

## **ANALYSIS OF THE RUSSIAN INITIATIVE: INTERNATIONAL CONVENTION ON THE SUPPRESSION OF ACTS OF CHEMICAL AND BIOLOGICAL TERRORISM**

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### **1. Review of the Initiative**

Due to the impending fear of a chemical or biological weapons attack from a non-state actor, the Russian Federation proposed an initiative for the International Convention on the Suppression of Acts of Chemical and Biological Terrorism. In particular, the concern is with the increased risk of industrial chemicals and chemical and biological warfare agents being utilized by terrorists.<sup>1</sup> This extensive proposal aims to be a “comprehensive, long-term, and global” solution against the risk of proliferation.<sup>2</sup> Such concern pertaining to terrorist’s ability to acquire and utilize chemical or biological agents as a mechanism to carry out terrorist acts is qualified in the current international political climate.

#### ***Existing Legal Gaps***

The Russian proposal claims to address multiple gaps within the existing international legal framework and offer the solution through the implementation of this proposal. This section will address claims set forth within the proposal and offer an analysis of each.

**Claim: “There is no convincing evidence that norms of international customary law explicitly prohibiting the use of chemical weapons by non-state actors and, in particular, qualifying such actions as an international crime exist.”<sup>3</sup>**

According to Russia in this first claim there are two issues. First there is no law in place explicitly prohibiting the use of chemical weapons by non-state actors. Second, there is no classification that partaking in these actions is an international crime. The Russians cite that within the Chemical Weapons Convention (CWC) the restriction “to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons,” is applicable only to state parties. In addition, they classify the prohibition on the use of chemical weapons under any circumstance to only apply to state parties as well.<sup>4</sup> However, citing Article VII, paragraph 1(a) of the CWC which states that it, “[p]rohibit[s] 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”<sup>5</sup>

According to the Russian interpretation, the CWC does not *explicitly* prohibit non-state actors from “gaining access to chemical weapons and using them.”<sup>6</sup> Instead, they argue that the responsibility is placed on the states with requirements to “ban” these actors on its territory and establishing appropriate legal consequences for partaking in these activities.

The CWC does however, clearly classify that any individual whether residing in his/her homeland, or is abroad needs to have legal consequences for partaking in activities that are *specifically* “prohibited to a State Party under this Convention.” This Convention requires all state parties to never: “develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; to use chemical weapons; to engage in any military preparations to use chemical weapons; to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.” Moreover, “each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention. Each State Party undertakes not to use riot control agents as a method of warfare.”<sup>7</sup> Therefore, it is evident that the CWC explicitly prohibits non-state actors from the procurement and usage of chemical weapons. The suggestion that this convention fails to do address non-state actors is faulty.

**Claim: During “conflict situations when chemical weapons are controlled or possessed by a State Party, and there is a need to take action in order to prevent them from falling into the hands of non-state actors.”**

Taking a look at the current international climate, we can see two examples of where a state party sought to relinquish its control over its CBRN weapons program. I will focus primarily on the example of Syria, since during the process of removal the Syrian Civil War was underway.

Although under the threat of airstrikes from the United States, a trilateral agreement emerged in order to retrieve chemical weapons declared by Syria.<sup>8</sup> The agreement formulated by John Kerry and Sergey Lavrov was presented and signed by Syria in September 2013. The pact was a complete elimination of the Syrian chemical weapon’s program in exchange for reprieve from Western airstrikes. This exemplary model for international cooperation arranged a 10-month deadline for obtaining and destroying all chemical weapons in Syria. Despite inadequate funding and the emergence of the civil war, 97% of stockpiles were dismantled within one year.<sup>9</sup>

Despite Syrian President Bashar al-Assad failing to disclose stockpiles of chlorine, not banned by the CWC, as well as a Ricin factory, the bilateral agreement between the United States and Russia resulted in the removal of over 1,300 tons of chemical weapons that had the potential to fall into the hands of non-state actors.<sup>1011</sup>

It seems that under the current international framework, international cooperation has proven successful in both the removal of chemical weapons from Syria as well as Libya. Though these

cases proved to be difficult and arduous processes, the integral component of international cooperation, in terms of taking immediate action to locate chemical stockpiles occurred with the employment of international experts such as the OPCW, and transferring, when necessary, stockpiles to a third country. The most difficult parts of the processes were obtaining full and accurate disclosures from the states themselves, as well as having the personnel and adequate funding available to conduct on-site inspections.

Therefore, if the main goal is to expedite the process of procuring chemical weapons that have been obtained from states, whether they express readiness or not, then it would be more beneficial to implement procedures that allow for independent patrolling and intelligence gathering in order to identify other possible locations not openly disclosed.

**Claim: During “conflict situation, a State Party or a State which is not a Party expresses its readiness to place its chemical weapons under international control to prevent them from being seized by terrorists.”**

The only example to date that we have is the 2003 self-renouncement by Muammar Gaddafi of the state chemical and biological weapon stockpiles in Libya. Although in a period of peace in 2003, the difficulties in resolving and destroying these stockpiles took over 8 years. After the Libyan Civil War erupted in 2011, OPCW forces were required to vacate the area. As of 2017, 14 years after Gaddafi first announced his commitment to abandoning his chemical and biological stockpiles, it is presumed that Libya is free of all chemical weapons as well as the associated precursors. However, this situation clearly illustrates the necessity for a more cohesive mechanism in order to more quickly and efficiently destroy chemical weapons.

One of the reasons for the delay in the destruction of the chemicals, is from the lack of an accurate disclosure of the stockpiles by Gaddafi. Post-uprising in 2011, authorities located two additional sites containing chemical weapons, munitions, and artillery shells.<sup>1213</sup> Countries acting in an effort of self-preservation from Western encroachment, cannot be fully trusted to provide accurate disclosures of chemical and biological weapons and their associated materials. Despite the willingness or “readiness” of any country seeking to disclose and relinquish control over their chemical weapons programs, it is clear that these motives are not purely candid.

Without addressing a conflict climate, it is apparent that even in peace times it is necessary to create a more cohesive and smoother process for the transference of CBRN weapons from target states to the states that offer assistance.

However, the Libyan crisis also revealed the readiness of the international community to band together and assist in the dismantlement process. In an effort to promote securitization by assisting in the removal of chemical weapons, Denmark conducted a multi-national maritime transportation operation in order to transport the weapons from Libya to Germany. Germany supplied the facility and the monetary support for the destruction of the chemicals. Canada provided the equipment to remove the weapons that were housed in Libya as well as additional monetary support. The United Kingdom helped facilitate the maritime operation as well as the processing of samples and the analyses that were necessary to identify and remove the chemicals. Spain offered patrol boats to

assist. The EU also provided financial support to assist in the clean-up processes. In conglomeration with other countries not listed, the strength and willingness of the international community to interact to facilitate a safe, secure, and verified process is clear.<sup>14</sup>

**Claim: “[T]he Convention does not provide a clear answer to the question of what to do with chemical weapons recovered from terrorists.”**

With states bearing full responsibility for monitoring and ensuring that individuals on its territory are not engaging in behaviour in violation of the CWC and BWC, a state would confiscate the prohibited materials and then dispose of them in a transparent and verifiable manner. Similar to if a state-run chemical and biological program was being dismantled, if a state does not have the financial ability or access to proper equipment and verifiable means of destruction then the OPCW would facilitate an international effort to bring resources together in order to destroy the stockpile.

One of the worries here is that there is not an explicit protocol established to facilitate this dismantlement and instead each new instance needs new dialogue to rally international support. Therefore, although the protocol is intuitive, it could be beneficial to construct formal practices and a chain-of-command to aid states needing this assistance.

**Claim: Amending the CWC to address the existing deficiencies is not the best option.**

Most countries would agree with this assertion. Markus Binder from START commented that “Any such effort would be impractical, and realistically any attempt is likely to be extremely unwise given the hostility of many State Party [sic] to the independence of the organization and the industry obligations related to non-proliferation. An amendment conference for this purpose would not be able to prevent other amendments being proposed which might have the effect of neutering the non-proliferation aspects of the Convention and limiting the CWC’s remit to disarmament.”

Although experts agree that it is too cumbersome of a process<sup>15</sup>, other outlets have been suggested such as in the OPCW’s Executive Council, at annual conferences of states parties, or at the review conferences. These methods are thought to be more universal as well as more pragmatic.<sup>16</sup>

**Claim: The international humanitarian law (IHL), by its nature, is only applicable in situations of armed conflict and contains special requirements regarding non-State actors which could be subject to its norms, which makes the IHL inapplicable to broad categories of terrorist activities.”**

International humanitarian law is only applicable during times of armed conflict. Terrorism that falls outside the scope of international armed conflict would not be covered under IHL. Since terrorism is an act that is perpetuated in order to instil fear to a target audience and comprised of “loosely organized groups (networks) or individuals that, at best, share a common ideology,” not all acts of terrorism would fall under the criteria of during “armed conflict.” In order for IHL to be applicable, war must be declared against an “identifiable party.”<sup>17</sup>

Some particular instances such as the US coalition in Afghanistan in 2001 as a response to September 11<sup>th</sup>, 2001 attacks would be considered an international conflict and thus terrorist actions perpetuated against civilians as well as indiscriminate fighting would fall under the jurisdiction of IHL. However, broad categories of non-state actors which use terrorism as a method to instill fear are not covered under IHL, and are therefore not covered under the Geneva Conventions.

**Claim: UNSC Resolution 1540 has generic stipulations disallowing States from aiding non-State actors from obtaining chemical weapons and their means of delivery. However, it is necessary that UNSC Resolution 1540 “singl[e] out from all non-State actors the most dangerous category, i.e. the terrorists.”**

Per the Chemical and Biological Non-State Adversaries Database (CABNSAD), the current classification of chemical and biological adversary threats includes: al-Nursah Front, al-Qa’ida Central, Hizballah, and the Islamic State of Iraq and the Levant within the top five organizations that serve as a threat to acquiring chemical weapons. With regard to the acquisition of biological elements for the purpose of conducting a terrorist attack these terrorist organizations also ranked within the top five: Hizballah, al-Qa’ida in the Arabian Peninsula (AQAP), Apocalyptic Millenarian Cult, al-Nursah Front.<sup>18</sup> Here it is apparent that of the non-state actors that may intend to conduct a chemical or biological attack, terrorist groups remain the most prevalent actors.

However, honing in on and singling out terrorist organizations from the broad classification of non-state actors would be detrimental to the international community as a whole. With disagreement among the definition of terrorist groups and the concept of terrorism, it seems as if referring to the entire category of non-state actors would close the gap suggested by the Russian Federation. The 1925 Geneva Protocol exclusively pertains to state actors and with the implementation of this proposal it would address only one segment within the entire classification of non-state actors. It is dangerous to define groups based on a specific criteria of being a “terrorist.” A universal definition of which is still disputed. Instead, in order to account for all actors within the international community it is essential that the vocabulary is limited to state and non-state actors. This proposal in particular, should therefore only use non-state actor terminology to foster a cohesive international legal framework.

**Claim: International Convention for the Suppression of Terrorist Bombings of December 15, 1997 is limited in its scope. First, it narrowly categorizes use of a weapon as a “lethal device.” Second, specifies exact locations of use. Third, the “intent to cause death, a serious bodily injury or extensive destruction of the objects mentioned in the convention.” However, the proposal by the Russian Federation would not be restrained by such limitations.**

Although the International Convention for the Suppression of Terrorist Bombings of 1997 categorizes a weapon as an “explosive or other lethal device,” the definition of such is much more encompassing than at first glance. What is covered under this Convention is in fact, an explosive/flammable device *or* any weapon or device that is designed or has the capability “to cause death, serious bodily injury or substantial material damage; or... a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the

release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.”<sup>19</sup>

As we can see from the original treaty, the scope is much broader than attributed. In fact, any explosive, flammable device, or device that can release chemical, biological, or radiological materials with the intent of causing death, serious injury, or building damage falls within the scope.

Second, this treaty covers any public space, infrastructure, or transportation system. Specifically, a “[p]lace of public use’ means those parts of any building, land, street, waterway or other location that are accessible or open to members of the public, whether continuously, periodically or occasionally, and encompasses any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or similar place that is so accessible or open to the public.” Or, “‘Public transportation system’ means all facilities, conveyances and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of persons or cargo.” Or, “‘State or government facility’ includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.” Or, “‘Infrastructure facility’ means any publicly or privately owned facility providing or distributing services for the benefit of the public, such as water, sewage, energy, fuel or communications.” Therefore, the only arena in which this treaty does not specifically cover seems to be private businesses which are not open to public access.

The wording here would limit actions taken by actors to instil fear, but not cause harm to individuals or to buildings/infrastructure. However, if a device has the “capability” to cause harm, yet is set in such a way that it would not cause harm it would still be punishable under this treaty. Therefore, this well-constructed treaty is not as constrained as it is made out to be.

Terrorism is a technique not necessarily an action per se. Therefore, it is integral to criminalize each type of action that may be employed under the technique of instilling fear. Other actions a terrorist organization may employ include (but are not limited to): armed attacks, assassinations, kidnappings, hijackings, arson, CBRN attack, bombings.

If the international community is seeking to close the gaps that currently exist within the international legal framework, then it needs to clearly specify which actions need to be criminalized. By simply saying that this doctrine is not held to the same specifications as the International Convention for the Suppression of Terrorist Bombings of December 15, 1997, it does not mean that it will allow for any actions that a non-state actor may employ. Instead, this Convention aiming at suppressing acts of chemical and biological terrorism ought to specify that actions that may be taken to release chemical or biological agents that have the intent or capability to kill, cause grievous bodily harm, or infrastructural damage prohibited.

However, the current International Convention for the Suppression of Terrorist Bombings of December 15, 1997 specifically outlines that any form of dissemination of biological and chemical

components is in violation of the treaty. The claim that this proposal would not fall prey to the same constrictions is ludicrous.

A gap that can be closed is the inclusion of the private sphere, specifically private businesses that do not allow public access. Furthermore, in terms of bioterrorism, it would require consultations with international legal experts if acts of bioterrorism such as: releasing strains of deadly illnesses, or the contamination of food supply that occurs without a device would fall through current legal framework.

**Claim: It is beneficial to create clauses to criminalize acts, define jurisdiction, levels of legal response, and “extradite or prosecute.”**

The addition of the “extradite or prosecute” clause, as well as the criminalization, jurisdiction, and legal responses are all advantageous to include to the international legal framework. The current international structure relies, to a large extent, on the national implementation of domestic legislation. However, since some states lack the appropriate mechanisms for identifying and addressing these criminal offences, the addition of this Russian proposal will not solve the problem of national legislation within countries. However, since states lacking these mechanisms struggle to sufficiently prosecute offenders, the addition of the “extradite or prosecute” clause allows states to extradite individuals to ensure that legal repercussions are enforced.

Moreover, under the current Chemical and Biological Weapons’ Conventions “neither requires parties to establish criminal jurisdiction over foreign nationals on their territory who have engaged in prohibited activities elsewhere or to conclude extradition arrangements.”<sup>20</sup> Therefore the implementation of extradition arrangements and jurisdiction declarations will aid in closing this gap.

### *Venue*

It has been speculated by many state parties that the Russian proposal is not wholly disarmament related. However, the Russian proposal emphasized some key disarmament components which should allow for it to be classified under the Conference on Disarmament.

**Claim: “WMD-terrorism is increasingly becoming a disarmament issue and its neglect undermines the WMD prohibitory and non-proliferation regimes and, de-facto, international security and stability.” The possibility of an accumulation of arms by non-State actors whose intentions are to “undermine stability and security on [the] global level as well as in specific States and regions.” Furthermore, they argue that here “emerges a new arms race actor.” The recent illustration of ISIS taking control over industrial capacities in order to produce chemical weapons is a clear example they say. They also argue that this a non-proliferation issue because these arms could be transferred to clandestine networks to other countries, regions, continents. This “wider access by non-State actors to chemical weapons components weakens the regime of the CWC and other instruments related to chemical disarmament.”**

The claim is that their initiative is relevant to the Conference on Disarmament because it addresses the issue on how to handle chemical weapons and equipment once possessed by non-state actors in a chain of custody, as well as how to properly and effectively destroy the chemical agents and components. Furthermore, they cite that at the inception of the Conference on Disarmament, namely the Decalogue of 1978, the agenda had other items that were on the topic of international security.<sup>21</sup> In addition, they cited CD/12 which was the first agenda which contained confidence building measures, verification systems, and compliance methods. Since the beginnings of the Conference on Disarmament, from the original mandate the conference addressed a plethora of arms control and non-proliferation issues, in the spirit of the convention this falls right into alignment. Therefore, it does seem that this proposal is relevant and within the scope on the Conference on Disarmament

**Claim: Another purpose of the convention is to “revitalize the CD itself as its Member States have been unable to agree on the negotiation Program for almost two decades. Since the late 1990s, none of the combinations of the traditional CD agenda items ha[ve] been conducive to consensus. In this regard, there is a need for a new topical issue which could rally the Member States of the Conference on Disarmament.”**

In order to overcome the deadlock, the Russian suggestion is “through thorough and creative search for a balance of interests rather than through relocating negotiations to other venues or even less so through rejecting the principle of consensus.” Therefore, for the principle of the matter, the Russian Federation submitted the program of work including this proposal to the Conference on Disarmament. This multi-faceted proposal in nature, allows for the intersection of disarmament, non-proliferation, and counter-terrorism efforts.”<sup>22</sup>

However, Markus Binder from START explained that “Presuming that the proposal was to progress to serious negotiation in the CD it would not “break the deadlock” in that institutions operations. The deadlock is not simply attitudinal, in so far as finding one agenda item that everyone can agree on will result in a breakthrough on other items as the members discover that they can in fact work together. Given that the deadlock is tied to fundamental disagreements at the national level about the merits of pursuing a FMCT or PAROS breaking the CD deadlock will require that one or more countries modify their proposals or abandon strongly maintained policy positions. This proposal will not affect these positions.”

Moreover, the possibility for states to take this convention hostage by linking it to talks on the FMCT also have the possibility to occur again as once previously occurred in 2000. As U.S. Ambassador Robert Grey explained that certain member states within the Conference of Disarmament began to link the passage of the FMCT to beginning new talks on outer space issues simultaneously. “Thus, we do not understand how the objective of such calls can be to bring about negotiations on a topic that is far from ripe and that has not benefited from thorough discussion by this Conference. We are, rather, of the view that that holding FMCT hostage to negotiations on outer space is simply a poorly disguised effort to block FMCT negotiations altogether.”<sup>23</sup>

Although Russia claims to put its priority of banning the deployment of weapons in outer space on the back burner, states may still feel worried that the introduction of this to the Conference on

Disarmament could begin to unite issues in an effort to pass the FMCT or reignite talks on the deployment of weapons to outer space.

**Claim: The Biologic and Toxin Weapons Convention lacks a direct ban on the use of biological weapons. Moreover, does not qualify biological terrorism as an international crime.**

Although the Biological Weapons Convention does not ban the use of biological and toxic weapons, it supplements the 1925 Geneva Protocol which does ban the use of biological warfare agents. The problem here, however, is that the use of biological agents are not banned during times of peace. This is an exigent issue that needs to be addressed, and this convention could be the prime place.

The second claim that the BWC does not categorize acts of biological terrorism as an international crime is accurate; however, the implementation of national measures is the most important aspect of criminalizing and responding to violations of the BWC. Therefore, it does not seem relevant that these actions are not considered an international crime if each nation erects legislation prohibiting these actions in accordance with the requirements by the BWC.

**Claim: The 1925 Geneva Protocol only applies to States, not non-State actors.**

This is true, the Geneva Protocol does not have any language imbedded that would allow for the extension of the Protocol to apply to non-state actors. It is necessary to fill this gap and ensure that non-state actors are covered within the international legal framework from the use or intent to use chemical or biological weapons.

## **2. Treaty**

The proposed treaty which is currently still a draft can be summarized to address six important issues: the inclusion of riot control agents, criminalization of those intending or threatening to use a chemical or biological weapons, the requirement for states to implement national legislation to criminalize these actions as wells as to make the “offences punishable,” encouraging the exchange of information pertaining to these criminal proceedings, declaration of national jurisdiction as well as jurisdiction during specific times and on different vessels, the insistence on the “extradite or prosecute” clause, and on the criteria pertaining to the destruction of chemical weapons.

### **The inclusion of riot control agents (RCAs)**

Within the April 6<sup>th</sup>, 2016 Explanatory Note by the Russian Federation, they highlight that the CWC does not include within its CWC Annex on chemicals, “toxic chemicals which have industrial purposes, but can also serve as chemical weapons.” They stress that there is no control over their “circulation, end use, consumers, and brokers in their acquisitions.” However, the Russian proposal does not offer a solution to the tedious process of tracking the use of these dual-use chemicals. Instead, the only area in which this issue is addressed is within the definition of a chemical weapon. Included is the clause under Article II Clause VII defining a Riot control agent

as: “Any chemical not listed in the CWC Annex on chemicals, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.”<sup>24</sup> Including Riot control agents under the category of Chemical Weapons, is not unprecedented. Within the 1925 Geneva Protocol (Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare), it “prohibits the use in war of asphyxiating, poisonous, or other gases, and of bacteriological methods of warfare.”<sup>25</sup>

However, what is original and beneficial to the international community is the conglomeration of the categorization of Riot control agents as a chemical weapon (since they are not categorized as such by the CWC) with non-state actors which is not included under the Geneva Protocol. Addressing this gap is vital and can aid in the criminalization of non-state actors using any kind of asphyxiating gases.

### **Criminalization of those intending or threatening to use a chemical or biological weapons**

Russia introduces new language into its initiative which veers away from standard language in the Chemical Weapons Convention and the Biological Weapons Convention. Neither document addresses “intent” or categorizes acts as “lawful” or “unlawful”. This, however, is emphasized within the Russian proposal. The addition of language of intentionality is worrisome to many. Some think that with the inclusion of intent it can undermine the existing bodies such as the CWC and OPCW. For example, Oliver Teir and Ralf Trapp in their analysis, *Russia’s chemical terrorism proposal: Red herring or useful tool?*, state the following:

“[T]he draft appears to build on more than a dozen international conventions aimed at countering international acts of terrorism. But by drawing language from these agreements, the proposed treaty could actually undermine the strong and universal norm established by the CWC against the use of chemical weapons by anyone, anytime and anyplace.

For example, Article 2 of the Russian draft severely restricts the scope of the prohibition by stating that any person that “unlawfully and intentionally” uses a chemical weapon commits an offense. This language appears to be taken from treaties such as the 1997 International Convention for the Suppression of Terrorist Bombings. Yet the CWC does not differentiate between the use of chemical weapons for “lawful” or “unlawful” purposes, nor does it separate “intentional” from “unintentional” use of chemical weapons. Rather, the drafters of the CWC wisely crafted a prohibition of all uses of toxic chemicals, except for purposes not prohibited. This so-called “general purpose criterion” is a solid and all-encompassing way to capture any use of a toxic chemical as a chemical weapon, irrespective of circumstances or perpetrators.”<sup>26</sup>

What Teir and Trapp overlook is that under the current international framework “intent” is disregarded and therefore not punishable. However, with the inclusion of this novel language, the initiative intends to be able to address situations in which non-state actors are intending to conduct an attack, but are detected before the completion of their operation. This would also allow for the criminalization of threats. Under the current international legal framework, this is not addressed.<sup>27</sup>

With regard to the addition of addressing “lawfulness” Russia intended to distinguish between riot control agents that would be lawful under national law and the unlawful use of chemicals as weapons.

**The requirement for states to implement national legislation to criminalize these actions as well as to make the “offences punishable”**

Much of the current debate within the international legal framework is the lack of seamless implementation of national legislation. However, the Russian initiative falls prey to the same criticisms. Under the CWC Article VII state parties are required to ensure that within its territory or any other area under its jurisdiction, no individual procures, uses a chemical weapon or partakes in any other action restricted to states. With near universality, 192 countries thus far and 98 percent of world’s population, the integrity and scope to which this treaty encompasses is unparalleled.<sup>28</sup> Although only 108 state parties have adequately adopted national legislation according to the CWC, this obstacle lies with the capacity of each nation and not with the CWC itself.<sup>29</sup>

With this new proposal, it will also be up to each state to enact national legislation and will not overcome the difficulties associated with national implementation.

**Encouraging the exchange of information pertaining to these criminal proceedings**

Although the Russian proposal intends to facilitate a greater degree of communication between countries, the current draft of Article VII does not clearly illustrate how this is to be done. The intent is to foster a greater degree of communication between countries with specific regard to “detect, prevent, suppress, and investigate the offences set forth in Article II and also in order to institute criminal proceedings against persons alleged to have committed those crimes.”<sup>30</sup> It also discusses the disclosure of information to international organizations such as Interpol. However, without explicit protocol set out to accomplish this, it does not appear as if this article will have any sort of substantial impact on the current exchange of information.

In addition, some speculate that Article VII will have no meaningful influence. According to Oliver Teir and Ralf Trapp they speculate as to “whether these practical shortcomings are best addressed through a new international instruments [sic] is doubtful. The lack of cooperation among governments in preventing terrorist acts has many reasons, including the sensitive nature of relevant information, national parochialism, and institutional rivalries. Few if any of these problems would be bettered by yet another international convention.”<sup>31</sup>

Information sharing is a rather difficult issue as many countries prefer to engage in bilateral exchanges, than to disseminate information broadly.<sup>32</sup> Currently within the European Union, there has been a push by Britain to mend the current gap within the information exchange environment.<sup>33</sup> Due to “sub-optimal sharing of information based on an overly strict application of the need-to-know principle,” the seemingly sensible plan to elaborate an international information system is undermined.<sup>34</sup>

Some current challenges in the field of information sharing as listed by the June 2016 Roadmap to Enhance Information Exchange within the European Union include:

- a) “limited availability of information (e.g. on specific types of terrorist travellers);
- b) limited access to information or a limited timeframe for identity and security checks on persons at borders (e.g. due to a complex legal base or technical obstacles);
- c) Member States and their authorities not being connected to systems;
- d) a suboptimal sharing of information based on an overly strict application of the need-to-know principle affecting in particular ongoing investigations and the possibility to undertake immediate action.”

A possible solution may be to specifically identify international organizations to which the dissemination of information to is of vital importance and keep a minimal list of international organizations to which it is permissible to exchange information with. For instance, listing only Interpol as an agreed upon international organization to transmit information to can reduce the number of possible actors with availability to this sensitive information.

### **The insistence on the “extradite or prosecute” clause**

The insistence on *aut dedere aut judicare* or the “extradite or prosecute” clause is highly beneficial in increasing the obligation on states to prosecute those that are found within violation of the law. This requires individuals to not escape legal consequences for their actions. According to the 2014 United Nations report: “The obligation to extradite or prosecute, the inclusion of this clause is to specifically fight against impunity.”<sup>35</sup> The desire of inter-state cooperation to tackle offenders of heinous crimes such as, but not limited to, crimes against humanity is an integral part of the effort within the international community to unite for a common cause. In fact, “[i]n the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, the Heads of State and Government and heads of delegation attending the meeting on 24 September 2012 committed themselves to “ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law ...”.<sup>36</sup> The inclusion of this within the Russian proposal is highly beneficial and can assist states that do not have the full capability to prosecute offenders.

### **The criteria pertaining to the destruction of chemical weapons.**

It is necessary to have an explicit guideline formulated to assist states with the acquisition and destruction of chemical and biological agents seized from non-state actors. Although current law requires states to ensure that civilians within their jurisdiction are not participating in the construction/stockpiling of these agents, it is still a viable possibility that groups can subvert national police forces and accumulate them.

The emphasis by the Russian initiative to address this issue is highly relevant. Since there is no chain-of-custody or existing legal framework in place to aid countries in the destruction of CBRN weapons, it is on a bilateral basis only between other countries. However, it could be a beneficial move to suggest an expansion of OPCW's role in the acquisition and destruction of these weapons in the insistence that non-state actors are discovered stockpiling them and the nation does not have adequate funding or supplies to adequately destroy them.

However, intuitively it seems that if a situation were to arise in the current climate where a state came across a stockpile of chemical or biological agents, under the existing framework of the CWC and BWC, they would report the occurrence transparently to the OPCW and then partake in the appropriate means of destruction such as: incineration or neutralization. In addition, if a state lacks adequate resources to complete dismantling, the OPCW would act as an intra-state facilitator to connect them with states with the ability to provide additional resources and/or complete the destruction on its soil as was done with international aid for Libya.

### **3. Review the position of each state**

#### **Canada**

Mr. Davison explained on March 15<sup>th</sup>, 2016 that the Russian proposal, although merit-worthy for its attempt to break deadlock, was “unnecessarily duplicative.” In response to the idea that non-State actors are not currently included under the existing framework, highlighted that the Chemical Weapons Convention addressed this concern. Moreover, with regards to State's efforts to prevent non-State actors from procuring chemical weapons is already a focus of the OPCW working group. It is necessary to allow this working group to conclude its efforts before an existing mechanism is brought into the international arena. However, Mr. Davison reiterated that they remain unconvinced that any new legally binding measures is necessary. In addition, he stated that with regard to addressing preventative measures to non-State actors obtaining chemical pre-cursors. He suggested that if a new legally binding instrument is necessary, that it should be as a protocol to the CWC. Lastly the United Nations Convention for the Suppression of Terrorist Bombings has 168 State parties which hold States accountable for criminalizing chemical devices that individuals may use.<sup>37</sup>

#### **France**

As of March 7<sup>th</sup>, 2017 France stated that all attempts to the fight against acts of chemical and/or biological terrorism should be combatted through existing mechanisms in order to preserve their relevance. Although they did not explicitly comment on the Russian proposal, it seems as if they are not interested in pursuing this separate convention.<sup>38</sup>

#### **Germany**

According to Mr. Biontino on May 24<sup>th</sup>, 2016, he explained that Germany, for the time being, would like to focus more on improving existing mechanisms than to begin an additional novel mechanism. The reasoning for this rests on the idea that relying on current frameworks within the established structure, affairs and specific experts is already currently possible, and it is not wholly necessary to establish a new arena within the Conference to host them. Furthermore, organizations like the Organization for the Prohibition of Chemical Weapons, the Secretary-General's

mechanisms, and the Security Council Committee resolution 1540 (2004) already deal with combatting terrorism and the issues around biological and chemical weapons usage. Therefore, although agreeing to the exigency of the issue of fighting terrorism, Germany would like to remain relying on the current existing international legal framework and mechanisms.<sup>39</sup>

### **India**

India seems committed to taking the necessary steps in order to protect against acts of terrorism. Per a statement on May 17<sup>th</sup>, 2016, India supported the Russian proposal as well as the expansion to include acts of terrorism using biological components. Furthermore, they emphasized the consensus building role of the proposal which could mark the beginning of a reignited Conference on Disarmament.<sup>40</sup> India's commitment to the Russian proposal persisted through to the updated version of the proposal on August 4<sup>th</sup>, 2016 and said it would take an active role in studying the draft and partaking in dialogue in the future.<sup>41</sup> Later in October, India reemphasized its commitment to strengthening the "WMD-terrorism nexus" and sought to continue to find novel methods as well as host the 2018 Conference. This much-appreciated gesture was welcomed by other parties and showed India's strong resolve towards multilateral negotiations within the international arena.<sup>42</sup>

### **Nigeria**

Nigeria, a country plagued by devastation from terrorist organization Boko Haram, is adamant in its resolve to maintain a proper national legal framework regardless of lack of resources and other overbearing internal problems.<sup>43</sup>

Tijjani Muhammad Bande at the 7985<sup>th</sup> Security Council Meeting explained that Resolution 1540's ability to invoke "Chapter VII of the United Nations Charter outside a country-specific context. "This ability, filled the gap that the Russian Federation claimed to exist with the non-State actors acquisition and application of weapons of mass destruction. Moreover, he explained the necessity of national implementation of Resolution 1540 in order to protect against actors seeking to employ terrorist tactics against civilians and countries. He expounded upon the fact that there is a "yawning compliance gap" which serves to the detriment of all countries, as no country is precluded from the possibility of a terrorist attack.<sup>44</sup>

Moreover, on August 23<sup>rd</sup>, 2016 Mr. Anthony Bosah highlighted the importance of establishing "precautionary measures and systems to address potential nuclear, chemical or biological proliferation was the collective responsibility of all Member States, he concluded.<sup>45</sup> Although the Russian proposal recognizes the existence of current preemptive measures one of the principal concerns relies on the reactive actions that are necessary once a terrorist organization is found with biological or chemical components. The steps that are necessary for obtainment, testing, and destruction are not clearly illustrated within the existing legal framework despite the vast proactive measures that are currently in place within the current existing legal framework.

### **South Africa**

In May 24<sup>th</sup>, 2016, Ms. Mancotywa-Kumsha explained that the issue with identifying the correct venue was of immediate concern to South Africa. Although terrorism is a valid concern, it is not a disarmament concern. She referenced the past Convention on the Suppression of Acts of Nuclear

Terrorism which was not dealt with in the Conference on Disarmament for this reason. In an effort to maintain relevant proposals within the Conference on Disarmament she questioned how “priority issues” would be treated if the Conference became an arena diluted with a variety of other concerns. However, despite these reservations, she clearly iterated that South Africa would not impeded a consensus decision to approve of this initiative.<sup>46</sup>

Most recently on June 29<sup>th</sup>, 2017 Dr. Mashabane voiced the substantial efforts that South Africa has made to carry out “global control regimes” as well as the reinforcement of national legislation through conglomerate efforts with “international organization[s], regional actors, civil society groups, and the private sector.”<sup>47</sup>

### **Switzerland**

On March 15<sup>th</sup>, 2016 Mr. Schmid highlighted the importance of clarifying whether the Conference on Disarmament is the appropriate venue. Furthermore, he explained that the use of chemical weapons by State or non-State actors is certainly contained in the existing international law whether in treaties or customary law.<sup>48</sup>

Mr. Masmajeun explained on May 24<sup>th</sup>, 2016 that it is first necessary to “consolidate[e] and strengthe[n] existing standards.” Regarding the issue of non-state actors obtaining CBRN weapons it is already within the existing international law. Furthermore, this suggestion that non-state actors are not included within the existing international legal framework could have adverse legal repercussions in the current environment.<sup>49</sup>

### **Syria**

On May 24, 2016 Mr. Al Nuqari supported the choice of venue for the Russian proposal and later highlighted the importance of the treaty with the spread of ISIL, Al-Qaida and Al-Qaida affiliates. Moreso, there has been recent news confirming experiments in Al-Qaida laboratories in Mosul where chemicals are being fabricated and tested on animals and ISIL prisoners. He exclaimed on the “real and present danger” that these groups pose to the security of the international community.<sup>50</sup>

On March 14<sup>th</sup>, 2017 Syria issued a statement at the Conference on Disarmament remarking on the distressing and impending threat of ISIL in the region as well as the possibility that they could obtain a chemical weapon. At this time, they adamantly voiced their support for the Russian proposal.<sup>51</sup>

### **United States of America**

On May 24<sup>th</sup> 2016, Mr. Wood spoke out against the Russian proposal by explicitly stating that there are no current existing gaps within the international legal framework, and any problems that may exist, exist with national implementation. The main concern for the United States is ensuring that existing instruments are not undermined.<sup>52</sup> On August 23<sup>rd</sup>, 2016, Michelle Sison reaffirmed this stance by stating that this proposal is “misleading,” and “found[ed] on [the] false premise that there were legal gaps”<sup>53</sup>

### **Venezuela**

Ruben Darío Molina, Vice Minister for Foreign Affairs of Venezuela, stated on March 1<sup>st</sup>, 2017 that they supported negotiations on the Russian initiative and challenged terrorism of any kind on all fronts. Moreover, they support this multilateral international humanitarian legal approach.<sup>54</sup>

#### **4. Perspective on the initiative**

Many states hold varying degrees of opinions on this proposal. In particular, however, is sentiments from the United States accusing the Russian Federation of being intentionally misleading. In particular, Markus Binder from START stated, “I strongly suspect that this proposal is designed to undermine the credibility of the CWC / OPCW. The driver for this is the OPCW’s role in exposing the ongoing use of CW against civilian populations by the Syrian government and the widespread rejection of ongoing efforts by both Russia and the Syrian government to transfer responsibility for these incidents to assorted Syrian rebel groups. The timing of the proposal, shortly after the OPCW’s late 2015 (S/1319/2015, S/1320/2015) and early 2016 (S/1318/2015/Rev.1/Add.1) rejection of Syrian government suggestions that rebel groups were mounting Sarin attacks for which the Syrian government had been assigned responsibility, is highly suggestive.”

Others such as Adam Sheinman, Special Representative of the President on the United States on Nuclear Nonproliferation commented that, “This issue could be solved in the framework of existing agreements and initiatives such as the UN Security Council Resolution 1540, which is now going through a comprehensive review concerning its implementation. We also continue to focus on negotiations within the CD on a Fissile Material Cut-off Treaty, which is a next realistic step in the multilateral nuclear negotiations, and all countries of the P5 agree with it.”<sup>55</sup>

Other states such as Canada, France, Switzerland, Germany, and Nigeria question the relevance of the venue, the proposed gaps the initiative seeks to fill, as well as the authenticity behind the proposal.

#### **5. Recommend next diplomatic steps**

From this analysis, we can see that many states struggle over some of the same hurdles with regards to the initiative by the Russian Federation. Therefore, if Russia is set on seeing this initiative through at the Conference on Disarmament, it is integral that an issuance of an additional Explanatory Note to clearly identify where each of the legal gaps are and how the current international legal framework fails to fill these holes. The current explanatory note prides itself on layman language by explaining the necessity behind adding certain measures; however, it does not provide a legal analysis explaining where the gaps are and how the Russian initiative will alleviate them. Claims like the Biological Weapons Convention does not criminalize the use of agents is faulty. It is true that the BWC does not explicitly criminalize the use of these agents; however, the 1925 Geneva Protocol does (although during wartime only). It is necessary that the new note that is issued explain where the gaps are within the entirety of the international legal framework. A more comprehensive approach in the analysis of the entire current legal framework could serve as a confidence building measure for states who worry over the intentions of Russia.

The main States that Russia must convince are: the United States, Canada, Switzerland, and France. The support from these Western States can set the stage for the adoption of a plan of work and the beginnings of a functional and productive Conference.

Second, in the current highly politicized climate, the proposal may have a higher chance of succeeding if it transitions away from the usage of “terrorist” for “non-state actor.” Not only will it streamline the international legal framework by limiting the terminology to state and non-state actor, it will circumvent the necessity to provide a definition for terrorism. Since terrorism is a method, highlighting the specific actions which need to be prosecuted and which the international community is more likely to come into agreement about can assist in the confluence of opinions.

Finally, it is important for Russia to take the initiative in bolstering the existing international legal framework. This may reassure States that are weary of Russian intentions to support their current effort to act comprehensively within the existing international legal framework as well as within the Conference on Disarmament.

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