

UNSCR 1540 and Treaty Requirements for Chemical and Biological Weapons

Strategic Trade Controls and Related Border Security

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UNSCR 1540 and CBW

- **Complements the BTWC and CWC [OP 5 & 8(a)]**
 - Fulfilment of treaty obligations \supset Fulfilment of UNSCR 1540
 - No duplication of implementation efforts
 - Reporting under BTWC Confidence-Building Measures (CBMs)
 - Reporting to the OPCW
 - BTWC and CWC offer concrete frameworks for national action
- **UNSCR 1540 offers some additional benefits**
 - Applicable to all UN Member States, even if not party to BTWC or CWC
 - Emphasis is on specific actionable items on national level

1540: Focus on non-state actors

- Refrain from providing any form of support to non-State actors [OP 1]
- Acts by non-state actors that need to be stopped
 - Develop, acquire, manufacture, possess, transport, transfer or use
 - Focus on *preventive* action by the state:
 - Foreclose the possibility of non-state actors embarking on an armament dynamic
 - Block acts by non-state actors at any stage of the armament dynamic
 - Controls will be needed on equipment, materials and processes that in and of themselves are unrelated to an armament dynamic (P e.g. bio- and chemical security)
- BTWC and CWC coverage of non-state actors
 - BTWC Art. III: 'any recipient whatsoever'
 - CWC Art. I(d): 'anyone'
 - Review conference documents; Additional agreements and understandings

Framework for considering CBW

- Chemical and biological weapons (CBW) have international *legal* definitions (unlike nuclear or radiological weapons)
 - Definitions are based on the '*General Purpose Criterion*'
 - Definitions comprise the CB agents and means of delivery
- The dual-use dimension of CB materials and equipment
 - Almost all toxic chemicals, pathogens and toxins have legitimate applications that are unrelated to weapon acquisition or use
 - Production tools and processes and research equipment, as well as knowledge, skills and expertise (the so-called '*intangibles*') may all be applied for weapon purposes
 - Pathogens, toxins and mineral poisons occur naturally, and can therefore not be 'eliminated'
 - Parties to the BTWC and CWC have the legal right to undertake CBW defence and protection activities, and engage in international cooperation to such ends

The arms: Biological weapons (BW)

- BW definition in BTWC [Art. I]
 - Microbial or other biological agents, or toxins whatever their origin or method of production
 - *Delivery systems*: weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict
- Additional understandings of BW via Review Conferences
 - Comprises human, animal and plant pathogens
 - Covers all microbial or other biological agents or toxins, *naturally or artificially created or altered*, as well as *their [sub-cellular] components*, whatever their *origin or method of production*
 - Covers all toxins (both proteinaceous and non-proteinaceous) of a *microbial, animal* or *vegetable* nature and their *synthetically produced analogues*

The arms: Chemical weapons (CW)

- CW definition in CWC [Art. II, 1]
 - Together or separately:
 - *Toxic chemicals* and their *precursors*
 - *Munitions and devices*, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals
 - *Any equipment specifically designed* for use directly in connection with the employment of munitions and devices (e.g. installations to fill munitions)
- Definition of *toxic chemical* in CWC [Art. II, 2]
 - Any chemical which through its *chemical action on life processes* can cause *death, temporary incapacitation* or *permanent harm*
 - Applies to *humans* and *animals* (☞ plants are not listed)
 - Definition applies to all toxic chemicals, regardless of their *origin* or of their *method of production*, and regardless of whether they are *produced in facilities, in munitions or elsewhere*.

The *General Purpose Criterion* (GPC)

- In BTWC [Art. I]
 - Prohibition on acquisition or retention of 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.*
 - Very limited list of non-prohibited purposes:
 - Prophylaxis
 - Protection
 - Other peaceful purposes (↳ residual category, but excludes deterrence with BW, open-air testing of BW, etc.)
- In CWC [Art. II, 1(a)]
 - Toxic chemicals and their precursors, except where intended for *purposes not prohibited under this Convention*, as long as the *types and quantities are consistent with such purposes*
 - Very limited list of non-prohibited purposes (CWC [Art. II, 9])
 - Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
 - Protective purposes;
 - Military purposes not connected with CW use and not dependent on the use of the toxic properties of chemicals as a method of warfare;
 - Law enforcement including domestic riot control purposes.

Understanding the *General Purpose Criterion* (GPC)

- The GPC is a critical tool in addressing the 'dual-use' issue
 - Under the GPC the BTWC and CWC *do not prohibit* objects or activities
 - They *prohibit* certain purposes to which they may be applied (i.e. acquisition, retention and use of the proscribed weapons)
- Functioning of the GPC
 - The *default position* is that all applications of biological agents, toxins and toxic chemicals are prohibited
 - Only a restricted set of purposes are '*non-prohibited*'
- Implications of the GPC
 - It covers *any and all* pathogens, toxins or toxic chemicals, whatever their origin or production method – past, present, and yet to be discovered
 - Even if control lists are used, unlisted items still fall under the prohibition
 - Any possession or manipulation of agents that cannot be justified under a non-prohibited purpose is a violation of the law
 - Can play a significant role in '*preventing*' acquisition or '*pre-empting*' use of CBW

2 examples of applying the *General Purpose Criterion* (GPC)

- **The research scientist**
 - Prof. X researches dangerous pathogens in a BSL-4 laboratory
 - In a professional capacity he/she is licensed or authorised to undertake such activities and to be in possession of highly contagious pathogens
 - In the evening he/she returns home. Prof. X thus takes on the persona of a private citizen and cannot undertake any of the professional activities or be in possession of any of the pathogens. Irrespective of professional qualifications or quality of the home laboratory, he/she would otherwise be unambiguously in violation of the national law based on the GPC.
- **Terrorist preparation of an attack with a CW**
 - In many instances law enforcement authorities can only act after a crime has been committed.
 - A terrorist in the stage of planning and preparing for a strike with toxic chemicals is already violating the GPC.
 - Law enforcement officials can therefore legally pre-empt the terrorist act before the agent is fully developed, produced or used.

Agent and equipment lists – 1

- UNSCR 1540 recognises the utility and recommends the development of national control lists [OP 6]
- The GPC is not easy to apply in everyday situations encountered by a multitude of national agencies and officials, or producers and consumers of dual-use items
 - Lists are concrete and can focus attention on agents & equipment of immediate or grave concern
 - They can inform a national licensing system, so that authorities know who produces, consumes, trades or transports relevant dual-use commodities
 - They help to raise awareness about dual-use concerns among key stakeholder communities

Agent and equipment lists – 2

- **Examples of lists**
 - CWC Annex on Chemicals
 - Comprises 3 Schedules, i.e. lists that group toxic chemicals and their precursors based on an assessment of the threat to the objectives of the CWC and commercial use
 - Australia Group Common Control Lists
 - European Union Regulation (EC) No 428/2009 — EU regime for the control of exports, transfer, brokering and transit of dual-use items
- **However, preserve the GPC because lists cannot cover all agents and equipment**
 - Concrete cases:
 - The terrorist incident that caused the largest number of casualties with a pathogen involved *Salmonella* (Rajneesh, Oregon, USA, 1984: 751 persons incapacitated)
 - *Chlorine* is not on any control list. Annual global production is in excess of 56 million metric tonnes. However, it is also being used today as a weapon of war
 - Pre-emptive function in law enforcement
 - Lists may be difficult to update (e.g., CWC Schedules)
 - Cover any future potential agents of warfare or terrorism

Approaches to CBW transfer controls under UNSCR 1540

- **Holistic approach**
 - A single law addresses all categories of non-conventional weaponry (CBRN)
 - Covers all aspects of national implementation (i.e. including transfer controls) based on international treaties and covers both state and non-state actor activities
 - Examples: India, South Africa, and European Union Regulation (EC) No 428/2009 — EU regime for the control of exports, transfer, brokering and transit of dual-use items
- **Treaty-specific approach**
 - Separate laws and regulations are promulgated for each weapon control treaty
 - If existing laws and regulations are amended or supplemented, then the national regulatory, criminal and penal provisions may be spread across different legal instruments
 - Examples: approach adopted by most countries
- **Minimalist approach**
 - Reinterpretation of existing legislation and regulations in function of new demands by international treaties and UNSC
 - Likely to contain serious regulatory and oversight gaps
 - Unlikely to meet the national implementation requirements of the BTWC and CWC



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