

The humanitarian dimension of the Convention on “silent weapons”

by Valentin A. Romanov

Analysing the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, concluded a quarter of a century ago (10 April 1972), American expert Lynn M. Hansen wrote: “The spectre of biological warfare is something no person enjoys contemplating. The spectre is real, however, as man has learned how to use biology to wage war against himself. Fortunately, the international community in 1972 outlawed these weapons.”¹ This is the essence of the Convention.

Prohibition of biological weapons

Prohibiting biological weapons meant not only that the weapons as such were declared unlawful, but also that on the Convention’s entry into force existing stocks of biological weapons were to be eliminated and the production and acquisition of such weapons was once and for all banned by the international community. The Convention placed a duty on each State Party “never in any circumstances to develop, produce, stockpile or otherwise acquire or retain” either biological agents and toxins “of types and in quantities that have no justification for prophylactic, protective or

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Original: Russian

¹ Lynn M. Hansen, “Arms Control in Vitro”, *Disarmament, A periodic review by the United Nations*, Volume X, No. 1, Winter 1986/1987, p. 59.

other peaceful purposes” or “weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.”² Furthermore, each State Party undertook to destroy, or to divert to peaceful purposes, all biological weapons and means of delivery which were in its possession or under its jurisdiction and control.

The Convention expressed the States Parties’ firm belief in “the importance and urgency of eliminating” biological weapons from the arsenals of States and their resolve “for the sake of all mankind to completely exclude the possibility” of their use, stressing that such use “would be repugnant to the conscience of mankind”. These preambular provisions actually reproduced the principle, already stated in international law, of the unacceptability of the use of biological weapons: indeed, in the well-known Geneva Protocol of 1925³ the States agreed to extend the prohibition of the use of chemical weapons to “bacteriological methods of warfare”, too. Recognizing the significance of the Protocol, the States party to the Convention of 1972 reaffirmed their “adherence to the principles and objectives” thereof and called upon all States “to comply strictly with them”, specifying that no provision of the Convention “shall be interpreted as in any way limiting or detracting from the obligations” assumed by the States under the 1925 Protocol.

A disarmament measure and a significant contribution to international humanitarian law

The Biological and Toxic Weapons (BW) Convention was drafted and concluded primarily as a disarmament measure. It is referred to as “the world’s first disarmament treaty”,⁴ with analysts noting that it is the first agreement “which involves the elimination of an entire class of weapons”⁵ and not just a weapon but “a dangerous weapon of mass destruction”, as

² For the Russian version of the Convention see «Международное гуманитарное право в документах». Составители Ю.М. Колосов, И.И. Котляров, М., Издательство Московского Независимого института международного права, 1996, стр. 445-450 (Y.M. Kolosov, I.I. Kotlyarov (eds), *International humanitarian law in documents*, Moscow Independent Institute of International Law Publishers, 1996, pp. 445-450).

³ Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare (Russian version in *op. cit.* above [note 2], p. 444).

⁴ Second Review Conference of the Biological Weapons Convention, Introduction, *Disarmament*, Volume X, No. 1, Winter 1986/1987, p. 43.

⁵ Oscar Vaerno, “The forthcoming review conference of the parties to the Biological Weapons Convention”, *Disarmament*, Volume IX, No. 2, Summer 1986, p. 214.

the Convention, and earlier the United Nations, had defined it. Since the weapon in question is — by its nature and purpose — capable of causing great suffering to human beings and since there is no possibility of protecting the civilian population from its damaging effects if it is used, we have every reason to regard the BW Convention as a significant contribution to the humanization of war and a major component of international humanitarian law. Hans-Peter Gasser names this Convention as one of the sources of international humanitarian law⁶, and Dr Jean Pictet, speaking about biological weapons — which he places in the category of “barbarous forms of warfare”⁷ — discusses the ban on their use provided for by the Geneva Protocol in the context of the principles of international humanitarian law.

The disarmament value of the BW Convention and its humanitarian dimension are determined by the specific nature and characteristic features of the weapon itself. According to the Special Report of a group of experts set up under the UN Secretary-General in 1968 by resolution of the UN General Assembly, the use of virulent bacteriological agents such as bacteria, viruses, fungi and rickettsia, which artificially cause plague, cholera, malignant anthrax, tularaemia and other grave diseases, can affect human beings, animals and agricultural crops. The report shows that in some ways bacteriological weapons are more dangerous than chemical or even nuclear arms: while nuclear weapons delivered by one strategic bomber can destroy an area of up to 30 sq km and chemical weapons an area twice that size, bacteriological weapons may affect an area of as much as 100 sq km.⁸ Biological weapons are capable of affecting large areas with only minimal human and material resources used, and the disease will develop even if only a tiny dose of the agent gets into a human body. The military and industrial circles of some countries are increasingly seeking to design “low cost” and “high efficiency” means of warfare which would enable them to target human beings without destroying material property (it is well known that half a kilogram of botulism toxin

⁶ Hans-Peter Gasser, *International humanitarian law. An introduction*, Henry Dunant Institute/Paul Haupt Publishers, 1993, pp. 12 and 14.

⁷ Jean Pictet, *Development and principles of international humanitarian law*, Henry Dunant Institute, Geneva, 1985, p. 55.

⁸ Абаренков В.П., Красулин Б.П. Разоружение. Справочник. М., 1988. стр. 221 (V.P. Abarenkov, B.P. Krasulin, *Disarmament, Reference book*, Moscow, 1988, p. 221).

could theoretically be sufficient to exterminate the population of the earth).⁹

In view of all this, the BW Convention obviously belongs to the law of The Hague: one of the latter's fundamental principles is expressed by the St Petersburg Declaration of 1868, namely the fact that "the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable (...) would (...) be contrary to the laws of humanity".¹⁰ Since then it has been widely recognized that in cases not expressly covered by legal texts "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience", in the words of the famous Martens clause which became an integral part of both the Geneva and the Hague branches of international humanitarian law.

The BW Convention may be justly considered as *jus cogens*, i.e., a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted, pursuant to the terms of the Vienna Convention on the Law of Treaties of 1969, which stipulates that the provisions of humanitarian treaties concerning the protection of human beings shall be preemptory.¹¹

The attitude of Russia and other CIS countries

The significance of the BW Convention as a major component of international humanitarian law lies not only in the content of the material and other obligations stipulated therein, but also in the fact that the overwhelming majority of States comprising the world community are party to it. The resolution of the 50th session of the UN General Assembly relative to the Convention noted with satisfaction that the latter bound more than 130 States. There are reasons to believe that their number will increase, in particular on account of the States which seceded from or were created following the break-up of the former USSR, once they take up the question of their accession or succession to the treaties to which the

⁹ Jean Pictet, *loc. cit.* (note 7).

¹⁰ ICRC (ed.), *International law concerning the conduct of hostilities, Collection of Hague Conventions and some other treaties*, Geneva, 1989, p. 165.

¹¹ Действующее международное право, Том 1, М., Издательство Московского Независимого института международного права, 1996, стр. 360 (*Current international law*, Volume 1, Moscow Independent Institute of International Law Publishers, 1996, p. 360).

Soviet Union was party. The States which have already acceded to these treaties are Armenia, Georgia, Turkmenistan and Uzbekistan — joining Ukraine and Belarus, which were party to the treaties in their own right. This issue was envisaged by the [CIS] Agreement of 24 September 1993 on priority measures for the protection of victims of armed conflicts. In case the States were not yet bound by relevant international treaties, the agreement provided for measures to be taken by the countries of the Commonwealth of Independent States (CIS) "to promptly declare their succession in respect of international treaties in the field of international humanitarian law applicable to States and other parties to an armed conflict, and to bring their national legislation in line with the rules and principles of international humanitarian law."¹² The parties shall, the Agreement goes on to say, coordinate mutual activities envisaged for the protection of victims of armed conflicts, enlisting the services of National Red Cross and Red Crescent Societies, the International Committee of the Red Cross and CIS bodies. The Agreement stresses that each party shall take necessary measures to suppress any breach of international humanitarian law, including effective prosecution and punishment of persons having organized, committed or ordered to be committed, acts qualified as war crimes or crimes against humanity under international law and/or national legislation.

As a successor to the USSR, which ceased to exist in 1991, Russia has taken on a special responsibility regarding the implementation of the Convention on biological weapons.¹³ It has had to make a far-reaching revision of the policy pursued by the former Soviet Union. To this end, in 1992 the President of Russia issued Decree No. 390 prohibiting the development of a biological offensive programme throughout the country.¹⁴

¹² For the text of the agreement in Russian, see *supra*, note 2, pp. 553-554.

¹³ This does not mean, however, that groundless accusations of violating the Convention can be made against the former USSR in connection with the outbreak of anthrax in 1979 in Sverdlovsk (now Yekaterinburg). The State Ad-Hoc Anti-Epidemic Commission found that the Sverdlovsk region had been subject to the threat of anthrax for several centuries and that this type of disease was considered endemic to the territory. Anthrax *nidi* were proved to be present in the soil. The analysis of the dynamics of contracting the infection showed that the anthrax outbreak had spanned the period of a month and a half; the infecting agents were found in assays of mixed fodder for cattle, and in meat and meat products belonging to some residents of the region; the strain of the infecting agent extracted from those samples and that found in the people who had contracted the disease were identical. The 1979 outbreak of anthrax in Sverdlovsk did not and could not have had anything to do with the local military centre's research on vaccine preparations against anthrax.

¹⁴ Россия: в поисках стратегии безопасности. Проблемы безопасности, ограничения вооружений и миротворчества. М., Наука, стр. 114. (Russia: in search of the security strategy. The problems of security, limitation of armaments and peacemaking. Moscow, Nauka, p. 114).

Breaches of law connected with biological weapons have become subject to criminal liability in Russia. Article 355 of the Criminal Code of the Russian Federation which came into force on 1 January 1997, provides that “the production, acquisition or sale of chemical, biological as well as any other type of weapons of mass destruction, prohibited by an international treaty to which the Russian Federation is a Party, shall be punishable by a prison sentence of 5 to 10 years”, and Article 356 of the Code states that “the use of prohibited means and methods of warfare, the use of weapons of mass destruction, prohibited by an international treaty to which the Russian Federation is a Party, shall be punishable by a prison sentence of 10 to 20 years.”¹⁵

Russia has demonstrated a spirit of goodwill and cooperation with other leading States party to the Convention on biological weapons — the United States and the United Kingdom — which are, together with Russia, Depositories of the Convention. As their joint statement on biological weapons of 14 September 1992 specifies, the governments of the three States “confirm their dedication to faithfully observe the Convention on biological weapons and agree that there is no place for biological weapons in their armed forces.”¹⁶

Shortcomings of the Convention and how to remedy them

The high degree of importance attached to the BW Convention is matched by the attention given to the procedure providing for a regular review of its operation by the States party to it, introduced “with a view to assuring that the purposes of the preamble and the provisions of the Convention (...) are being realised”. Since the Convention’s entry into force in 1975 there have been four review conferences (in 1980, 1986, 1991 and 1996) as well as a special conference, convened in 1994. Convention-related issues are also regularly discussed by the UN General Assembly.

There are, however, more than enough reasons for concern over the implementation mechanism of the Convention. The text, drafted during the Cold War era, has numerous deficiencies. Russian scholar Alexander N. Kalyadin notes that “the Convention does not provide for the international inspection of the elimination of stocks of biological weapons, means

¹⁵ The Criminal Code of the Russian Federation, ICRC translation.

¹⁶ *Дипломатический вестник*, 1992, No. 19-20, стр. 27 (*The Diplomatic Herald*, No. 19-20, 1992, p. 27).

of their transportation and respective equipment, and of their conversion for peaceful purposes. The Parties to the Convention are not obliged to notify one another whether they have liquidated these stocks and when exactly they did so. The Convention contains no provisions concerning effective verification, and inspection of biological sites is not even mentioned. Respect for the obligations assumed under the Convention is to be primarily ensured by measures of national control (i.e., self-control). The whole system of ensuring compliance with the Convention is based more on trust than on international supervision. There are no provisions setting out clearly defined sanctions against countries violating the Convention."¹⁷ Since 1980 the number of unilateral accusations of Convention violations has grown; one crucial question is what course of action should be taken if bilateral efforts to settle problems yield no results.

The different Review Conferences have adopted a number of resolutions which are overall aimed at strengthening the Convention and improving its application without undertaking a formal revision of the text. It should be mentioned, however, that the main outcome of the Fourth Review Conference, according to its Final Declaration, was to confirm the Convention's viability. The Conference emphasized, in particular, the vital importance of the States Parties' full compliance with all the provisions of the Convention. At the same time the Final Declaration did not mention any specific cases of non-compliance with the Convention. The Conference participants noted with interest the information provided by the Russian delegation concerning measures taken in Russia in the preceding five-year period with a view to excluding even the possibility of any breaches of the Convention on the territory of the country.

When summing up the resolutions of the above-mentioned Review Conferences, the following key points should be noted:

1. Taking into account scientific discoveries in the field of microbiology, genetic engineering and biotechnology since the Convention's entry into force, the Conferences proceeded from the premise that Article I of the Convention, which provides for the total prohibition of biological weapons, covered all discoveries of the kind.
2. With reference to Article V, which sets out the States Parties' obligation "to consult one another and to cooperate in solving any prob-

¹⁷ *Supra*, note 14, p. 112.

lems which may arise in relation to the objective of, or in the application of the provisions of, the Convention”, Conference participants have agreed in principle that this includes the right of each State Party to call a consultative meeting at the level of experts which would be open to all other participants; in such a case the consultations and cooperation may be undertaken within the framework of the UN and in accordance with its Charter.

3. The above-mentioned Special Conference, held in 1994, passed a number of resolutions concerning Articles VI and VII of the Convention; these detail the procedure for lodging complaints with the UN Security Council for breach of obligations deriving from the provisions of the Convention, and bind the States Parties to cooperate with any investigations initiated by the UN Security Council. The Conference was convened pursuant to UN General Assembly resolution 37/98 C of 13 December 1982 and following the report of the Ad-Hoc Group of Governmental Experts (the so-called “VEREX” report) set up to identify and evaluate potential verification measures from a scientific and technical standpoint, The Group worked out 21 verification measures as well as some variations of their possible combinations to be able to distinguish between prohibited and authorized activities. The Special Conference then set up an Ad-Hoc Group open to all States party to the Convention to consider appropriate measures, including possible verification measures, and draft proposals to strengthen the Convention, to be included, as appropriate, in a legally binding instrument to be submitted for the consideration of States party to the Convention. The issues connected with strengthening the Convention were recognized as difficult, requiring a step-by-step approach to the establishment of a coordinated regime of its implementation. Various proposals were made. Specifically, the delegations of East European countries suggested drawing up an additional protocol which would contain measures strengthening the verification mechanism. Similar ideas were put forward — in less categorical terms — in the study prepared under the aegis of the Stockholm International Peace Research Institute (SIPRI), which recommended that the insufficiently explicit provisions of the Convention should be clarified through statements of understanding or, if possible, additional protocols.¹⁸

¹⁸ Winfried Lang, “Taking the pulse of the biological weapon regime”, *Disarmament*, Volume X, No. 1, Winter 1986/1987, p. 45.

4. Certain measures providing for greater transparency of biotechnological activities were envisaged: the States Parties undertook to exchange data, including names and localities, the volume of and general trends in the activities of scientific research centres. It is worth mentioning in this connection that Russia submits data about its biological activities to the UN Secretary-General every year; the information provided is so detailed as to include the floor space of laboratory premises, the number of specialists employed, their qualification, the sources of financing, etc.

Russian specialists support the idea of a further study of potential verification measures; according to A.N. Kalyadin, "they believe that there is more to the task than just creating an effective verification mechanism — the task also includes the need to effectively use the economic and technical resources for such verification, on the one hand, and to avoid inflicting damage to the activities allowed under the Convention, on the other hand. Notices and notifications of biological activities, checking documentation and interviews with personnel at the respective sites, visual inspection and identification of the equipment, medical examinations would, in their opinion, constitute the optimal elements of such a mechanism."¹⁹

Analysing the results of the Second Review Conference of the BW Convention, Winfried Lang — professor of international law and international relations at Vienna University and chairman of the Conference in question — mentioned "the extent and nature of new political commitments entered into by the States Parties."²⁰ The declarations concerning the substance of the Convention which were adopted at the First, Third and Fourth Review Conferences can in the same way be regarded as resolutions which also impose political obligations.

These political obligations, which naturally do not amount to an international agreement but have been adopted at a forum created by such an agreement — viz. the conference of the States party to the Convention on biological weapons — can be regarded both as a result of interpreting Convention provisions (the Vienna Convention on the Law of Treaties of 1969 keeps an eloquent silence over the issue of the legal value of the texts arising from such interpretation) and as a result of an innovative approach to the Convention's terms, which cannot but confer on the latter

¹⁹ *Supra* note 14, p. 116.

²⁰ Winfried Lang, *supra*, note 18, p. 48.

the value of *sui generis* acts under international law. Taken together with the provisions of the Convention, such political obligations create a framework which one might call the regime of the Convention, without which the functioning of the Convention as an international legal act would be unthinkable — as would the fulfilment of the rights and obligations it provides for.

The effects of the Chemical Weapons Convention

As little as ten years ago the Convention on biological weapons was “the only binding international agreement which prohibits (...) a particular weapons system.”²¹ Now it is no longer alone, especially after the conclusion in 1993 of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, known as the Chemical Weapons Convention (CW), the drafting of which was initially linked with that of the BW Convention. That link is reflected in Article IX of the BW Convention which affirmed the recognized objective of effective prohibition of chemical weapons and the obligation to continue negotiations with a view to reaching an appropriate agreement. The preamble of the CW Convention, in turn, stresses that it “reaffirms the principles and objectives as well as the obligations taken” under the BW Convention, referring to the objective defined in above-mentioned Article IX. This establishes a certain interrelationship between the two conventions, as they deal with a weapon of mass destruction in its two variations.

In view of that interrelationship, the more advanced system of implementation found in the CW Convention is of special significance. Since this system provides for a verification mechanism and on-site inspection, one would be tempted to extract from it the elements which could, *mutatis mutandis*, be incorporated into the BW Convention where appropriate. It is not, of course, a question of simply borrowing settlement procedures and applying them to the sphere of biological weapons. The first practical step, predetermined by the “kinship” of the two conventions, could be a resolution of the UN General Assembly, where issues concerning the BW Convention are discussed, authorizing the Secretary-General — possibly with the assistance of government experts — to prepare a comparative analysis of the implementation systems of the two conventions, including

²¹ Jorge Morelli Pando, “Results of the Second Review Conference”, *Disarmament*, Volume X, No. 1, Winter 1986/1987, p. 58.

measures of international supervision and verification of compliance with the commitments undertaken. In other words, a good solution might be to adopt the procedure that was used, pursuant to the decision of the UN General Assembly, for the above-mentioned special report on possible consequences of the use of chemical and bacteriological weapons, prepared by the international group of experts (from 14 countries) set up under the UN Secretary-General. The report of such a group could be sent out for consideration to the States party to the BW Convention and could then, together with the governments' comments, be submitted to the next Review Conference with a view to working out appropriate recommendations.

On the whole, the strategy of strengthening the provisions of the Convention banning biological weapons answers the need for promoting the value of international humanitarian law as a major achievement and an important component of civilization and contributes to its advancement throughout the world.
