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The Counter-Biological Terrorist International Legal Framework: Where Do Things Stand Now?

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About this publication

This paper is the outcome of research carried out in the scope of the project CBRN-ITALY on International legal obligations related to Prevention, Preparedness, Response and Recovery from CBRN events and status of their implementation in Italy.

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The project aims at developing a common understanding of CBRN events and of actors involved, at mapping obligations stemming from the wide range of applicable norms of International Law and European Union Law, at exploring the implementation of applicable international obligations in Italy and at providing recommendations to address the gaps in the International, European and Italian legal and policy frameworks in all phases of the CBRN emergency management cycle.

The research activities are structured around four stages: 1. Definitions, 2. Mapping International and Regional Obligations, 3. Assessing the situation in Italy, 4. Providing recommendations.

For further information on the PRIN Project CBRN-ITALY, please visit: <http://www.cbrn-italy.it/en>

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Abstract

The research question which has guided the development of this paper is: “is the current counter-biological terrorism legal regime apt to manage the related contemporary challenges?”. The focus of the first section, indeed, is the analysis of the impact of the Covid-19 pandemic on the biological terrorist threat. In concrete terms, it highlights and explains the threat-amplifier function played by Covid-19. The second section presents an overview of the universal, binding legal instruments that form part of the counter-bioterrorism regime. It basically consists in a mapping exercise. Finally, the third section is proposed to be a critical synthesis of the information provided in the previous two parts. It aims at individuating some of the limitations of the above mentioned legal framework, both the well-established ones and the ones more directly related to the pandemic. The third section concludes with an analysis of the latest developments in the field undertaken by the US judiciary. Even if the analysis of national legislations is beyond the scope of this paper, it still provides useful hints on the direction in which the legal framework may develop.

1. Introduction

The pandemic's effect on the world, even if Covid spread has been demonstrated not to be purposeful¹ offers a clear illustration of what could be the impact of a similar fashioned bioweapon. Indeed, as experts sustain “the novel SARS-CoV-2 has several characteristics of an ideal biological weapon, including high transmission rate, long incubation period, airborne transmission, and significant morbidity/mortality”.²

The spread of Covid-19 has disrupted the everyday life of millions, generated chaos, weakened the relationship of trust between people and their governments and severely affected the economy of plenty of nations, demonstrating the potentially global scale that the consequences of such an attack may lead to. As supported by the newspaper *The Conversation* “This outbreak is the most effective model for future terrorist activities and a new model for circumventing the conventions of modern warfare”.³

It is therefore fundamental to understand where the international community now stands in terms of countering biological terrorism. In order to conduct this assessment, I will first analyse the nature of biological threats, mainly in light of the interaction between the spread of the pandemic and bioterrorism (section 1). The spread of the pandemic is recognized as a potential threat amplifier; the literature presents rapid technologic advancement as having the same potential. However, I have not to deal such new technological challenges. Then, I will provide an overview of the main international legal instruments available to manage such threat (section 2). The focus of the second section is the analysis of the international legal framework specifically affecting or specifically dealing with biological counter-terrorist activities and on the obligations that it imposes upon states. Therefore, I will not take into consideration international instruments whose scope of application is limited to terrorism only in its conventional forms. Moreover, considering the limited extension of this paper, I will only focus on universal and binding instruments, while acknowledging the fundamental role that soft law and “regional” law do also play. Finally, I will compare the emerged insecurity scenario with the said legal framework, in order to find its shortcomings and limitations (section 3).

The methodology adopted changes depending on the sections. Indeed, on the one hand the first and the third section are developed through the critical reading of the sources, composed by official documents of several international organization, legal and academic sources and newspaper articles. On the other hand, the second section consists in a mapping exercise, it is basically a legal literature review. Finally, the objective of this paper is not to provide a comprehensive analysis, but an overview. Indeed, the aim is to individuate and illustrate both potential and well affirmed legislative loopholes, so to point at the direction in which further research would be needed.

¹ Joint WHO-China Study, ‘WHO-convened Global Study of Origins of SARS-CoV-2: China Part’ (2021)

² Lyon R, *The COVID-19 Response Has Uncovered and Increased Our Vulnerability to Biological Warfare* (Military Medicine 2021).

³ ‘Coronavirus is not a bioweapon — but bioterrorism is a real future threat’ (*The Conversation*, 2021).
<<https://theconversation.com/coronavirus-is-not-a-bioweapon-but-bioterrorism-is-a-real-future-threat-135984>>.

Before proceeding, it is important to highlight that there is no universally accepted legal definition of biological terrorism, however, for the purpose of the present paper, the following definition is adopted: “bioterrorism refers to the intentional release of biological agents or toxins for the purpose of harming or killing humans, animals or plants with the intent to intimidate or coerce a government or civilian population to further political or social objectives”.⁴

2. Bioterrorism and Covid-19

It is hard to assess the overall impact that the pandemic had on bioterrorism, since events are still unfolding. However, several International Organizations have already launched the alert. The Council of Europe Committee on Counter-Terrorism⁵ was among the first to illustrate the potential linkage between the global coronavirus outbreak and the increasing employment of bioweapons at the hand of terrorist groups or by the so called “lone wolves”.⁶ In addition, it is already possible to illustrate the bioterrorist challenges emerging from the pandemic scenario.

In 2020, the United Nations Institute for Training and Research (UNITAR) issued a document entitled “Impact of Covid-19 on Violent Extremism and Terrorism”.⁷ It identifies three main categories of emerging challenges. First, “violent terrorist groups from all the ideological spectrum ... approach the pandemic as an opportunity to spread conspiracy theories and disinformation to undermine confidence in the government and also as an opportunity to increase their support base”.⁸ Second, it is likely that groups will modify their strategy of attack according to lockdown measures and restrictions to movement, shifting the targets from public spaces to critical infrastructures such as hospitals and supermarkets. Third, the expectation (already materialized) that groups will use the virus as a bioweapon, intentionally spreading it and encouraging such conduct throughout their support base, as also recognized by the UN General Assembly.⁹ From a US federal investigation¹⁰ emerged that white supremacists were organizing racial terrorist attacks aimed at spreading Covid-19 in “non-white” neighborhoods; they also

⁴ Steering Committee on Counter Terrorism (CDCT), ‘Overview and Preliminary Reflection on the Bioterrorism Threat’ (2020).

⁵ *ibid.*

⁶ A lone wolf is someone who prepares and commits terrorist acts alone, outside of any command structure and without material assistance from any group. However, they may be influenced or motivated by the ideology and beliefs of an external group and may act in support of such a group.

⁷ United Nations Institute for Training and Research, 2020. Impact of Covid-19 on Violent Extremism and Terrorism. Geneva.

⁸ *ibid.*

⁹ United Nations General Assembly (UNGA), ‘Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy’ (2021).

¹⁰ ‘White supremacists discussed using the coronavirus as a bioweapon, explosive internal document reveals’ (Insider, 2020) < <https://www.businessinsider.com/coronavirus-white-supremacists-discussed-using-covid-19-as-bioweapon-2020-3?r=US&IR=T>>.

targeted law enforcement agencies. Their plan was to get contract the virus and then to spread it “leaving saliva on door handles at local FBI offices, spitting on elevator buttons... and being in public with their perceived enemies”.¹¹

Beyond these three categories there are other two factors to be taken into account. First of all, the current public health crises have largely captured the attention of the international community, and consequently a large share of resources including financial and military ones. This has consequently reduced the share of resources allocated to other issues, including counterterrorism. One emerging concern is that the countries which are suffering heavier forms of this kind of pressure are the ones already characterized by a low availability of resources, namely the ones that are more affected or vulnerable to terrorism in general terms.¹² This is likely to create a dangerous vicious circle with worrisome potential spillovers. Indeed, “ISIL/Da’esh figures have called to seize the opportunity and launch attacks, while countries are busy fighting the pandemic”.¹³ Second, the pandemic has highlighted countries’ vulnerabilities to bioweapons. As reported by the author Regan F. Lyon : “the ambiguity of both our capabilities and weaknesses, which provided deterrence to adversarial employment of biological weapons before the pandemic, no longer exists”.¹⁴ The document illustrates how the US biodefence proved to be unprepared to confront the pandemic, bringing the example of the country’s inability to provide sufficient quantities of Personal Protective Equipment (PEE), fundamental to boost the resilience and efficiency of the healthcare system. Another example has been its inability to ensure population compliance with public health recommendations, demonstrated by the widespread emergence of anti-vax movements, and resulted in a weaker governmental capacity of “flattering the curve”. Both these trends have directly affected the county’s biological deterrence (by making explicit the weakness of its biological defence) *vis-à-vis* potential attackers. However, the unpreparedness to deploy an effective biological defence is not a US peculiarity, but a widespread condition.¹⁵ Summing up, the COVID-19 crisis has highlighted States’ lack of preparedness, and this has opened a window of opportunities for bioterrorist attackers, showing that massive

¹¹ *ibid.*

¹² see n 8.

¹³ see n 6.

¹⁴ see n 1.

¹⁵ ‘Has COVID-19 increased the threat of bioterrorism in Europe?’ (Euractiv, 2020)

<<https://www.euractiv.com/section/defence-and-security/news/has-covid-19-increased-the-threat-of-bioterrorism-in-europe/>>.

destruction was possible at reasonable costs¹⁶ and without the necessity of extremely advanced technology.¹⁷

However, rapid technological advancement is recognized as another potential driver conducting to the proliferation of bioterrorist attacks. For example, range of pathogens that can be use and produced in dual-use laboratories has become wider and the information on how to prepare and launch such an attack are becoming more and more accessible, with a primary role played by the dark web.¹⁸ While acknowledging their crucial important, dealing with such developments goes beyond the scope of this paper.

3. The International Legal Framework to Counter Bioterrorism

The 1925 Geneva “Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare”¹⁸ is the first relevant international binding instrument of the modern era. It explicitly prohibits the use of bacteriological methods of warfare; therefore, it applies to State actors in the sole context of international armed conflict confrontation.

There has been 50 years of legislative vacuum between the adoption of the said protocol and the adoption of other instruments. Due to the lack of provisions prohibiting the production of bacteriological weapons in peacetime, a truly biological armed race has occurred in those years. Indeed, the aim of the 1972 “Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction” (BWC)¹⁹ was to halt this dangerous practice, directly addressing state parties’ activities both in peace and in war time. The behaviour of non-State actors is not directly addressed, in fact, the threat of bioterrorism was not even conceived at the time. However, States are bound to take any necessary measure to prevent the development and retention of biological weapons within their jurisdiction.²⁰

In concrete terms the convention prohibits state parties to:

¹⁶ Elyasa Y, *Bioterrorism: The Development and its Regulations According to the International Law* (Lampung Journal of International Law, 2021).

¹⁷ see n 8. *ie* considering the costs and technological assets required for conducting a nuclear terrorist attack in comparison to the ones related to the deployment of a biological attack, it is far more feasible to steal a virus and disperse it

¹⁸ North Atlantic Treaty Organization (NATO), ‘Biological Weapons: Technological Progress and the Spectre of Bioterrorism in the Post-Covid-19 Era’ (draft) (2021).

¹⁸ United Nations (UN), ‘Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare’ (1925)

¹⁹ Committee on Disarmament in Geneva, ‘Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction’ (1972).

²⁰ *ibid*, art 4.

“never in any circumstances to develop, produce, stockpile or otherwise acquire or retain: (1) microbial or other biological agents ... of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; (2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict”.²¹

This convention clearly represents an improvement of the coverage offered by the previous protocol, also because of the broader definition of biological agents that it provides, which seriously enlarges the number and type of agents and pathogens covered. The BWC enforcement mechanism is based on the possibility to bring complaints to the Security Council (SC) against other state parties acting in breach of the convention.²²

A further improvement is represented by the Resolution 1540 (2004) by the UN SC (UNSCR 1540).²³ This resolution has been adopted²⁴ unanimously in the aftermath of the 9/11 attack. At the time the most pressing concern was to prevent terrorist groups or rogue states to appropriate WMD and, indeed, the resolution mainly focuses on non-State actors. According to the experts, “Though UNSCR 1540 is most accurately labelled a non-proliferation measure”²⁵ this resolution “is currently the binding international agreement most directly, and arguably most effectively, addressing bioterrorism prevention.”²⁶

In concrete terms UNSCR 1540 “decides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery”.²⁷ The resolution, however is not limited to provide this sort of negative obligations, it also contains a positive obligation upon States to “adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes”.²⁸ Interestingly, this positive obligation is also qualified by specific and detailed indications on the type of measures to be taken in order to effectively enforce it.²⁹ Moreover, for what concerns verification and enforcement, the resolution “establish[es]... a Committee..., which will report

²¹ *ibid*, art 1.

²² see n 22, art 6.

²³ United Nations Security Council (UNSC), ‘Security Council resolution 1540 concerning weapons of massive destruction’, (2004).

²⁴ the Security Council is acting in legislative capacity under the ch VII of the UN charter, therefore this resolution is binding on all the states of the international community.

²⁵ Merriam E, *The International Legal Regime Affecting Bioterrorism Prevention* (National Security Law Journal, 2014)

²⁶ *ibid*.

²⁷ see n 27, paragraph 1.

²⁸ see n 27, paragraph 2.

²⁹ see n 29.

to the Security Council for its examination..., on steps they [the states] have taken or intend to take to implement this resolution”.³⁰

Besides these major instruments, the international legal framework governing bioterrorism has mainly developed through the adoption of sectorial treaties. The scholar Ben Saul defined them: “they are treaties that require states parties to criminalize particular methods of transnational violence commonly used by terrorists”.³¹

This category includes the 1997 United Nations “International Convention for the Suppression of Terrorist Bombings”.³² The convention focuses on the prevention and criminalization of the offence of terrorist bombings defined as the intentional use of "explosives and other lethal devices";³³ therefore including biological materials. It requires States Parties to “to establish jurisdiction over and make punishable, under their domestic laws, the offences described, to extradite or submit for prosecution persons accused of committing or aiding in the commission of the offences, and to assist each other in connection with criminal proceedings”.³⁴ The United Nations 1999 “International Convention For the Suppression of The Financing of Terrorism”³⁵ uses exactly the same template of the previously described convention, but it focuses on the offence of direct and indirect financing of terrorism, in all its nuances; therefore including bioterrorism financing within its scope.

Moreover, there is the “Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation”,³⁶ adopted in 2005. The instrument aims at eradicating CBRN terrorism in the ocean, is mainly focuses on prevention. Finally, there is the “Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation”,³⁷ it is the first instrument that directly demarcates the prevention and eradication of CBRN terrorism in the said field.

4. The Limitations and Shortcomings of the Framework

³⁰ see n 27, paragraph 4.

³¹ Saul B, *The Legal Relationship between Terrorism and Transnational Crime* (International Criminal Law Review, 2017).

³² United Nations General Assembly (UNGA), ‘International Convention for the Suppression of Terrorist Bombings’ (1997).

³³ *ibid*, paragraph “key provisions”.

³⁴ *ibid*.

³⁵ United Nations General Assembly (UNGA), ‘International Convention for the Suppression of the Financing of Terrorism’ (1999).

³⁶ International Maritime Organization (IMO), ‘Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation’ (2005).

³⁷ International Civil Aviation Organisation (ICAO), ‘Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation’ (2010).

The analysis conducted in the previous paragraph highlighted that this legal regime is a composite one. There is no single instrument comprehensively regulating the area, instead, the biological counterterrorism field is regulated through an assemblage of protocols, conventions and resolutions.

The first evident shortcoming is that biological terrorism is often not addressed *per se*, but it is rather considered in the broader context of CBRN counter-terrorism³⁸ or even included in all-encompassing category of counter-terrorism itself.³⁹ For example, the BWC, which is considered to be one of the cornerstones of the regime, has achieved this status due to its substantial implications on the issue. In concrete terms, the BWC “only” affects bioterrorism through anti-proliferation measures⁴⁰, but it has not been specifically designed to manage such threat. The lack of a unitary framework and this general lack of provision specificity addressing bioterrorism is problematic at least because it results in the scarcity of specific instruments and tools. In practice, the application of more general instruments to specific situations may reduce the effectiveness of States’ capabilities in countering bioterrorism. The UNSCR 1540 represents a partial exception to this general trend.

Moreover, the realm of biodefence seems to be underregulated, as it has also been demonstrated by the Covid-19 Crisis, and provided that on average these legal instruments “primarily encourage States to take non-proliferation measures at the national level but do not define any common regulation standards in the field of bioterrorism”.⁴¹ Public healthcare systems play a fundamental role in countering biological threats, as already been discussed in the first section, and therefore constitute a fundamental asset in each State’s biodefence mechanism. Therefore, ensuring their proper functioning during emergencies should represent an absolute priority in order to boost States’ capabilities to prevent⁴² and respond to bioterrorism attacks. International Health regulations generally adopt an all-hazard approach, indeed, eventually covering bioterrorism cases when they amount to Public Health emergencies of international concern. In concrete terms, a relatively straightforward way to improve Public healthcare systems functioning during biological emergencies could be the introduction of international regulations to prevent the shortages of PPE, setting minimum stockpiled quantities or requiring States to

³⁸ as in the case of the “Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation” and of the “Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation”.

³⁹ as in the “International Convention For the Suppression of The Financing of Terrorism”.

⁴⁰ see n 29.

⁴¹ see n 3.

⁴² it is because a stronger healthcare system aims at decreasing the potential “gains” derived that a terrorist group may obtain through a bioterrorist attack while increasing its “costs”, it increases bio-deterrence.

“establish agreements with PPE manufacturers to prioritize production in declared biological emergencies”.⁴³

There are some other important shortcomings qualifying this legal regime. First of all, the definition of what constitutes a biological weapon, provided by the BWC, is vague, and there is no list of prohibited biological agents and of the respective quantities that could not be legally utilized.⁴⁴ This leads States to autonomously determine what agents are legally allowed and in what quantities, wrenching the possibility to establishing (necessary) international standards. The difficulties connected to the redaction of such lists are mainly related to the dual-use issue and to rapid technological developments. Second point, “there exists no independent verification mechanism in the biological weapons arena”,⁴⁵ it means that infringements of related legal instruments occur without being noticed, while for the chemical and nuclear regimes this is not the case. Third, such instruments only provide for weak enforcement mechanisms,⁴⁶ indeed, there is no independent international body ensuring compliance. Again, the UNSCR 1540 constitutes a partial exception to this scenario, considering that it is backed by the power of the SC. However, taking actions against non-complying states would require, according to the opinion of most States and international scholars,⁴⁷ the acceptance of an additional resolution. Another shortcoming in this resolution, that to date is the most advanced and encompassing instrument available, is the fact that while it sets obligations upon States it does not provide them the necessary means to achieve implementation.⁴⁸ This mainly affects the developing countries, which may lack the necessary economic, technological or technical resources.

In sum, it is clear that the detrimental impact of Covid-19 on bioterrorism, even if it has been recognized by major stakeholders, has not yet stimulated a response in international legal arena. This is partially justifiable considering the limited time span elapsed from the beginning of the pandemic. However, some interesting developments recently took place in the USA. On the 24th of March 2020, the Deputy Attorney General Rosen issued the Memorandum of Understanding (MoU) “Department of Justice Enforcement Actions Related to COVID-19”⁴⁹ addressing attorneys and federal law enforcement agencies. The MoU reads: “you may encounter criminal activities ranging from malicious hoaxes, to threats targeting specific individuals or the

⁴³ see n 1.

⁴⁴ see n 29.

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ Asada M, *Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation* (Journal of Conflict and Security Law, 2008)

⁴⁸ *ibid.*

⁴⁹ The United States Department of Justice, Memo from Deputy Attorney General Rosen, ‘Department of Justice Enforcement Actions Related to COVID-19’ (2020).

general public, to the purposeful exposure and infection of others with Covid-19. ... such acts potentially could implicate the Nation's terrorism related status".⁵⁰This document is innovative because it potentially equates the voluntary spreading of Covid-19 (weaponization of the virus) and misinformation to terrorist offences. It may be possible that this development will have some spillovers in the international realm.

5. Conclusion

The aim of the paper was to present an overview of the current counter-biological terrorism international legal regime and to evaluate it in light of the challenges emerged from the Covid-19 pandemic. Indeed, the pandemic has both shown the devastating effects that a large-scale biological attack may produce and uncovered the unpreparedness of the international community to deal with such kind of weapons. The international community demonstrated that its biological defence is weak, and this has resulted in the weakening of its bio-deterrence *vis-à-vis* potential attackers and in the consequent increased terrorists' attention toward biological weapons.

These evolutions have basically stimulated no reaction in the international legal environment, at least for what concerns universal and binding legal instruments. Even if it is partially justifiable, it is also necessary to state that adjustments are strongly needed, and the increased biological threat makes a strong argument in this sense. Another strong argument emerges from the fact that the framework in general is rather weak, above all if compared to the sibling frameworks dealing with chemical and nuclear counter-terrorism. It lacks specificity and mainly focuses on prevention, and largely in the form of "non-proliferation", leaving the field of biodefence underregulated. Response to bioterrorism is also addressed, mainly in the form of obligation of criminalization at the national level of certain conducts, which are equated to terrorist offences. However, the instruments containing these measures are generally sectorial in nature, which means that their scope of application is circumscribed by definition. Importantly, the field is qualified by the absence of an independent verification mechanism and by weak enforcement mechanisms. It is also problematic that often when mandatory implementation is required, the crucially important possibility to accede *ad hoc* funding is not granted. In sum, the international legal framework affecting biological counterterrorism is definitely unprepared to deal with the currently heightened threat.

However, a partial exception to this scenario is represented by the UNSCR 1540, which up to date is the instruments that most comprehensively deals with the bioterrorist threat. The improvement of this

⁵⁰ *ibid*, paragraph 2.

legal framework, indeed, may definitely start from its troubleshooting. Some interesting directions in which this reform process may proceed are illustrated in the previously discussed US MoU. In conclusion, there is definitely the need for further research, so to allow stakeholders to understand how they might improve the framework in the most effective way for the sake of whole international community.

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