UNSCR 1540 and Treaty Requirements for Chemical and Biological Weapons

Strategic Trade Controls and Related Border Security

Dr Jean Pascal Zanders

Legal & Regulatory Consultation
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UNSCR 1540 and CBW

• Complements the BTWC and CWC [OP 5 & 8(a)]
  • Fulfilment of treaty obligations ⇒ 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 (⇒ 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* (plant 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 treat 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