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**STRENGTHENING THE BWC AND  
CRIMINALIZING BIOLOGICAL WEAPONS UNDER INTERNATIONAL LAW**

by

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Commissioned Paper

## **STRENGTHENING THE BWC AND CRIMINALIZING BIOLOGICAL WEAPONS UNDER INTERNATIONAL LAW**

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Abstract. A brief summary is given of three current negotiations to develop new international law to strengthen the international regime against biological weapons:

The Ad Hoc Group of the States Parties to the Biological Weapons Convention is developing draft proposals for strengthening the BWC, including verification measures, to be included in a legally binding instrument.

The UN Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996 to elaborate an international convention for the suppression of terrorist bombings is considering a draft convention submitted by France on behalf of the Group of Seven Major Industrialized Countries and the Russian Federation. Included among the devices whose terrorist use would be made an international crime under this draft convention are those that release "biological agents or toxins".

The Preparatory Committee on the Establishment of an International Criminal Court, created by the UN General Assembly in December 1995 to prepare a text of a convention for a permanent international criminal court, is developing a statute to define the crimes to be within the court's jurisdiction. The current rolling text of the statute includes a provision making it an international crime for any person, regardless of official position, to use "bacteriological (biological) agents or toxins for hostile purposes or in armed conflict".

In addition, this paper considers the possible creation of a convention to make it an international crime for any person to order, direct, plan or knowingly participate in the development, production, acquisition, stockpiling, retention, transfer, or use of biological weapons. Such a convention would make individual offenders, whether official or not, subject to indictment and prosecution by any State Party in which they may be found or by any international tribunal that may have appropriate jurisdiction.

## **NEGOTIATIONS IN THE AD HOC GROUP OF STATES PARTIES TO THE BWC**

The 1994 Special Conference of States Parties to the Biological Weapons Convention established an Ad Hoc Group "...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 the States Parties." Starting in July 1995, the Ad Hoc Group has met in Geneva in seven sessions, the most recent of which (14 July - 1 August 1997) is taking place at the time of this writing. An eighth session is planned for 15 September - 3 October.

Following the practice of earlier sessions of the Ad Hoc Group, the results of discussions at its sixth session (3-21 March, 1997) are reflected in working papers prepared by Friends of the Chair. These papers, on "Definitions and Objective Criteria", on "Measures to Promote Compliance", and on "Measures Related to Article X" (of the BWC, on international technological exchange and cooperation), have been incorporated by the Chair into a single "Rolling Text of a Protocol to the Convention" comprising 22 articles, plus annexes on implementation and appendices.

Aside from material in its annexes and appendices, the Rolling Text, as placed before the seventh session of the Ad Hoc Group, contains substantive text under only two articles: Article II (Compliance Measures) and Article VI (Scientific and Technological Exchange for Peaceful Purposes and Technical Cooperation). Article II itself is divided into nine parts, of which five contain substantive text, namely those entitled Definitions, Declarations, Other Visits and Procedures, Measures to Strengthen Article III of the BWC (regarding international transfers of agents and equipment), and Investigations.

Although replete with bracketed alternative formulations, qualifying footnotes, and blank spaces, and not implying agreement on scope or content, the Rolling Text represents a significant procedural move toward a negotiating format. How effective it will be as a device for facilitating progress toward a legally binding instrument will have begun to be apparent at the seventh session of the Group. In what follows, only two of the topics under negotiation will be touched upon: declarations and on-site measures.

Declarations. The Rolling Text provides for declarations in 10 different areas:

- existence and description of national biological defence programs;
- facilities associated with national biological defence programs;
- past offensive and defensive national biological programs;
- vaccine production facilities;
- high containment facilities;
- outbreaks of disease caused by listed agents;
- facilities working with listed agents;
- other production facilities (having certain dual-use production characteristics);
- other relevant facilities (for example, having aerosol chambers for tests involving micro-organisms);
- international transfers of listed agents and equipment.

The first six of these areas are included among the annual declarations and information exchanges agreed to as confidence-building measures at the second (1986) and third (1991) BWC Review Conferences. Many States Parties have submitted declarations in one or more years and several have provided important information on past offensive and defensive activities. Many other states, however, have never submitted a declaration. Both in its successes and its shortcomings, the existing non-binding regime for confidence-building declarations provides experience to be taken into account in designing a legally binding regime.

On-site measures. The Rolling Text includes provisions for three categories of on-site measures:

- non-challenge visits at declared sites, conducted at random with no implication of compliance concern;
- clarification visits, to clarify possible ambiguities or gaps in declarations not resolved by consultation procedures;

--challenge inspections or investigations to address specific compliance concerns, including investigations at particular facilities suspected of involvement in prohibited activities and field investigations, as in cases of alleged use of biological weapons or suspicious outbreaks of disease.

Listed in the Rolling Text and described in an annex are seven specific on-site activities that could be used by an investigating team, to be implemented in accord with the principles of managed access. These activities (which are also listed in the final report of the Ad Hoc Group of Governmental Experts that was established by the Third Review Conference of the BWC), are interviewing, visual observation, identification of key equipment, auditing, medical/disease-related examination, sampling and identification, and background information and data.

Some representatives of commercial enterprises and others have recommended that on-site measures be confined to challenge inspections, made on short notice and based either on allegations of the use of biological weapons or on strong evidence of other violation of the BWC. It is argued that the potential cost of other on-site measures in counter-productive controversy and in loss of proprietary information outweighs their potential value for deterrence and detection of non-compliance. Against this it is considered by others that on-site measures in addition to possible challenge inspections are needed to develop and maintain the knowledge and skill necessary for an effective inspectorate, to provide a mechanism less fraught with political consequence for clarifying ambiguities, and for the deterrent effect of an unlikely but unexpected visit.

The example set by international agreement on the on-site measures and procedures in the Chemical Weapons Convention and the accumulation of experience in actually implementing them, if successful, hold promise for resolving differences regarding the scope and conduct of on-site measures to strengthen the BWC.

Broad objectives of compliance measures. The generally agreed objectives of declarations and on-site measures are to increase transparency and thereby avoid false suspicions or allegations of non-compliance and, in conjunction with other measures, to facilitate deterrence and detection of prohibited activities.

While obviously not relevant to states that remain outside the BWC, compliance measures will act to deflect States Parties, now numbering more than 130, from biological weapons activities should they become tempted to engage in them.

Whether the compliance measures ultimately agreed achieve their objectives will depend on the vigilance, determination, and even-handedness of the States Parties,

especially the leading nations, in implementing them and in dealing with violations. As compared with less formal political agreements, an advantage of compliance measures that are formally negotiated and legally binding, particularly if they are implemented by an international body rather insulated from political pressures, is that such measures are more difficult for states with competing agendas to ignore.

Notwithstanding the advantage of a legally binding regime over the present arrangements, the prescription of a legal obligation is also a prescription of a possible treaty violation. Therefore, in order to avoid the risk of subjecting states to frivolous or malicious disputes, with the further risk of damaging the international regime against biological weapons itself, utmost care is needed to devise compliance measures that are clear and cost-effective.

## **BIOLOGICAL WEAPONS AND INTERNATIONAL CRIMINAL LAW**

As with other arms control and disarmament treaties, the BWC holds states, not individuals, responsible for acting in accord with its provisions. Recent worldwide interest in the utility of international criminal law creates new opportunities for deterring, detecting, and punishing biological weapons offences and for strengthening the civilized norm that those who commit such offences are *hostis humanis generis*, enemies of all humanity.

Article IV of the BWC obliges States Parties to "take any necessary measures to prohibit and prevent" prohibited activities "within the territory of such State, under its jurisdiction or under its control anywhere". This provision has been viewed as a requirement for States Parties to establish appropriate domestic criminal law applicable to persons under their national jurisdiction. Many States Parties have such law, and its enactment by states that do not is strongly to be encouraged.

Nevertheless, domestic law against biological weapons clearly does nothing to deter or punish activities prohibited by the BWC if such activities are committed under the official orders or with the complicity or acquiescence of the state. In such cases, if the violation is detected, the international community may be left with a bitter choice between doing nothing or threatening or actually imposing sanctions costly in lives and well-being of the innocent.

Neither does domestic law address the case in which a person commits a biological weapons offence in one state but then appears in another state that lacks jurisdiction over the offence.

These gaps in the existing regime against biological weapons can, to a significant extent, be addressed by the creation of appropriate international criminal law. This is illustrated by two negotiations currently in progress under the auspices of the UN General Assembly, one directed against terrorist use of such weapons and the other with applicability even to individual government officials and heads of state.

### **DRAFT INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS**

UN General Assembly resolution 51/210 of 17 December 1996 established an Ad Hoc Committee, open to all States Members to elaborate an international convention for the suppression of terrorist bombings. On 11 February 1997, France, on behalf of the Group of Seven Industrialized States and the Russian Federation, submitted to the General Assembly a draft convention on terrorist bombings which is now before the above-mentioned Ad Hoc Committee.

The draft bombing convention makes it an offence to deliver, place, or discharge any device that releases "biological agents or toxins" with the intent to cause death or serious bodily injury, or to attempt to do so, or to organize or direct others to do so. The draft convention includes similar provisions dealing with explosive, incendiary, and toxic chemical bombs and devices.

The draft convention would obligate a State Party in which an offender or alleged offender is found, without exception whatsoever and whether or not the offence was committed in its territory, either to extradite the person or to submit the case to its competent authorities for prosecution in accordance with the laws of that state. The same obligation, *aut dedere aut judicare* (either extradite or adjudicate), is included in several modern international conventions already in force, including conventions for the suppression and punishment of aircraft hijacking and sabotage (1970; 1971), crimes against internationally protected persons (1973), hostage taking (1979), theft of nuclear materials (1980), torture (1984), and crimes against maritime navigation (1988).

The draft bombing convention applies only to acts committed by terrorists. Article 3 specifically states that it does not apply to acts by "military forces of a State in connection with their official duties." It is to be hoped that this limitation receives close scrutiny for, without revision or elaboration, it might engender the false impression to some that the use of biological (and chemical) weapons, both in war and outside of war, is not prohibited to military forces.

Both to avoid possibly harmful ambiguities in the bombing convention and to maximize its constructive synergism with the BWC, closer interaction between their hitherto rather separate constituencies should be encouraged.

## CONVENTION TO ESTABLISH AN INTERNATIONAL CRIMINAL COURT

The UN General Assembly, in January 1997, decided that, circumstances permitting, a diplomatic conference of plenipotentiaries be held in 1998, with a view to finalize and adopt a convention on the establishment of an international criminal court. This followed many years of study and drafting of a statute for such a court by the International Law Commission, a body of experts appointed by the General Assembly to codify and develop international law -- followed by further study and drafting by an ad hoc committee and then a Preparatory Committee established by the General Assembly in December 1995.

The Preparatory Committee is expected to complete the drafting of a widely acceptable consolidated text of a convention in April 1998, for submission later in the year to the diplomatic conference, to be held in Rome.

The present rolling draft text of the statute of the court includes as a crime under its jurisdiction the use of "bacteriological (biological) agents or toxins for hostile purposes or in armed conflict". Regarding individual responsibility for crimes covered in the draft statute, the rolling text provides that "a person is criminally responsible if that person commits, orders, induces, or knowingly facilitates the commission of such a crime which in fact occurs or is attempted." Moreover, the statute is to be applicable to "all persons without any discrimination whatsoever" Further, "official capacity as Head of State or Government, or as a member of a Government or parliament or as an elected representative, or as a government official shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [*per se*] constitute a ground for reduction of the sentence."

Certainly, the existence of an international criminal court operating under such a statute could have profound implications for the prohibition of biological weapons, extending beyond actual use to include attempted use and to cover perpetrators and all who order or knowingly aid them in the prohibited activity, regardless of official position. Faced with the possibility of indictment and, if brought before the court, conviction, sentencing and punishment, those contemplating biological weapons activities, from terrorists to heads of state, might well reconsider.

It is not appropriate here to attempt to address the many technical issues connected with the creation and operation of an international criminal court. But, as with the bomb convention, the knowledge and perspectives of those striving to strengthen the constraints against biological weapons should be brought to bear on the further development of the statute under which the International Criminal Court would operate.

**A DRAFT CONVENTION FOR THE PREVENTION AND PUNISHMENT OF  
THE CRIME OF DEVELOPING, PRODUCING, ACQUIRING, STOCKPILING,  
RETAINING, TRANSFERRING OR USING BIOLOGICAL WEAPONS**

Considering that a large majority of states, including all the leading states of the world, are parties to the BWC, it seems reasonable to create international criminal law that would extend the prohibitions of the BWC to individual persons.

The provisions of an international convention to criminalize biological (or biological and chemical) weapons could in large part be modeled on treaties in force that criminalize various other abhorrent crimes threatening to the entire world community, including genocide, aircraft hijacking, harming diplomatically protected persons, hostage taking, nuclear theft, torture, and crimes against maritime navigation. Relevant provisions would include those dealing with the scope of individual criminal responsibility, categories of natural and legal persons covered, establishment of national jurisdiction, obligation to adjudicate or extradite, obligation of states parties to render judicial assistance in investigations and criminal proceedings, and assurance of due process and fair treatment to the accused.

A model treaty criminalizing both biological and chemical weapons has been drafted by the Harvard Sussex Program on CBW Armament and Arms Limitation and has been further developed with the advice of a committee of legal experts. It is attached to this paper as an appendix.

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APPENDIX

Draft 10 March 1997

DRAFT CONVENTION ON THE PREVENTION AND PUNISHMENT OF  
THE CRIME OF DEVELOPING, PRODUCING, ACQUIRING,  
STOCKPILING, RETAINING, TRANSFERRING OR USING  
BIOLOGICAL OR CHEMICAL WEAPONS

PREAMBLE

The States Parties to this Convention,

Recognizing that any use of disease or poison for hostile purposes is repugnant to the conscience of humankind;

Believing that the maintenance and reinforcement of the worldwide norm against biological and chemical warfare is essential to international and domestic peace and security;

Considering that biological and chemical weapons pose a threat to the well-being of all humanity and to future generations;

Recognizing that the development, production and use of biological and chemical weapons are within the capability of States as a result of the decisions and actions of individual government officials and personnel, as well as within the capability of other entities and of individuals;

Considering that knowledge and achievements in the fields of biology, chemistry and medicine should be used exclusively for the health and well-being of humanity;

Desiring to encourage the peaceful and beneficial advance and application of these sciences by protecting them from adverse consequences that would result from their hostile exploitation;

Recalling that the development, production, stockpiling, acquisition, retention, transfer and use of biological and chemical weapons are prohibited by the Geneva Protocol of 1925, the Biological Weapons Convention of 1972 and the Chemical Weapons Convention of 1993, and other international agreements;

Seeking to ensure and enhance the effectiveness of the Biological Weapons Convention and the Chemical Weapons Convention, to which the majority of States are parties or signatories;

Recalling that

every State Party to the Biological Weapons Convention is obliged to take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of biological weapons within its territory or under its jurisdiction or control anywhere and that

every State Party to the Chemical Weapons Convention has that same obligation as regards chemical weapons as well as an obligation to prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction from undertaking any activity prohibited to a State Party under the Convention and that

every State Party to the Chemical Weapons Convention has accepted the obligation to extend its penal legislation to any such activity prohibited to a State Party under the Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law;

Noting that many States have made it an offence for persons under their jurisdiction to engage in activities prohibited by the Biological Weapons Convention or the Chemical Weapons Convention, and providing penalties for such offences;

Determined, for the sake of human beings everywhere and of future generations, to eliminate the threat of biological and chemical weapons;

Have agreed as follows:

## ARTICLE I

1. Any person commits an offence if that person:

(a) orders, directs, plans or knowingly participates in the development, production, acquisition, stockpiling, retention, transfer or use of biological or chemical weapons; or

(b) attempts to commit any offence described in sub-paragraph (a); or

(c) assists, encourages or induces, in any way, anyone to engage in the development, production, acquisition, stockpiling, retention, transfer or use of biological or chemical weapons; or

(d) threatens to use biological or chemical weapons to cause death or injury to any person or in order to compel a natural or legal person, international organization or State to do or refrain from doing any act.

2. It shall not be a defense against prosecution or extradition for the above offences that a person acted in an official capacity or under the orders or instruction of a State, a superior officer, a public or private authority or any other person or for any other reason.

3. Notwithstanding the above provisions of this Article, nothing in this Convention shall be construed as prohibiting activities that are not prohibited under the Chemical Weapons Convention or the Biological Weapons Convention or that are directed toward the fulfillment of a State's obligations under such convention and that are conducted in accordance with its provisions.

## ARTICLE II

1. Biological weapons are defined, in accordance with Article I of the Biological Weapons Convention, as:

(a) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;

(b) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

2. Chemical weapons are defined as in Article II of the Chemical Weapons Convention.

3. Person means any natural person or, to the extent consistent with municipal law, any legal entity.

### ARTICLE III

Each State Party shall make the offences set forth in Article I punishable by appropriate penalties which take into account the grave nature of those offences.

### ARTICLE IV

1. Each State Party to this Convention shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article I which are committed:

(a) in the territory of that State or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State; or

(c) when, if that State considers it appropriate, the alleged offender is a stateless person whose habitual residence is in its territory.

(d) when the offence is committed to harm that State or its citizens or to compel that State to do or abstain from doing any act.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article I in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to Articles VI and VII.

3. Each State Party shall inform the Depository of the legislative and administrative measures taken to implement this Convention.

4. Each State Party shall designate a contact point within its government to which other States Parties may communicate in matters relevant to this Convention. Each State Party shall make such designation known to the Depository.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

6. Jurisdiction with respect to the offences set forth in Article I may also be exercised by any international tribunal that may have jurisdiction in the matter.

#### ARTICLE V

1. Upon being satisfied that the circumstances so warrant, any State Party to this Convention in the territory of which the alleged offender is present shall take such person into custody or take other measures to ensure the presence of such person for the purpose of prosecution or extradition.

2. The custody and other measures shall be as provided in the law of that State Party but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

3. Such State shall immediately make a preliminary inquiry into the facts.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with Article IV and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant the detention of that person. The State which makes the preliminary inquiry contemplated in paragraph 3 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

## ARTICLE VI

1. The offences set forth in Article I shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. For purposes of extradition between States Parties, the offences set forth in Article I shall not be regarded as a political offence or as an offence inspired by political motives.
3. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may, if it decides to extradite, consider this Convention as the legal basis for extradition in respect of the offences set forth in Article I. Extradition shall be subject to the other conditions provided by the law of the requested State.
4. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in Article I as extraditable offences as between themselves subject to the conditions provided by the law of the requested State.
5. The offences set forth under Article I shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with paragraph 1 of Article IV.

## ARTICLE VII

The State Party in the territory of which the alleged offender is found shall, if it does not extradite such person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

## ARTICLE VIII

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in Article I.
2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

## ARTICLE IX

States Parties shall cooperate in the prevention of the offences set forth in Article I, particularly by:

- (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories;
- (b) exchanging information and coordinating the taking of administrative and other measures as appropriate to prevent commission of those offences.

## ARTICLE X

Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in Article I shall be guaranteed fair treatment at all stages of the proceedings, including;

- (a) assistance in communicating immediately with appropriate authorities of the State entitled to exercise rights of protection;
- (b) the right to be visited by a representative of the State of which that person is a national.
- (c) enjoyment of all the rights and guarantees provided by the law of the State in the territory of which such person is present; and
- (d) treatment in accord with internationally guaranteed human rights.

## ARTICLE XI

1. Each State Party shall, in accordance with its national law, provide to the Depositary as promptly as possible any relevant information in its possession concerning:

(a) the circumstances of the offence; and

(b) the measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.

2. The State Party where the alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Depositary, who shall transmit the information to the other States Parties.

## ARTICLE XII

Any dispute between States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice.

## ARTICLE XIII

1. Five years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Depositary, a Conference of States Parties shall be held at [Geneva, Switzerland], to review the operation of the Convention with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realized.

2. At intervals of seven years thereafter, unless otherwise decided upon, further sessions of the Conference shall be convened with the same objective.

ARTICLES XIV *et seq.* on modalities, to include the following:

AMENDMENT  
DURATION  
SIGNATURE AND RATIFICATION  
ENTRY INTO FORCE  
DEPOSITARY  
AUTHENTIC TEXTS