consider the offences to have been carried out not only in the place where they actually occurred but also in the territory of the state that is asserting the jurisdiction.	This provision is common in international conventions and can be found in treaties such as the 1998 Bombing Convention
Article 8	Prosecute or extradite.	If a state does not extradite it must "without exception whatsoever" submit "without delay" a case to authorities for the purpose of prosecution using procedures of that country.	The phrase "without exception whatsoever" with regards to the principle of prosecute or extradite means that the offences outlined in article 1 cannot be considered as political. This is expressly stated later in the convention in Article 10. When read along side Article 6 the potential for prosecutions based on false accusations is limited.

Draft Convention continued

ARTICLE	NAME	CONTENT	COMMENTS ON ARTICLE
Article 9	Mutual Assistance	States parties are to afford one another the "greatest measure of assistance in connection with investigations or criminal or extradition proceedings." This includes assistance in obtaining evidence. Assistance may also be sought from international bodies.	
Article 10	Political Offences	None of the offences outlined in article 1 is to be regarded as a political offence, an offence connected to a political offence or an offence inspired by political motives. Accordingly a request for extradition cannot be refused on this ground alone.	The 'political offence exception' concerns the problem whereby some states refuse to pursue persons who assert a motivation of political opposition to their government. CBW weapons have never been accepted as legitimate tools for expression of political opposition so it is unlikely that such an assertion in the context of CBW would be accepted. However, by making a clear international prohibition no person can hide behind this legal exception.
Article 11		Extradition can be refused if the state party has "substantial grounds" for believing the request is based on a desire to punish the alleged offender because of his race, religion, nationality, ethnic origin or political opinion.	
Article 12	Preventative Co-operation	States Parties are required to take <ul style="list-style-type: none"> ➤ all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories ➤ exchange information and co-ordinate the taking of administrative and other measures as appropriate to prevent the commission of those offences 	Although requirements to co-operate and exchange information are contained in the BWC and CWC, the article here requires co-operation in order to prevent an offence "within or outside" the state's territory.

Draft Convention continued

ARTICLE	NAME	CONTENT	COMMENTS ON ARTICLE
Article 13	Reporting to the United Nations	<p>States parties are required to inform the Secretary General of the United Nations of legislative and administrative efforts to implement this convention. In particular they are required to inform the Secretary General of the jurisdiction they have established.</p> <p>States parties are also to keep the Secretary General informed of the results of any extradition or legal proceedings in relation to an offender and relay the findings of any legal proceedings.</p> <p>States parties are also required to establish a contact point within its government for communication purposes.</p>	The nomination of the United Nations as the organisation that collects and distributed information ensures that states parties have easy access to all necessary information required for the operation of this convention.
Article 14	Dispute Settlement	Disputes between states parties which cannot be resolved through negotiation can be submitted to a six month arbitration period. Should arbitration fail the matter can be referred to the International Court of Justice.	
Article 15	Review Conference	10 years after entry into force, or earlier if requested by a majority of states parties, the states parties can call a conference of states parties to review the operation of the convention. Further session of the conference will normally be held at intervals of seven years thereafter.	Periodic reviews of the convention ensure convention continues to function properly
Article 16	Signature	The convention will be opened for signature at the United Nations headquarters in New York. Instruments of ratification are to be deposited with the UN.	
Article 17	Entry into Force	The conference will enter into force 30 days after a specific number of states (not yet decided) have ratified the convention.	
Article 18	No reservation	The articles of this Convention are not subject to reservation.	This provision avoids the political manipulation of the treaty.
Article 19	Texts	Texts is to appear in the languages of the United Nations Arabic Chinese English French Russian and Spanish	

The table presented above shows that the HSP Draft Convention advocates a holistic approach to criminalizing CBW. Rather than criminalizing simply the use of chemical and biological weapons, the convention proposes criminalizing all elements of the armament process - the development production acquisition stockpiling retention transfer and use of chemical or biological weapons - in line with the prohibitions already expressed in the BWC and CWC. By defining the prohibited acts according to the two treaties the legal constraints will include the breadth of prohibition accorded to Article 1 by the general purpose criterion. This criterion, prohibiting purposes rather than things will allow exploitation of future technology for 'hostile' intent to be included as crimes under international law.

Further, the proposed convention would make it a crime under international law for any person to order, direct, or knowingly to participate or render substantial assistance in any element of the weaponising chemical or biological weapons. Such propositions would enable pre-emptive arrests, investigations and prosecutions to take place resembling those which took place in the UK when traces of ricin were found in a residential premises in London on 5th January 2003²⁵ and remove any immunity previously granted to state officials or military personal.

In order to criminalize these elements under international law each state party would be required under this convention to establish jurisdiction with respect to such crimes extending to all persons on its territory irrespective of the place where the offence was committed, or the citizenship of the alleged offenders or victims. Those found to be in violation of these prohibitions would become *hostes humani generis* (an enemy of humankind) and so any state party would have a duty "without exception whatsoever" to either prosecute or extradite.

²⁵The suspects were charged under the Terrorism Act of 2000 and the Chemical Weapons Act 1996 with being "concerned in the development or production of a chemical weapon" and having materials "connected with the commission preparation or instigation of an act of terrorism. When the suspects appeared in front of Bow Magistrates Court in February 2003, the charge read out included conspiracy to make a chemical weapon between 1 and 20 January.

See Metropolitan Police, webs site, at: www.met.police.uk, press release, 7th January 2003, "Joint statement following terrorism arrests". M Huband, K Guha and J Burns, *The Financial Times*, 9th January 2003, "Seventh terror suspect arrested over poison plot as hunt goes on"; J Steele, *The Daily Telegraph*, 24 Jan 03, p 8, "Anti-terror squad holds eighth man in ricin inquiry". Reuters, *The International Herald Tribune*, p 4, 27 Feb 03, "3 are charged over plot to make chemical arms".

The treaty offers more than the simple establishment of universal jurisdiction. The treaty also takes up additional questions such as

➤ Extradition:

Article VII allows those offences listed in Article 1 to be considered extraditable offences and for these offences to be included as extraditable offences in every extradition agreement subsequently concluded between states parties. Furthermore the draft convention can be used as a legal basis for extradition should bilateral extradition treaties not exist between the requesting and the requested states party

➤ Responsibility:

In outlining the prohibitions in article I the draft convention uses the words "any person." The definition of "person" used for this convention includes both 'natural' person i.e. a human and 'legal entity' - a term which refers to corporations. When read along side Article II, the phrase 'any person' includes 'natural persons' including government officials, former heads of state and military personnel (including during times of war) as well as 'legal persons' such as corporations.

➤ Immunity

Immunity is also not offered to those claiming that the prohibited acts were conducted as a political offence. A defence cannot be used which is based on acting in an official capacity or under orders from a superior.

➤ Rights of the accused

The convention requires that if a state party does not extradite an alleged perpetrator that it is obliged to submit without delay the case for prosecution. Further the alleged offender can communicate with an appropriate representative of his state and be visited by him. The state party holding the alleged has to inform the person of his rights.

5. Conclusions

The paper has highlighted some of the inadequacies that occur when the present system of controls of CBW interfaces with international law.

Treaty-based international law such as the prohibitions on CBW outlined in the BWC and CWC are designed to constrain state behaviour. By joining the regime which governs international responses to CBW states are forgoing individualistic behaviour in order to receive long-term communal benefits. In the BWC and CWC one long-term benefit is that CBW weapons will not be used for hostile purposes.

The extent to which these international prohibitions relate to non-state actions is dependent upon a system of state-level treaty enforcement. This system relies upon states parties to implement, under national law, international prohibitions. Whilst in and of itself this system should not produce problems, the reliance upon individual states to implement international prohibitions means that, across the board, uneven standards of fulfilment of treaty requirements is likely. This has been seen with the statistics given for national implementation in the BWC and CWC. Perhaps the reasons for uneven implementation might be because some states view national legislation as more pressing than others whilst other states may be unable to divert their limited resources to create national legislation. Others yet might not know how to fully meet their obligations especially if the direction given to states parties for national implementation is the nebulous phrase “take all necessary measures”.

Even if a state has fulfilled its treaty requirements by implementing effective national legislation, under the present system international legal proceedings, not necessarily envisaged by treaty builders, come into play. Who is criminally responsible for the CBW act? Can that person be tried? If someone can be found as responsible then who should try the accused – the state where the person is located? The state where the incident took place if different from where the person is located or the state whose nationals were victims of the assault? If the state with jurisdiction is not the same as where the accused is located, does the requesting state have an extradition treaty with the requested state? Do the two states view the act as criminal?

Being able to answer these questions becomes even more important when non-state actors are considered. At present the actions of non-state actors in the CBW environment are governed by the indirect system of treaty governance and by national legislation. Such legislation may not be universal leading to situations where one country does not view the action as criminal, or to situations where extradition is not possible because no treaty exists.

Bringing together the weight of international law and CBW controls so that not only is technology denied to the proliferator, but should he gain access to them his actions constitute an international crime seem to be one way of effectively strengthening the CBW regime. Taken seriously the idea of making some acts of CBW an international crime means the creation of additional mechanism which could make adequate some aspects of the legal framework which are at present insufficient.

The results of this action would be to strengthen the norm, clarify state requirements and facilitate legal co-operation and assistance. Further categorising CBW as an international crime means that the criminal act is applicable and everywhere. States and non-state actors cannot pick and choose which international law they abide and which to ignore. Consequently the universal condemnation of CBW so long at the core of the regime would be given the weight and the force of international criminal law.