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Strengthening the Biological Weapons Convention

Review Conference Paper No 4

The US Statement at the Fifth Review Conference: Compounding the Error in Rejecting the Composite Protocol

Graham S. Pearson, Malcolm R. Dando &
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THE US STATEMENT AT THE FIFTH REVIEW CONFERENCE: COMPOUNDING THE ERROR IN REJECTING THE COMPOSITE PROTOCOL

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Introduction

1. The twenty-fourth session of the Ad Hoc Group session in July - August 2001 opened with plenary statements on Monday and Tuesday 23 and 24 July 2001 on behalf of over 50 of the approximately 55 States engaged in the negotiation of the Protocol that the Chairman's composite Protocol text should form the basis for the political decisions to adopt the Protocol before the Fifth Review Conference later in 2001. On the morning of Wednesday 25 July, a further two States Parties spoke in support of the Protocol.

2. The United States then spoke saying that *"After extensive deliberation, the United States has concluded that the current approach to a Protocol to the Biological Weapons Convention,...is not, in our view, capable of achieving the mandate set forth for the Ad Hoc Group, strengthening confidence in compliance with the Biological Weapons Convention."* They went on to say that *"We believe the objective of the mandate was and is important to international security, we will therefore be unable to support the current text, even with changes, as an appropriate outcome of the Ad Hoc Group efforts."*

3. A detailed evaluation¹ of the United States statement analysed its various elements and concluded that the rejection by the United States of the Protocol was a huge mistake based on illogical assessments. Many of the elements and arguments in the United States statement are incorrect and not valid. Several are based on alleged concerns that have no basis in the actual composite Protocol text. It was evident that the United States was indeed making a "stunning" mistake² and was failing to take all possible steps to strengthen the international norm totally prohibiting biological weapons and to obstruct the proliferation of biological weapons. The evaluation concluded by urging the United States to urgently reconsider its position.

4. Consequently, when following the anthrax attacks in the United States in September and October 2001, there was on 1 November 2001 a United States Presidential statement addressing the strengthening of the Convention, this was welcomed as it demonstrated a US intention to re-engage in the multilateral activities to ensure the prevention of biological

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¹Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The US Rejection of the Composite Protocol: A Huge Mistake based on Illogical Assessments*, University of Bradford, Department of Peace Studies, Evaluation Paper No 22, August 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

²Barbara Hatch Rosenberg, *Allergic Reaction: Washington's Response to the BWC Protocol*, Arms Control Today, July/August 2001, pp.3-8. Available at http://www.armscontrol.org/act/2001_07_08/rosenbergjul_aug01.asp?print

weapons. The Presidential statement³ said that *"The United States is committed to strengthening the Biological Weapons Convention (BWC) as part of a comprehensive strategy for combating the complex threats of weapons of mass destruction and terrorism."* and went on to propose that *'...all Parties:*

- *Enact strict national criminal legislation against prohibited BW activities with strong extradition requirements;*
- *Establish an effective United Nations procedure for investigating suspicious outbreaks or allegations of biological weapons use;*
- *Establish procedures for addressing BWC compliance concerns;*
- *Commit to improving international disease control and to enhance mechanisms for sending expert response teams to cope with outbreaks;*
- *Establish sound national oversight mechanisms for the security and genetic engineering of pathogenic organisms;*
- *Devise a solid framework for bioscientists in the form of a code of ethical conduct that would have universal recognition; and*
- *Promote responsible conduct in the study, use, modification, and shipment of pathogenic organisms.*

The statement continues to say that *"Our objective is to fashion an effective international approach to strengthen the Biological Weapons Convention. The ideas we propose do not constitute a complete solution to the use of pathogens and biotechnology for evil purposes. However, if we can strengthen the Convention against the threat of biological weapons, we will contribute to the security of the people of the United States and mankind as a whole."*

5. In our briefing book⁴ for the Fifth Review Conference, we emphasized that the fact that the United States had recently made proposals was to be welcomed and that it was clear from the Presidential statement that the United States was expecting to engage in dialogue about these proposals as the statement said that *"I have directed my Administration to consult with our friends and allies, as well as with Congress, industry, and non-governmental experts, on these proposals. We look forward to hearing the new ideas on how best to achieve our common aim of eliminating biological weapons."* We underlined the importance of the Fifth Review Conference recognizing the continuing need to strengthen the BTWC and the need to explore **all** proposals for achieving this. Such proposals would need to be explored in an appropriate multilateral forum which might be a continuation of the Ad Hoc Group. The key requirement is to continue to work urgently on the strengthening of the Convention through a legally binding instrument.

³The White House, *Statement by the President: Strengthening the International Regime against Biological Weapons*, 1 November 2001, Available at <http://www.whitehouse.gov/news/releases/2001/11/print/20011101.htm>

⁴Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims (eds), *Strengthening the Biological Weapons Convention: Key Points for the Fifth Review Conference*, University of Bradford, Department of Peace Studies, November 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

6. This then was the background to the Fifth Review Conference of the Biological and Toxin Weapons Convention which opened on Monday 19 November 2001 with statements by many of the participating States Parties. Most of these referred to the anthrax attacks in the United States, expressed regret at the failure of the Ad Hoc Group to complete the negotiation of a Protocol and indicated the importance of continuing to work multilaterally on the strengthening of the effectiveness and implementation of the Convention. The statement⁵ on Monday 19 November 2001 by Belgium on behalf of the European Union -- and the Central and Eastern European countries associated with the EU and the associated countries Cyprus, Malta and Turkey -- totalling some 27 countries, was representative of that of many States Parties.

7. The EU statement referred to the terrorist acts which struck the United States on 11 September, as well as the anthrax attacks and expressed solidarity with the American people and the government of the United States. It then went on to say that the EU *"believes that disarmament and non-proliferation on a multilateral basis are today more than ever essential in order to deny terrorists and terrorist organizations any access to more powerful means to implement their abominable activities. The EU will continue to support fully international efforts in the fields of disarmament, arms control and non-proliferation."*

8. The EU stressed that *"Combating terrorism that makes use of biological and toxin weapons is a duty for all States Parties to the BTWC."* and that *"The international community is entitled to expect that the States taking part in this Conference will spare no effort to prevent biological weapons from being used by terrorists."* The statement then noted that the EU and its Member States had over the past five years *"taken an active part in the negotiations on a legally binding Protocol establishing a regime to strengthen confidence in the implementation of the Convention."* and noted that the Council of the European Union had in its conclusions of 11 June 2001 *"confirmed its commitment to contribute to drawing up a Protocol including the set of concrete measures which the EU's Common Position of 17 May 1999 defined as essential for the establishment of an instrument which would effectively reinforce the Convention."* The statement went on to say that *"We deeply regret that during the 24th session of negotiations, the Ad Hoc group was not able to conclude an agreement on such an instrument to reinforce the Convention. The EU considers it essential that the Ad Hoc Group's mandate -- which had been unanimously agreed at the 1994 Special Conference, and which remains fully in force -- be successfully implemented."*

9. The EU then said that *"The Review Conference must be the opportunity to give a new impulse to our work by defining a series of commitments and additional measures that States should adopt in order to strengthen the implementation of the Convention in all of its provisions: compliance with the fundamental norm defined in article I, non-proliferation and export controls, measures in case of concerns over compliance with the Convention (e.g. investigation measures), technical assistance and international cooperation."* and added that *"Some of these measures will need to be detailed further. This should be the subject of our work after this Conference."* The EU statement concluded by saying that *"It is essential that the Conference agree to a regular follow-up to the work to enable the States Parties to strengthen the Convention comprehensively."*

⁵Belgium, *Fifth Review Conference of the States Parties of the BTWC*, Statement by Belgium on behalf of the EU, 19 November 2001.

10. The EU statement had thus indicated a willingness to consider *a series of commitments and additional measures* to strengthen the Convention and recognized the necessity of follow-up meetings to detail such measures further as the three week period of the Review Conference is too short for substantive negotiation on the detail of such measures.

The United States Statement

11. The United States statement⁶ was made by John Bolton, Under Secretary of State for Arms Control and International Security, on Monday 19 November 2001. This was a five page statement with four sections preceded by an introduction:

- a. Introduction
- b. Straight Talk About BWC Compliance
- c. New Approaches to the BW Threat
- d. U.S. Proposals for Strengthening the BWC
- e. Review Conference Objectives

This analysis considers each of these sections in turn. For clarity, particular language from the statement that is evaluated is reproduced in *bold italics*.

A. Introduction

12. The introduction noted that President Bush in his recent statement to the United Nations General Assembly had warned that the world faced the horrifying prospect of terrorists searching for weapons of mass destruction and that they can be expected to use biological weapons the moment they are capable of doing so. The statement went on to say that:

We, the parties to the Biological Weapons Convention, must demonstrate an unwavering commitment to fighting this undeniable threat. We must overcome years of talking past each other, and address the real issues. Will we be courageous, unflinching, and timely in our actions to develop effective tools to deal with the threat as it exists today, or will we merely defer to slow-moving multilateral mechanisms that are oblivious to what is happening in the real world?

Widespread agreement could be expected for these words -- apart from the final clause *or will we merely defer to slow-moving multilateral mechanisms that are oblivious to what is happening in the real world?* This final clause indicates an inaccurate perception in Washington of the real world as multilateral mechanisms are increasingly the norm in international relations -- whether the subject is nuclear safety and safeguards as in the IAEA, chemical weapons as in the OPCW, international public, animal or plant health as in the WHO, OIE and FAO, the environment as in the Secretariat of the Convention on Biological Diversity or the development of regional policies and directives as in the European Union. Indeed, whether *multilateral mechanisms* are *slow-moving* or not depends on the readiness of governments to work constructively together. It is simply not true to suggest that such multilateral mechanisms *are oblivious to what is happening in the real world*.

⁶John R. Bolton, *Statement of the Honorable John R. Bolton, Under Secretary of State for Arms Control and International Security, United States Department of State to the Fifth Review Conference of the Biological Weapons Convention*, 19 November 2001. Available at <http://www.us-mission.ch/press2001/1911bolton.htm> and at <http://usinfo.state.gov/topical/pol/arms/stories/01111902.htm>

13. The statement continues by saying that

The United States has repeatedly made clear why the arms control approaches of the past will not resolve our current problems. This is why we rejected the flawed mechanisms of the draft Protocol previously under consideration by the Ad Hoc Group. Countries that joined the BWC and then ignore their commitments and certain non-state actors would never have been hampered by the Protocol. They would not have declared their current covert offensive programs or the locations of their illegal work -- nor would the draft Protocol have required them to do so. By giving proliferators the BWC stamp of approval, the Protocol would have provided them with a "safe harbor" while lulling us into a false sense of security.

This assertion in the first sentence implies that past arms control approaches are ineffective -- and thus suggests that arms control approaches should no longer be addressed -- but without any indication as to what alternative is feasible in the real world. Certainly the time when the superpowers could impose a solution on the rest of the world is long gone -- and the reality is that a negotiated multilateral agreement is the **only** way forward in this day and age. The dismissal in the second sentence of the Protocol reiterates the assertion of 25 July 2001 and is again backed by illogical assessments⁷. The statement in the third sentence that **Countries that joined the BWC and then ignore their commitments and certain non-state actors would never have been hampered by the Protocol** is not an argument against the Protocol but rather an argument that underlines the limitations of the Convention and the failure of the States Parties in general -- and the Depositaries in particular -- to utilize the mechanisms in the Convention and developed at successive Review Conferences to address concerns. Indeed, concern about countries ignoring their commitments is one of the compelling arguments in support of the Protocol as this would require States Parties to establish National Authorities to meet their obligations under the Protocol -- and the mechanisms in the Protocol to address ambiguities, uncertainties, anomalies and omissions would make it very much harder for any State Party to ignore its commitments. The assertion that **non-state actors would never have been hampered by the Protocol** is also incorrect as the implementation of the Protocol would require States Parties to enact penal legislation to make work on biological weapons a criminal offence, would require improved implementation of Article III of the Convention in respect of transfers, and over time the enhancement of infrastructure relating to biosafety and GMP in the States Parties would not only bring benefits for health and safety but would also hamper the activities of non-state actors. The Protocol was never being proposed or presented as a universal panacea but simply as an additional tool to help the international community tackle the problems associated with a strengthened regime to prevent the development, production and acquisition of biological weapons.

14. The fourth sentence **They would not have declared their current covert offensive programs or the locations of their illegal work -- nor would the draft Protocol have required them to do so** is a surprising assertion that ignores the reality of the real world. Does the United States really believe that any State would enter into an agreement to declare **their current covert offensive programs**? Certainly, there is no prospect of any Protocol containing such a requirement. Such a requirement would have to proceed from the assumption that States Parties were ignorant, or contemptuous, of their obligations under Articles I and/or II of the Convention. But the Protocol is intended to strengthen the

⁷Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The US Rejection of the Composite Protocol: A Huge Mistake based on Illogical Assessments*, University of Bradford, Department of Peace Studies, Evaluation Paper No 22, August 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

Convention -- not to undermine its credibility. Although we have argued⁸ that there is much to be said for declarations in the draft Protocol of the locations of **past** offensive programmes and their locations -- and for a regime that builds confidence that such facilities are only used for permitted activities -- such ideas were not fully developed by the negotiators of the draft Protocol. This same charge could be leveled at the BTWC -- but then the United States fully supports the Convention even though its compliance mechanisms are limited.

15. The fifth sentence *By giving proliferators the BWC stamp of approval, the Protocol would have provided them with a "safe harbor" while lulling us into a false sense of security* is inaccurate as proliferators, who were States Parties to the Convention, would be unlikely to accede to the Protocol as the obligations of the Protocol would increase the chance that prohibited activities were exposed -- and, indeed, this is one of the clear benefits from the Protocol. This incorrect assertion is reiterated in different words in the next paragraph when the question was asked *"Do we really believe that a Protocol that would allow violators to conduct an offensive biological weapons program while publicly announcing their compliance with the agreement is "better than nothing?"*" This assertion completely ignores the provisions in the Protocol for mandatory declarations and the follow-up procedures for declarations including the clarification of uncertainties, ambiguities, anomalies and assertions let alone the provisions for addressing compliance concerns.

16. The introduction then goes on to say that before we consider new ways to strengthen the Biological Weapons Convention *we must first confront the failure of many states to abide by that very document. Too many states are parties to the BWC but have not lived up to their commitments.* Whilst a laudable statement, it behoves any State Party making such a statement to first examine their own record with regard to the use of the procedures already available under the Convention to challenge such States Parties. Procedures for the investigation of complaints of non-compliance have always existed under Article VI, but if the United States did not wish to involve the Security Council, it could have used Article V instead and have a Formal Consultative Meeting convened, as Cuba did in 1997⁹. It is to be noted that when John Bolton gave a press conference¹⁰ in Geneva immediately after making his statement to the Review Conference, he was repeatedly asked by a journalist, who noted that *the BW Convention has certain provisions to clarify the kind of allegations you have made at least vis a vis those countries that are also states parties, the question why hasn't the U.S. yet entered this kind of procedures. Like for instance Cuba did years ago when they had some allegations against the U.S. Are you going to do that?* The journalist received no answer as to whether the US would or would not use the procedures elaborated at previous Review Conferences under Article V to address compliance concerns.

⁸Graham S. Pearson, *The Ad-Hoc Group: Past Biological Weapons Facilities* in Erhard Geissler, Lajos Gázsó and Ernst Buder (eds), *Conversion of Former BTW Facilities*, Kluwer Academic Press, Dordrecht, NATO Science Series, 1. Disarmament Technologies, Vol 21. pp. 201-208. Graham S. Pearson, *Past Biological Weapons Facilities: An Opportunity for the Ad Hoc Group*, ASA Newsletter 97-6, 4 December 1997, issue number 63, p.1, 16-17.

⁹See account in Graham S. Pearson, *Article V: Consultation and Cooperation* in Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims (eds), *Strengthening the Biological Weapons Convention: Key Points for the Fifth Review Conference*, University of Bradford, Department of Peace Studies, November 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

¹⁰John R. Bolton, *Transcript of Press Briefing by the Honorable John R. Bolton, Under Secretary of State for Arms Control and International Security, United States Department of State at the Palais des Nations, Geneva, Switzerland*, 19 November 2001. Available at <http://www.us-mission.ch/press2001/1911boltonpress.htm> and <http://usinfo.state.gov/topical/pol/arms/stories/011112001.htm>

17. It then declares that *The United States will simply not enter into agreements that allow rogue states or others to develop and deploy biological weapons.* This emphatic assertion is again laudable -- but it needs to be borne in mind when considering the proposals put forward by the United States later in the statement and used as test of their value. The introduction concludes by again hitting the Protocol by saying that *We will continue to reject flawed texts like the draft BWC Protocol, recommended to us simply because they are the product of lengthy negotiations or arbitrary deadlines, if such texts are not in the best interests of the United States and many other countries represented here today.* This is a misrepresentation of the reality of the situation -- the composite Protocol was recommended as being an effective and worthwhile strengthening of the BTWC and was the best that could be negotiated at this time. Many States Parties would have liked to have seen a stronger Protocol but the political reality is that the States Parties -- and particularly the United States - - were not prepared to agree to a stronger Protocol. It is therefore disingenuous, to say the least, of the United States to claim that the composite Protocol was not in the best interests of *many other countries represented here today* as it was evident from the statements in July that over 50 of the 55 or so States Parties engaged in the Ad Hoc Group negotiations of the Protocol considered that the composite Protocol was in their best interests.

B. Straight Talk About BWC Compliance

18. This section of the statement starts in the first paragraph by noting that *While the vast majority of the BWC's parties have conscientiously met their commitments, the United States is extremely concerned that some states are engaged in biological weapons activities that violate the Convention.* and goes on to say that *We also are concerned about potential use of biological weapons by terrorist groups, and states that support them. So I plan to name names. Prior to September 11, some would have avoided this approach. The world has changed, however, and so must our business-as-usual approach.* These words suggest that the approach being adopted of naming names is new. This is, however, not the case as 10 years ago at the Third Review Conference two of the Depositary States, the United States and the United Kingdom, named names. The United States stated¹¹ that:

Among the proliferators are states which have thrown aside the international obligations and standards they assumed when they signed and in some cases ratified the BW Convention. We must not and cannot turn a blind eye to states not in compliance with the object and purpose of the Convention. ... We have a striking recent example of the threat posed by noncompliance and the importance of addressing the issue head-on. That example is Iraq, which has clearly had a biological weapons program, even though it had signed the Biological Weapons Convention. ... We believe the Soviet Union and other states have extensive biological weapons programs in violation of the BW Convention. We insist that those signatories and Parties not in compliance with their obligations "get their house in order" and take the steps necessary towards full compliance. We will strongly urge the Conference to express similar sentiments in its final document.

At the same Review Conference, the United Kingdom also named names by stating¹² that:

¹¹Ronald F. Lehman II, *Statement by Ambassador Ronald F. Lehman II Head of United States Delegation, Third Review Conference, Biological and Toxin Weapons Convention, 10 September 1991.*

¹²Tessa Solesby, *Statement by Ambassador Solesby, Leader of the Delegation of Great Britain and Northern Ireland to the Third Review Conference of the Parties to the Convention on the Prohibition of the Development,*

Our concern about the compliance of States Parties with the Convention is based on real grounds. We have already referred to ... Iraq The United Kingdom also has long-standing concerns over the non-compliance of the Soviet Union with the Biological and Toxin Weapons Convention.

19. These concerns were reflected in the Article I section of the Final Declaration of the Third Review Conference where the Conference *"expresses concern at statements by some States Parties that compliance with Articles I, II and III has been, in their view, subject to grave doubt in certain cases..."*

20. Similarly at the Fourth Review Conference, four States Parties -- Australia, France, and two Depositary States, the UK and the US, all named both Iraq and the former Soviet Union as being non-compliant in the General Debate. The UK said¹³ that *"The existence of a massive offensive biological weapons programme conducted illegally for years in the Soviet Union has recently come to light."* and on Iraq said that *"thousands of Coalition troops, as well as neighbouring civilian populations, were at real risk from Saddam Hussein's extensive biological weapons programme during the Gulf War."* The United States noted¹⁴ that *"After more than twenty years under that global norm, the threat of biological warfare remains all too real. In 1992, for example, President Yeltsin publicly and bravely acknowledged and then renounced the massive offensive biological weapons program Russia had inherited from the Soviet Union. The challenge to demonstrate full eradication of that programme still remains."* In respect of Iraq, the US said *"Through UNSCOM and other sources, we have learned in disturbing detail about the scope, ambition, and persistence of Saddam Hussein's biological weapons program in Iraq."* Finally, the US said *"Overall, the United States believes that twice as many countries now have or are actively pursuing offensive biological weapons capabilities as when the Convention went into force."*

21. In 1996, at the Fourth Review Conference, the United States proposed¹⁵ the following language to the Committee of the Whole that *"The Conference emphasizes the vital importance of full implementation by all States Parties of all the provisions of the Convention and notes its concern that compliance with Article I, by some States Parties, has been subject to doubt in certain specific cases. The Conference notes the efforts of UNSCOM to address some of these concerns and expresses its support for the early and satisfactory completion of UNSCOM's important work. The Conference also notes the important decree by the President of the Russian Federation in April, 1992, indicating that his country would accomplish its obligations under the Convention. The Conference expressed the hope that objectives outlined in that decree would rapidly be fulfilled. The Conference agrees that the application by States Parties of positive approaches in accordance with the provisions of the Convention is in the interests of all States Parties and that any non-compliance with its provisions would undermine confidence in the Convention."* The negotiations leading to the Final Declaration were difficult with neither Iraq nor the Russian Federation wishing to see

Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 11 September 1991.

¹³David Davis, MP, United Kingdom Minister of State for Foreign & Commonwealth Affairs, *Statement*, Biological Weapons Convention Fourth Review Conference, 26 November 1996.

¹⁴John D. Holum, Director, United States Arms Control and Disarmament Agency, *Statement*, Biological Weapons Convention Fourth Review Conference, 26 November 1996.

¹⁵United Nations, Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *Report of the Committee of the Whole*, BWC/CONF.IV/6, 29 November 1996, p.12.

any specific mention of their countries even though both countries had since the Third Review Conference openly acknowledged having had offensive biological weapons programmes. The eventual language in the Article I section of the Final Declaration stated :

"The Conference emphasizes, once more, the vital importance of full implementation by all States of all the provisions of the Convention, especially Articles I, II and III. The Conference agrees that the application by States Parties of positive approaches in accordance with the provisions of the Convention is in the interests of all States Parties and that any non-compliance with its provisions would undermine confidence in the Convention. Non-compliance should be treated with determination in all cases, without selectivity or discrimination."

22. The US statement to the Fifth Review Conference then continued by naming names in the subsequent paragraphs. The second paragraph addresses the stated intention of Usama bin Laden and his al Qaeda terrorist organization and concludes by noting that ***"While the United States is not prepared, at this time, to comment on whether rogue states may have assisted a possible al Qaeda biological weapons program, rest assured that the United States will not rely alone on treaties or international organizations to deal with such terrorist groups or the states that support them."*** and then goes on to add that ***"Neither the Biological Weapons Convention nor the former draft BWC Protocol would stop biological terrorism by groups like al Qaeda or restrain their rogue-state patrons."*** This sweeping assertion that neither the Convention nor the draft Protocol would stop biological terrorism by terrorist groups or restrain their rogue-state patrons does not do justice to the value of the norm established by the BTWC that biological weapons are totally prohibited and fails to recognize that the ultimate aim of any multilateral treaty is to achieve universality -- and thereby to become customary international law. It also is misleading in that it fails to recognise that the obligations of the Convention in Article IV require each State Party to *take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.* Moreover, the obligations in Article III require each State Party *not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention.* It should also be noted that at the Fourth Review Conference, the Final Declaration usefully extended the understanding in respect of Article III by declaring that *"The Conference affirms that Article III is sufficiently comprehensive to cover any recipient whatsoever at international, national or subnational levels."*

23. Furthermore, the statement is misleading in that it fails to recognise that the Protocol would help improve implementation of the Convention -- and thus of the national implementation of measures to implement Article IV and Article III of the Convention. In respect of Article IV of the Convention, Article 17 of the composite Protocol text states that in particular each State Party shall:

(a) *Prohibit 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 the Convention, including enacting penal legislation with respect to such a prohibition;*

(b) *Prohibit natural and legal persons from undertaking any activity prohibited to a State Party under the Convention anywhere under its control; and*

(c) *Prohibit, in conformity with international law, natural persons possessing its nationality from undertaking any activity prohibited to a State Party under the Convention anywhere.*

Furthermore, each State Party shall designate or establish a National Authority which shall serve as the national focal point for effective liaison with the Organization and with other States Parties. The Protocol provisions will over time provide assurance that other States Parties have enacted legislation to implement both the Protocol and the Convention which will also bring benefits from strengthened national prohibition thereby contributing to countering bioterrorism. As for Article III of the Convention, it has to be recognized that what the composite Protocol text actually states in Article 7 is that:

*Each State Party shall ... review and, if necessary, amend or **establish** any legislation, regulatory or administrative provisions to regulate the transfer of agents, toxins, equipment and technologies relevant to Article III of the Convention...*[Emphasis added]

Consequently, the Protocol requirement is to **establish** legislation, regulatory or administrative proposals to regulate the transfer of agents, toxins, equipment and technologies -- a far cry from the assertion that an effective tool has to be forfeited. The United States in its rejection of the Protocol appears not to recognize that there are many other States Parties to the BTWC who have seriously addressed their implementation of Article III of the Convention -- and who see the composite Protocol text as being in their national interests. This improved implementation of Article IV and Article III of the Convention coupled with the Protocol procedures to address and clarify concerns would indeed help to counter biological terrorism by national groups and by rogue States who were party to the Convention and the Protocol.

24. The third paragraph addresses Iraq and the work of UNSCOM and its successor UNMOVIC. The paragraph concludes by stating that ***The existence of Iraq's program is beyond dispute, in complete contravention of the BWC. The BWC Protocol would have neither hindered nor stopped it.*** The contravention of the BWC leads to the question as to what actions under the Convention -- such as Article V and Article VI -- have the States Parties taken -- and, more particularly, what action has the United States as one of the three Depositary States taken? The final sentence is misleading as it ignores the question as to whether Iraq would have acceded to the Protocol and then ignores all the provisions in the Protocol for improving the implementation of the Convention -- notably through mandatory declarations, the clarification procedures of uncertainties, anomalies, ambiguities or omissions, the compliance concern procedures and investigations -- which would certainly have hindered Iraq's program.

25. The fourth paragraph addresses North Korea and concludes by stating that ***While we are hopeful that Pyongyang will come into compliance with the BWC and end its program, the fact remains that the BWC has been ineffective in restraining North Korea. The draft BWC Protocol would have done no better.*** As noted in the previous paragraph in respect of Iraq, the non-compliance with the BWC leads to the question as to what actions under the Convention -- such as Article V and Article VI -- have the States Parties taken -- and again as to what action has the United States, taken? The final sentence is again misleading as it

ignores the question as to whether North Korea would have acceded to the Protocol and then ignores all the provisions in the Protocol for improving the implementation of the Convention -- notably through mandatory declarations, the clarification procedures of uncertainties, anomalies, ambiguities or omissions, the compliance concern procedures and investigations -- which would certainly have hindered North Korea's program.

26. The fifth paragraph then addresses Iran and Libya, Syria -- a signatory State -- and Sudan -- a non party to the BTWC. It concludes by stating that ***The BWC has not succeeded in dissuading these states from pursuing BW programs and we believe the draft BWC Protocol would have likewise failed to do so.*** In respect of the States Parties -- Iran and Libya -- and the Signatory State -- the concerns about the pursuit of BW programmes raises precisely the same questions as for Iraq and North Korea. Namely, what actions under the Convention -- such as Article V and Article VI -- have the States Parties taken -- and again as to what action has the United States, one of the three Depositary States, taken? As for the non-State Party, Sudan, the question arises as to what action to encourage Sudan to become a State Party has been taken by the States Parties -- and, more particularly, what action has the Depositary State, the United States, taken? The final clause ***and we believe the draft BWC Protocol would have likewise failed to do so.*** is again misleading as it ignores the question as to whether the States named would have acceded to the Protocol and then ignores all the provisions in the Protocol for improving the implementation of the Convention -- notably through mandatory declarations, the clarification procedures of uncertainties, anomalies, ambiguities or omissions, the compliance concern procedures and investigations -- which would certainly have helped to dissuade such States from pursuing BW programmes.

27. The final paragraph of this section concludes with the reasonable exhortation that ***The United States calls upon all BWC parties and signatories that have not done so to immediately terminate their offensive biological weapons programs and comply fully with their obligations.***

C. New Approaches to the BW Threat

28. The first paragraph starts by stating that:

In light of the September 11 terrorist attacks, widespread violations of the BWC, and the weaknesses of the draft BWC Protocol, which rendered it incapable of effectively addressing these serious threats, the United States has crafted alternative proposals.

and goes on to say that:

Just as we can no longer rely solely on traditional means to fight a war against terrorism, we need to look beyond traditional arms control measures to deal with the complex and dangerous threats posed by biological weapons.

This argument would be far more convincing had the United States sought to utilize ***arms control measures*** to the full. It is not correct make the assertion that ***the weaknesses of the draft BWC Protocol, which rendered it incapable of effectively addressing these serious threats*** as the draft Protocol would have significantly strengthened the Convention and

resulted in an improved regime that was well worth having and which would have reduced the danger from biological weapons¹⁶.

29. The statement continues in the same paragraph to emphasise that:

Countering these threats will require a full range of measures -- tightened export controls, an intensified non-proliferation dialogue, increased domestic preparedness and controls, enhanced biodefense and counter-bioterrorism capabilities, and innovative measures against disease outbreaks.

before adding, apparently almost as an afterthought the sentence that ***Strict compliance by all Parties with the BWC is also critical.*** The second and final paragraph of this section then states that the United States ***has a dedicated bio-defense program to ensure that Americans and our friends and allies are protected against bioweapons attacks.*** which is followed by even greater emphasis ***US bio-defense programs are a means to an end, to protect Americans and our friends and allies.*** This section is concluded by stating that:

An essential element in our strategy is to find agreement in this body on measures that countries can undertake immediately to strengthen the BWC. We strongly believe that the key is to broaden our understanding of the biological weapons threat and the types of measures that are potentially valuable in countering it.

This makes it evident that the US was looking to the Fifth Review Conference to agree measures ***that countries can undertake immediately to strengthen the BWC.*** One would expect that, in these circumstances -- given the emphasis on measures to be undertaken ***immediately***, the United States would have submitted fully elaborated and detailed proposals to the Review Conference -- comparable, for example, for the elaborated and detailed proposals¹⁷ made by South Africa for strengthening of the confidence-building measures. In fact, the US proposals are not elaborated in detail either in the statement or in the proposals put to the Committee of the Whole.

30. The final sentence ***that the key is to broaden our understanding of the biological weapons threat and the types of measures that are potentially valuable in countering it*** is welcomed as we have for some time emphasised¹⁸ the importance of **all** the elements of the web of reassurance in countering biological weapons whether used by "rogue States" or by non-State actors. Such a web will reassure the State and its public that such weapons are totally prohibited and, if used, will have minimal effect. The elements of this web are:

- a. Strong international and national prohibition regime reinforcing the norm that biological weapons are totally prohibited

¹⁶Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Effective Strengthening of the Biological and Toxin Weapons Convention*, University of Bradford, Department of Peace Studies, Evaluation Paper No 20, April 2001 and also Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Evaluation of the Costs and Benefits to States Parties*, University of Bradford, Department of Peace Studies, Evaluation Paper No 21, July 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

¹⁷South Africa, *Strengthening Confidence-Building Measures -- Working Paper by South Africa*, BWC/CONF.V/COW/WP.1, 16 November 2001. Available at <http://www.opbw.org>

¹⁸Graham S. Pearson, *Why Biological Weapons Present the Greatest Danger*, Seventh International Symposium on Protection against Chemical and Biological Warfare Agents, Stockholm, Sweden, 15-19 June 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

- b. Broad international and national controls on the handling, storage, use and transfer of dangerous pathogens
- c. Preparedness including both active and passive protective measures and response plans that have been exercised
- d. Determined national and international response to any use or threat of use of biological weapons ranging from diplomatic sanctions through to armed intervention,

which together are mutually reinforcing and lead a would-be possessor to judge that acquisition and use of BW would not be valuable, would be detected and incur an unacceptable penalty. It is, however, necessary to stress the importance of strengthening the international and national prohibition element -- in other words, the arms control regime and its national implementation.

D. U.S. Proposals for Strengthening the BWC

31. In the next section, the US proposals are described in three subsections:

- *National Implementation (Article IV)*
- *Consultation and Cooperation (Article V)*
- *Assistance to Victims (Article VII) and Technical and Scientific Cooperation (Article X)*

Each subsection is considered in turn below using as criteria the requirements elaborated earlier in the United States statement, namely, that *The United States will simply not enter into agreements that allow rogue states or others to develop and deploy biological weapons.* and that these are measures *that countries can undertake immediately to strengthen the BWC.*

32. *National Implementation (Article IV).* A number of specific proposals are made in this subsection:

- (a) *The United States proposes that Parties agree to enact national criminal legislation to enhance their bilateral extradition agreements with respect to BW offenses and to make it a criminal offense for any person to engage in activities prohibited by the BWC.*
- (b) *Further, Parties should have strict standards for the security of pathogenic microorganisms and: (a) adopt and implement strict regulations for access to particularly dangerous micro-organisms, including regulations governing domestic and international transfers; and (b) report internationally any releases or adverse events that could affect other countries.*
- (c) *Sensitizing scientists to the risks of genetic engineering, and exploring national oversight of high-risk experiments, is critical and timely, as is a professional code of conduct for scientists working with pathogenic micro-organisms.*

33. Enactment of criminal legislation. This has long been encouraged by the States Parties at the Review Conferences -- at the Fourth Review Conference in 1996, the Final Declaration¹⁹ in the section on Article IV stated that:

2. The Conference notes those measures already taken by a number of States Parties in this regard, for example the adoption of penal legislation, and reiterates its call to any State Party that has not yet taken any necessary measures to do so immediately, in accordance with its constitutional processes. Such measures should apply within its territory, under its jurisdiction or under its control anywhere. The Conference invites each State Party to consider, if constitutionally possible and in conformity with international law, the application of such measures also to actions taken anywhere by natural persons possessing its nationality.

In addition, the composite Protocol text²⁰ included in Article 17 the requirement for each State Party to:

(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognised by international law from undertaking any activity prohibited to a State Party under the Convention, including enacting penal legislation with respect to such a prohibition;

(b) Prohibit natural and legal persons from undertaking any activity prohibited to a State Party under the Convention anywhere under its control; and

(c) Prohibit, in conformity with international law, natural persons possessing its nationality from undertaking any activity prohibited to a State party under the Convention anywhere.

Moreover, provision is also made in the Protocol for each State Party to cooperate with other States Parties in providing the appropriate form of legal assistance to facilitate the implementation of the obligations detailed above.

34. It is also evident from the experience of the implementation of the Chemical Weapons Convention with its closely similar requirements to those in the composite Protocol, that the future Organization would provide valuable surveys of the legislative and administrative measures taken by each State Party thereby providing an effective and efficient means by which the enactment provisions can be harmonized and strengthened by States Parties.

35. The US proposal to the Fifth Review Conference regarding the enactment of criminal legislation is welcomed. It does not, however, meet the criteria of not allowing ***rogue states or others to develop and deploy biological weapons.*** Although, in principle, it could be undertaken ***immediately to strengthen the BWC,*** this, in the real world, is unlikely as the record over the past decade when Review Conferences have exhorted the States Parties to enact necessary measures and to provide *information on the texts of specific legislation*

¹⁹United Nations, Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *Final Declaration*, BWC/CONF.IV/9, Geneva, 1996.

²⁰United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/56-1 and 56-2, 18 May 2001, Geneva, Annex B.

enacted or other measures taken to assure domestic compliance with the Convention to the United Nations Department for Disarmament Affairs has been poor.

36. Strict standards for the security of pathogenic microorganisms. This has also long been encouraged by the States Parties at the Review Conferences -- at the Fourth Review Conference in 1996, the Final Declaration²¹ in the section on Article IV stated that the Conference notes the importance of:

- Legislation regarding the physical protection of laboratories and facilities to prevent unauthorized access to and removal of microbial or other biological agents, or toxins;

The Fourth Review Conference, reflecting the concern amongst States Parties about the possible use of biological and toxin weapons in terrorist or criminal activity, also included in its Final Declaration language in the sections on the various Articles which implicitly required strict standards for the control and security of biological and toxin agents. Examples are the following:

a. On Article III, the following was included: *The Conference affirms that Article III is sufficiently comprehensive to cover any recipient whatsoever at international, national or subnational levels.*

b. Also, on Article III was included: *In the development of implementation of Article III, the Conference notes that States Parties should also consider ways and means to ensure that individuals or subnational groups are effectively prevented from acquiring, through transfers, biological agents and toxins for other than peaceful purposes.*

c. On Article IV, the following was included *The States Parties recognize the need to ensure, through the review and/or adoption of national measures, the effective fulfilment of their obligations under the Convention in order, inter alia, to exclude use of biological and toxin weapons in terrorist or criminal activity.*

37. The composite Protocol text has also addressed the security of pathogenic microorganisms. In Article 15 Confidence-Building Measures, provision was included for the following:

B. National Legislation and Regulation

Each State Party may at its own discretion provide a list of the number, dates and titles of legislation, regulation, directives, orders or other administrative and legal measures that govern, regulate, provide guidance on or otherwise control:

(a) Access to buildings or other structures in which pathogens or toxins are being produced, handled or stored;

²¹United Nations, Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *Final Declaration*, BWC/CONF.IV/9, Geneva, 1996.

This provision had been developed from a requirement, that was still within square brackets, in the rolling text for a Notification as follows:

[(M) NATIONAL LEGISLATION AND REGULATIONS

22. Each State Party [shall at the request of the Organization within [10] days] [may on a voluntary basis] declare, in accordance with paragraphs 1 to 3 above, a list of the number, dates and titles of legislation, regulation, directives, orders or other administrative and legal measures that govern, regulate, provide guidance on or otherwise control:

(a) Access to buildings or other structures in which pathogens or toxins are being produced, handled or stored;

38. In addition, the composite Protocol text in Article 14 Scientific and Technological Exchange for Peaceful Purposes and Technical Cooperation includes provisions in several places addressing biosafety:

a. In paragraph 4, *each State Party shall promote and support the following activities ... (a) The publication, exchange and dissemination of information ... on current and recent developments ... on biosafety...*

b. In paragraph 23, provision is made for the visiting team, if specifically requested, to provide information and advice on:

(a) Biosafety, including environmental protection and occupational health issues;...

(g) The provision of information, or guidance, or the identification of any specific training opportunities for facility personnel on efficient biosafety, occupational health and safety practices and environmental protection relevant to the facility....

c. In paragraph 29 on cooperative relationships with other international organisations and among States Parties, provision is made for the Organization to conclude, where appropriate, agreements and arrangements in order to, *inter alia*,:

(a) Derive the greatest possible synergy in, and benefits from:

(iii) Current Good Manufacturing Practice, Good Laboratory Practice, biological containment and other biosafety regulations and practices.

(vi) Regulations governing the handling, transportation, use and release of microbial and other biological agents and toxins.

39. The US proposal to the Fifth Review Conference regarding strict standards for the security of pathogenic microorganisms is welcomed. It does not, however, meet the criteria regarding rogue states and others set out in the US statement.. Although, in principle, it could be undertaken ***immediately to strengthen the BWC***, this, in the real world, is unlikely as the record over the past decade when Review Conferences have exhorted the States Parties to

enact necessary measures and to provide *information on the texts of specific legislation enacted or other measures taken to assure domestic compliance with the Convention* to the United Nations Department for Disarmament Affairs has been poor.

40. *Sensitizing scientists to the risks of genetic engineering, exploring national oversight of high-risk experiments, and a professional code of conduct for scientists working with pathogenic micro-organisms.* This is essentially an elaboration of the appeals that have long been made by the States Parties at the Review Conference -- at the Fourth Review Conference in 1996, the Final Declaration²² in the section on Article I stated that:

8. The Conference appeals through the States Parties to their scientific communities to lend their support only to activities that have justification for prophylactic, protective and other peaceful purposes, and refrain from undertaking or supporting activities which are in breach of the obligations deriving from provisions of the Convention.

In addition, an awareness of the prohibitions resulting from the BTWC has also long been encouraged by the States Parties at the Review Conferences -- at the Fourth Review Conference in 1996, the Final Declaration²³ in the section on Article IV stated that the Conference notes the importance of:

- Inclusion in textbooks and in medical, scientific and military education programmes of information dealing with the prohibitions and provisions contained in the Biological and Toxin Weapons Convention and the Geneva Protocol of 1925;

41. The sensitizing of scientists, national oversight of high-risk experiments and a professional code of conduct are all embraced under broader provisions in the composite Protocol text which has included in Article 14 Scientific and Technological Exchange for Peaceful Purposes and Technical Cooperation, as well as the provisions outlined in the previous section addressing biosafety, the following provisions:

a. In paragraph 23, provision is made for the visiting team, if specifically requested, to provide information and advice on:

(d) The principles and requirements of national and international regulatory mechanisms governing the production, validation and marketing and sale of biological products for prophylaxis, diagnosis and treatment of diseases caused by microbial or other biological agents or toxins, in particular infectious diseases, and pharmaceutical products and vaccines;

(i) The provision of information and guidance as well as the identification of any specific training opportunities for facility personnel to facilitate the development, evaluation or licensing of products;

²²United Nations, Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *Final Declaration*, BWC/CONF.IV/9, Geneva, 1996.

²³United Nations, Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, *Final Declaration*, BWC/CONF.IV/9, Geneva, 1996.

b. In paragraph 29 on cooperative relationships with other international organisations and among States Parties, provision is made for the Organization to conclude, where appropriate, agreements and arrangements in order to, *inter alia*,:

(a) *Derive the greatest possible synergy in, and benefits from:*

(ii) *Sharing information on environmental release of genetically-modified organisms.*

(c) *Promote and support the establishment of a framework for multilateral co-operation among the States Parties ... with the aim of inter alia:*

(ii) *Improving knowledge of relevant existing national regulatory and administrative procedures and facilitating harmonisation of such procedures.*

(d) *Facilitate the provision of information and advice about relevant existing regulatory procedures on the peaceful uses of microbial and other biological agents and toxins.*

42. It should also be noted that in the negotiation of the Protocol, the States Parties were careful not to include provisions which overlapped with responsibilities being undertaken by other multilateral treaties -- notably the Convention on Biological Diversity which has, for example, particular provisions relating to the assessment of hazard in genetic manipulation. Quite rightly, the States Parties negotiating the Protocol have sought to focus on those activities that are of particular relevance to the BTWC and which the future Organization to implement the Protocol would be best fitted to do. It should be recalled that Article I General Provisions of the Protocol specifically states that:

6. In implementing the provisions of this Protocol, the States Parties and the Director-General shall, when appropriate, take into account existing agreements and competencies of other relevant international organizations and agencies as well as the activities of States Parties in order to avoid duplication and to ensure an effective and co-ordinated use of resources.

43. The US proposal to the Fifth Review Conference regarding sensitizing scientists to the risks of genetic engineering, exploring national oversight of high-risk experiments, and a professional code of conduct for scientists working with pathogenic micro-organisms are welcomed. These do not, however, meet the criteria regarding rogue states or others set out in the US statement. Moreover, care needs to be taken that these proposals do not clash with similar closely-related proposals already being developed in other fora, notably by the Convention on Biological Diversity and the Cartagena Protocol on Biosafety.

44. **Analysis.** The Bolton statement concludes this element by asserting that:

Such measures, if adopted and implemented, will contribute significantly to doing what none of the measures in the draft BWC Protocol would do: control access to dangerous pathogens, deter their misuse, punish those who misuse them, and alert states to their risks. Individually and collectively, they would establish powerful new tools to strengthen the BWC by enhancing our ability to prevent the development, production or acquisition of dangerous pathogens for illegal purposes. These

benefits can be achieved quickly, since implementation does not depend on lengthy international negotiation.

This assertion needs to be analysed. Its sweeping assertion that these measures would *contribute significantly to doing what none of the measures in the draft BWC Protocol would do* is not accurate. As has been shown in the sections above, the measures proposed by the United States have all largely been included in the Final Declarations of previous Review Conferences and had been incorporated into the composite Protocol text. The principal problem with these United States proposals is that none of them would meet the criteria laid down by John Bolton -- *The United States will simply not enter into agreements that allow rogue states or others to develop and deploy biological weapons*. Furthermore, whilst there is indeed merit in the United States proposals, there is no indication as to how they could achieve **collectively** the declared objective that *Individually and collectively, they would establish powerful new tools to strengthen the BWC by enhancing our ability to prevent the development, production or acquisition of dangerous pathogens for illegal purposes*. It is all too clear that previous measures endorsed by Review Conferences -- notably the agreed Confidence-Building Measures (CBMs) -- have been interpreted and implemented on an individual basis by those States Parties who have decided to submit the agreed information -- and this has involved far less than even half of all the States Parties. The CBM experience does not provide any basis for the assertion that collectively the United States proposals would strengthen the Convention. There is indeed a compelling need²⁴ for an organization to fill the institutional deficit of the BTWC not for its own sake, but to enable the treaty regime to evolve more coherently over the periods in between Review Conferences; and, more concretely, to enable the States Parties collectively to carry out the actions to which they are committing themselves, politically, in the Final Declarations of the Review Conferences. The organization to implement the Protocol would have been particularly effective in strengthening the BTWC regime.

45. *Consultation and Cooperation (Article V)*. Two further proposals are made in this subsection:

a. The United States seeks to establish a mechanism for international investigations of suspicious disease outbreaks and/or alleged BW incidents.

b. We are also supportive of setting up a voluntary cooperative mechanism for clarifying and resolving compliance concerns by mutual consent, to include exchanges of information, voluntary visits, or other procedures to clarify and resolve doubts about compliance.

46. A mechanism for international investigations of suspicious disease outbreaks and/or alleged BW incidents. The United States statement makes it clear that the proposed mechanism would require Parties to accept international inspectors upon determination by the UN Secretary General that an inspection should take place. The statement asserts that this would make investigations of such events more certain and timely and goes on to argue that it would also allow us to acquire internationally what is likely to be the first hard evidence of

²⁴See Nicholas A. Sims, *The Functions of the BTWC Review Conferences: Maximizing the Benefits from the Fifth Review Conference*, Strengthening the Biological Weapons Convention, Review Conference Paper No. 2, University of Bradford, Department of Peace Studies, November 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

either accidental or deliberate use of biological warfare agents and help insure that any such event did not get covered up by the responsible parties.

47. In considering this proposal, it is important to recognise that the BTWC provides for such an investigation as Article VI states that:

(1) Any State Party to this convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council.

(2) Each State Party to this Convention undertakes to cooperate in carrying out any investigation which the Security Council may initiate, in accordance with the provisions of the Charter of the United Nations, on the basis of the complaint received by the Council. The Security Council shall inform the States Parties to the Convention of the results of the investigation.

48. In addition, successive Review Conferences have addressed the importance of prompt investigations with language such as that in the Article VI section of the Final Declaration of the Fourth Review Conference which states that:

4. The Conference recalls, in this context, United Nations Security Council resolution 620 (1988), which at the time encouraged the United Nations Secretary-General to carry out prompt investigations, in response to allegations brought to its attention by any Member State concerning the possible use of chemical and bacteriological (biological) or toxin weapons that could entail a violation of the 1925 Geneva Protocol or of any other applicable rule of international treaty or customary law. The Conference also recalls the technical guidelines and procedures contained in Annex I of United Nations document A/44/561 to guide the United Nations Secretary-General on the timely and efficient investigation of reports of the possible use of such weapons. The States Parties reaffirm their agreement to consult, at the request of any State Party, regarding allegations of use or threat of use of bacteriological (biological) or toxin weapons and to cooperate fully with the United Nations Secretary-General in carrying out such investigations. The Conference stresses that in the case of alleged use the United Nations is called upon to take appropriate measures expeditiously, which could include a request to the Security Council to consider action in accordance with the Charter.

49. The composite Protocol text included in Article 9 and Annex B detailed and well-developed procedures for the carrying out of the following types of investigations:

(a) Investigations to be conducted in geographic areas where the release of, or exposure of humans, animals or plants to, microbial or other biological agents and/or toxins has given rise to a concern about a possible non-compliance with Article I of the Convention or use of bacteriological (biological) and toxin weapons...

(b) Investigations of alleged breaches of obligations under Article I of the Convention, to be conducted inside the perimeter around a particular facility at which there is a substantive basis for a concern that it is involved in activities prohibited by Article I of the Convention...

50. Against this background, the question needs to be asked as to what does the United States proposal add? The proposal is not detailed and can, therefore, only be compared to the provisions already in the Convention in Article VI which have been the subject of the extended understandings contained in the Final Declarations of previous Review Conferences. The United States proposal does not address the principal shortcoming of the existing provisions relating to investigations mounted by the United Nations Secretary-General -- namely that they can only take place within a State which has invited the Secretary-General to mount such an investigation within its territory.

51. In comparison with the provisions in the composite Protocol text, the United States proposal falls far short as it is limited to investigations of *suspicious disease outbreaks and/or alleged BW incidents* -- it does not address accidental releases nor any compliance concerns related to facilities. Nor does the proposal meet the requirement specified earlier in the United States statement of not entering into *agreements that allow rogue states or others to develop and deploy biological weapons*.

52. A voluntary cooperative mechanism for clarifying and resolving compliance concerns by mutual consent, to include exchanges of information, voluntary visits, or other procedures to clarify and resolve doubts about compliance. In considering this proposal, it is important to recognise that the BTWC provides for consultation and cooperation as Article V states that:

The States Parties to this Convention undertake to consult one another and to cooperate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention. Consultation and Cooperation pursuant to this article may also be undertaken through appropriate international procedures within the framework of the United Nations and in accordance with its Charter.

53. Furthermore, successive Review Conferences have developed procedures to strengthen the implementation of the provisions of Article V. These were adopted in the Article V section of the Final Declaration of the Third Review Conference and had built on the agreements reached at the First and Second Review Conferences. These procedures are elaborated as follows in the Final Declaration of the Third Review Conference which stated that:

The Conference reaffirms the agreement reached at the Second Review Conference, and agrees that in order to strengthen the implementation of the provisions of Article V the following procedures should be adopted:

- A formal consultative meeting could be preceded by bilateral or other consultations by agreement among those States Parties involved in the problems which had arisen;

- Requests for the convening of a consultative meeting shall be addressed to the Depositaries, who shall immediately inform all States Parties of the request and shall convene within 30 days an informal meeting of interested States Parties to discuss the arrangements for the formal consultative meeting, which shall be held within 60 days of receipt of the request.

- *With regard to taking decisions, the consultative meeting shall proceed in accordance with rule 28 of the rules of procedure of the Rule Conference;*
- *The costs of the consultative meeting shall be met by the States parties participating in accordance with the United Nations assessment scale prorated to take into account differences between the United Nations membership and the number of States Parties participating in the meeting;*
- *A consultative meeting may consider any problems which may arise in relation to the objective of, or in the application of the provisions of the Convention, suggest ways and means for further clarifying, inter alia, with assistance of technical experts, any matter considered ambiguous or unresolved, as well as initiate appropriate international procedures within the framework of the United Nations and in accordance with its Charter;*
- *The consultative meeting, or any State Party, may request specialized assistance in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention, through, inter alia, appropriate international procedures within the framework of the United Nations and in accordance with its Charter;*
- *The States Parties agree that, should the consultative meeting, or any State Party, make use of such procedures within the framework of the United Nations, including lodging a complaint with the Security Council under Article VI of the Convention, the Secretary-General may be kept informed;*
- *The Conference considers that States Parties shall cooperate with the consultative meeting in its consideration of any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention, and in clarifying ambiguities and unresolved matters, as well as cooperate with appropriate international procedures within the framework of the United Nations and in accordance with its Charter;*

54. It should also be noted that these procedures were utilised²⁵ in 1997 by Cuba concerning an outbreak of *Thrips palmi* in Cuba. A formal consultative meeting, attended by 74 States Parties, was held in Geneva on 25 - 27 August 1997 and led to a Chairman's report issued on 15 December 1997 by Ambassador Ian Soutar of the UK which outlined the process which had been followed. The report concluded that "*due inter alia to the technical complexity of the subject and the passage of time, it has not proved possible to reach a definitive conclusion with regard to the concerns raised by the Government of Cuba.*" The report went on to emphasise that "*there had been general agreement throughout the process that the requirements of Article V of the Convention and of the consultative process established by the Third Review Conference have been fulfilled in an impartial and transparent manner.*" Furthermore, "*the Bureau agreed that the experience of conducting this process and consultation had shown the importance of establishing as soon as possible an effective Protocol to strengthen the Convention which is being negotiated in the Ad Hoc Group.*"

²⁵See account in Graham S. Pearson, *Article V: Consultation and Cooperation* in Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims (eds), *Strengthening the Biological Weapons Convention: Key Points for the Fifth Review Conference*, University of Bradford, Department of Peace Studies, November 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

55. The composite Protocol text in Article 8 Consultation, Clarification and Cooperation elaborates in some detail the procedures to be followed *on any matters which may be raised relating to the objects and purpose of the Convention*. Furthermore, Article 6 Follow-Up after Submission of Declarations includes procedures to resolve any ambiguities, uncertainties, anomalies or omissions in declarations which include written consultation, consultative meetings and visits.

56. Against this background, the question needs to be asked as to what does the United States proposal for a voluntary cooperative mechanisms add? The States Parties to the Convention have already elaborated -- and utilised -- a procedure for *solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention*. In addition, in accordance with the obligation under Article V of the Convention, successive Review Conferences in their Final Declarations under Article V have clearly recognized that, as at the Fourth Review Conference:

1. The Conference notes the importance of Article V and reaffirms the obligation assumed by States Parties to consult and cooperate with one another in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention.

This reemphasizes that States Parties have an obligation to consult and cooperate with **one another** in solving any problems.

57. The United States proposal for a voluntary cooperative mechanism falls far short of the provisions in the composite Protocol text. And again the proposal does not meet the requirement specified earlier in the United States statement regarding not entering into *agreements that allow rogue states or others to develop and deploy biological weapons*.

58. *Assistance to Victims (Article VII) and Technical and Scientific Cooperation (Article X)*. Three further proposals are made in this subsection:

a. Restricting access and enhancing safety procedures for use of dangerous pathogens,

b. Strengthening international tools to detect serious illness and/or potential illegal use of biology,

c. Providing assurance of help in the event of a serious disease outbreak.

59. Restricting access and enhancing safety procedures for use of dangerous pathogens. The United States statement expands on this by adding *As we are aware, biosafety standards vary widely throughout the world. The United States strongly believes every country would benefit from adopting rigorous procedures, and therefore proposes that Parties adopt and implement strict biosafety procedures, based on WHO or equivalent national guidelines*. It is unclear from the statement precisely how this proposal differs from that for *strict regulations for access to particularly dangerous micro-organisms* made under *National Implementation (Article IV)*. The analysis provided above of the latter proposal shows how previous Review Conferences and the composite Protocol text have previously addressed this point.

60. However, as noted earlier, care needs to be taken that proposals do not clash with similar closely-related proposals already being developed in other fora, notably by the Convention on Biological Diversity²⁶ and the Cartagena Protocol on Biosafety. The Convention on Biological Diversity (CBD) in its Article 19 "Handling of Biotechnology and Distribution of its Benefits" in its third and fourth paragraphs addresses safety and transfer aspects:

*"3. The Parties shall consider the need for and the modalities of a protocol setting out appropriate procedures, including, in particular, **advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology** which may have adverse effect on the conservation and sustainable use of biological diversity."*

*"4. Each Contracting Party shall, directly or by requiring any natural or legal person under its jurisdiction providing the organisms referred to in paragraph 3 above, provide **any available information about the use and safety regulations required by that Contracting Party in handling such organisms**, as well as available information on the potential adverse impact of the specific organisms concerned to the Contracting party into which those organisms are to be introduced." [Emphasis added]*

61. The first Conference of the Parties to the CBD was held in Nassau, Bahamas from 28 November to 9 December 1994. It established an Open-ended Ad Hoc Group of Experts on Biosafety with a mandate

"(a) to consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of safe transfer, handling and use of any living modified organism resulting from biotechnology that may have an adverse effect on the conservation and sustainable user of biological diversity; and

(b) to consider existing knowledge, experience and legislation in the field of biosafety, including the views of Parties, subregional, regional and international organizations, with a view to presenting a report for consideration at the second meeting of the Conference of the Parties, so as to enable the Conference of the Parties to reach an informed decision as to the need for and the modalities of a protocol."

62. A review was then carried out of existing international and regional guidelines/agreements on biosafety and identified needs for additional action in several areas such as the need for immediate action by countries which have not adopted specific regulations for biosafety or have not used existing legislation to promulgate regulations for biosafety. Furthermore, whilst some efforts at regional harmonization have been undertaken or are underway, such regional harmonization was not occurring on a global basis and the panel felt that such action should be initiated in those regions where it has not yet begun. Several main conclusions were drawn which included the following:

"The Panel strongly believes that capacity building is essential to ensure adequate capacities to implement effectively biosafety regulations at the national level in a way which also promotes safe development in the field of biotechnology."

²⁶See account by Graham S. Pearson, *Article X: Some Building Blocks*, Briefing Paper No. 6, University of Bradford, Department of Peace Studies, March 1998. Available at <http://www.brad.ac.uk/acad/sbtwc>

and

"The Panel also strongly believes that immediate action is needed to access existing biosafety frameworks including their ability to address the movement of LMOs [living modified organisms] across national boundaries and to address other related transboundary issues. The Panel finds that such issues are best addressed by an appropriate international framework."

63. A report²⁷ was considered by the second Conference²⁸ of the Parties to the CBD when they met in Jakarta on 6 to 17 November 1995 which agreed Decision II/5 stating that the Conference of the Parties

"1. Decides to seek solution to the above mentioned concerns [about safety in biotechnology] through a negotiation process to develop in the field of safe transfer, handling and use of living modified organisms, a protocol on biosafety, specifically focussing on transboundary movement, of any living modified organisms resulting from modern biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity, setting out for consideration, in particular, appropriate procedure for advance informed agreement;

2. Decides to establish an Open-ended Ad Hoc Working Group under the Conference of parties which shall operate in accordance with the terms of reference in the annex to this decision;"

This decision also stressed the importance of the urgent finalisation of the United Nations Environmental Programme International Technical Guidelines on Safety on Biotechnology noting that *"guidelines on biosafety...may be used as an interim mechanism during the development of the protocol and to complement it after its completion, for the purposes of facilitating the development of national capacities to assess and manage risks, establish adequate information systems and develop expert human resources in biotechnology."*

64. At the third meeting of the Conference of the Parties to the CBD in Buenos Aires, Argentina on 4 - 15 November 1996, decision III/20²⁹ affirmed its *"support for a two track approach through which the promotion of the application of the UNEP Technical Guidelines for Safety in Biotechnology can contribute to the development and implementation of a protocol on biosafety, without prejudicing the development and conclusion of such a protocol"*.

65. UNEP International Technical Guidelines for Safety in Biotechnology. A joint initiative taken by the UK and the Netherlands following the Rio summit in June 1992 was to develop guidelines on safety in biotechnology. These guidelines were then taken forward by UNEP and developed into their International Guidelines. These are the second approach endorsed

²⁷Convention on Biological Diversity, *Report of the Open-Ended Ad Hoc Group of Experts on Biosafety*, UNEP/CBD/COP/2/7, 3 August 1995.

²⁸Convention on Biological Diversity, *Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity*, Jakarta, 6 - 17 November 1995, UNEP/CBD/COP/2/19 dated 30 November 1995.

²⁹Convention on Biological Diversity, *Report of the Third Meeting of the Conference of the Parties to the Convention on Biological Diversity*, Buenos Aires, Argentina, 4 - 15 November 1996, UNEP/CBD/COP/3/38 dated 11 February 1997.

by the Committee of Parties to the CBD in parallel with the Biosafety Protocol; namely for the finalisation and application of the UNEP International Technical Guidelines for Safety in Biotechnology. This was promoted by the decision 18/36 on Biosafety made by the Governing Council of UNEP on 26 May 1995³⁰ which affirmed the *"desirability of the United Nations Environment Programme contributing to international efforts on biosafety while avoiding duplication with other international activities currently being undertaken by other organizations...."* The International Guidelines were adopted by a meeting of the Global Consultation of Government-designated Experts held in Cairo, Egypt from 11 to 14 December 1995 and issued by UNEP³¹. The foreword to the International Guidelines by Elizabeth Dowdeswell, Executive Director of UNEP, emphasises the linkage between the application of the Guidelines and the capacity-building that is essential for their implementation as being both obvious and inevitable. It goes on to say that:

"Indeed, it is vital and urgent for countries and regions to acquire the various relevant capacities to implement the Guidelines. Neither these Guidelines or the biosafety protocol currently under development will in or of themselves ensure safety in biotechnology development, research and application. Consequently, the national and regional capacity-building programmes that are necessary for the effective implementation of these Guidelines should be formulated and given adequate technical and financial support on a priority basis. Founded on sound scientific principles, their implementation needs to be undertaken with technical competence, logical consistency and judicious urgency."

" UNEP has formulated such a programme as part of its 1996-1997 programme of work. It incorporates components and proposals for funding by, among others, the Global Environment facility (GEF), through which developing countries and countries with economies in transitions will receive the technical and financial support to develop and/or strengthen their national biosafety frameworks which will permit the effective implementation of these Guidelines and any future international agreement on biosafety within a harmonized regional and global context."

66. The Foreword goes on to outline essential elements of the role of the national biosafety frameworks:

"The development of the national biosafety frameworks called for in the Guidelines will entail technical and financial support to Governments and relevant in-country or regional entities. Such support is essential in order to:

** Establish or strengthen national authorities or national institutional biosafety mechanisms;*

** Review national legislative, administrative and policy measures on biosafety;....*

** Enhance public awareness of biotechnology risks... through initiatives involving the community at large, policy makers, legislators, administrators, the private sector and the biotechnology industry;"*

³⁰United Nations Environment Programme, *Proceedings of the Governing Council at its Eighteenth Session*, Nairobi, 15 - 26 May 1995, UNEP/GC. 18/40, 13 June 1995.

³¹United Nations Environment Programme, *UNEP International Technical Guidelines for Safety in Biotechnology*, UNEP Nairobi, Kenya.

67. The Preface to the guidelines makes it clear that they have been developed on the basis of common elements and principles derived from relevant existing regional and international instruments and national regulations and guidelines. Although it is clear that the Guidelines were prepared to focus primarily on living modified organisms, the General Principles and Considerations make it clear that the basis for safety in biotechnology rests on the characteristics of the basic organisms together with consideration of the newly introduced traits. Annex 3 of the International Guidelines is entitled "Risk Assessment: Examples of Points to Consider, as Appropriate" which makes it clear that:

The impacts to be considered include those on human health, agricultural production, other organisms and the quality of the environment.

It goes on to outline the information required for a scientifically sound risk assessment which includes

"INFORMATION RELATING TO THE ORGANISM WITH NOVEL TRAITS

Characteristics of the organism from which the organism with novel traits is derived:

The relevant biological, physiological and genetic and environmental characteristics of the recipient/parental/host organism include, as appropriate:

- * the name and identity of the organism
- * pathogenicity, toxicity and allergenicity (in the case of micro-organisms it should be noted that there are internationally accepted classification lists for human pathogens. Similar lists exist at national level for plant and animal pathogens);...

INFORMATION RELATING TO THE INTENDED USE

CHARACTERISTICS OF THE POTENTIAL RECEIVING ENVIRONMENT"

68. The Chapter on Mechanisms at National and Regional Level emphasises the importance of establishing, designating or strengthening *"national and/or regional authorities/national institutional mechanisms for oversight and/or control of the use of organisms with novel traits."* It notes that *"the authority or mechanism should have, or have access to, the relevant scientific and technical knowledge and experience."* It says that:

"Effective oversight mechanisms require that: a risk assessment has been done; or the organism has been exempted from oversight on the basis of experience and knowledge; relevant users supply to the authority/national institutional mechanism all required relevant information or appropriate references; users record the outcome of relevant activities and inform the authority/national institutional mechanism of the outcome when required. In particular, they should provide relevant information if there is an unexpected or adverse effect on human health or environmental impact during, or as a result of, the notified use."

It goes on to say that *"Mechanisms for oversight and/or control can include prior notification to the authority/national institutional mechanism of contained use facilities and certain*

contained uses and releases of organisms with novel traits." If such prior notification is required, then *"such notification may or may not require a positive decision from the authority/national institutional mechanism before the notified use can proceed."* The Chapter then addresses public participation:

"As set out in Agenda 21 and relevant provisions of the Convention on Biological Diversity, authorities/national institutional mechanisms are responsible for encouraging public participation by allowing access to information on which decisions are based, whilst respecting confidential commercial information."
[Emphasis added]

69. The Chapter on Mechanisms at International Level focuses on information exchange and supply. It states that *"Countries are encouraged to participate in the exchange of general information about national biosafety mechanisms..."*. It goes on to note that *"Countries, organizations and companies will wish to be aware of which countries have adopted similar measures to those set down in these guidelines to facilitate the exchange of mutually acceptable data and assessments. This form of information exchange can be carried out through direct information exchange, as well as through the creation of an international register or database."* The chapter then addresses the supply of information related to transboundary transfer of organisms with novel traits outlining the information to be provided and the concept of the advance informed agreement process.

70. **Analysis.** In Briefing Paper No. 6³², the following analysis was provided. It is apparent that the UNEP International Technical Guidelines for Safety in Biotechnology are being widely promoted and are seen as being complementary to the Biosafety Protocol which whilst particularly addressing advance informed agreement for transboundary transfers also includes Articles on Risk Assessment, Risk Management, Minimum National Standards and on Information Sharing/Biosafety Clearing House. Although all of this is aimed at micro-organisms with novel traits, the risks are all based primarily on the baseline micro-organism and how the novel traits amend the risks. Internationally, there is a move, certainly for micro-organisms with novel traits, towards information exchange and for information supply should such micro-organisms be transferred from one country to another. There is also clear encouragement for the provision of information to the public, whilst protecting commercial confidential information. All of this helps to build confidence nationally, regionally and internationally that such micro-organisms are being handled, used and transferred in safe ways for permitted purposes -- and in this way contributes to building confidence in compliance with the BTWC.

71. Against this background, the question needs to be asked as to what does the United States proposal for restricting access and enhancing safety procedures for use of dangerous pathogens, add? It is far from clear what the proposal adds to what is already being undertaken by the States Parties to the Convention on Biological Diversity. Nor is it clear how duplication will be avoided. Nor does the proposal meet the criteria about agreements specified earlier in the United States statement.

72. Strengthening international tools to detect serious illness and/or potential illegal use of biology. The United States statement also adds that *Furthermore, we should enhance support of WHO's global disease surveillance and response capabilities.* Previous Review

³²Graham S. Pearson, *Article X: Some Building Blocks*, Briefing Paper No. 6, University of Bradford, Department of Peace Studies, March 1998. Available at <http://www.brad.ac.uk/acad/sbtwc>

Conferences have in their Final Declarations under Article X addressed this issue. For example, at the Fourth Review Conference, the Final Declaration stated that:

10. The Conference shares the worldwide concern about new, emerging and re-emerging infectious diseases and considers that the international response to them offers opportunities for increased cooperation in the context of Article X application and of strengthening the Convention. The Conference welcomes the efforts to establish a system of global monitoring of disease and encourages States Parties to support the World Health Organization, including its relevant newly established division, the FAO and the OIE, in these efforts directed at assisting Member States to strengthen national and local programmes of surveillance for infectious diseases and improve early notification, surveillance, control and response capabilities.

and went on to say that:

12. The Conference urges States Parties, the United Nations and its specialized agencies to take further specific measures within their competence for the promotion of the fullest possible exchange of equipment, materials and scientific and technological information for the use of bacteriological (biological) agents and toxins for peaceful purposes and of international cooperation in this field. Such measures could include, inter alia:

1. Transfer and exchange of information concerning research programmes in biosciences and greater cooperation in international public health and disease control;

....

7. Cooperation in providing information on their national epidemiological surveillance and data reporting systems, and in providing assistance, on a bilateral level and/or in conjunction with WHO, FAO and OIE regarding epidemiological and epizootical surveillance, with a view to improvements in the identification and timely reporting of significant outbreaks of human and animal diseases;

as well as:

16. The Conference welcomes efforts to elaborate an international programme of vaccine development for the prevention of diseases which would involve the scientific and technical personnel from developing countries that are States Parties to the Convention. The Conference recognizes that such a programme will not only enhance peaceful international cooperation in biotechnology but also contribute to improving health care in developing countries, assist in establishing systems for worldwide monitoring of communicable diseases, and provide transparency in accordance with the Convention.

73. The composite Protocol text also addressed this issue in Article 14 Scientific and Technological Exchange for Peaceful Purposes and Technical Co-operation which includes the following provisions

a. In paragraph 4 where

Each State Party shall promote and support the following activities...

(a) The publication, exchange and dissemination of information ... on current and recent developments... on ... diagnosis, surveillance, detection, treatment and prevention of diseases caused by microbial or other biological agents and toxins, in particular infectious diseases;

(b) The work of existing laboratories on the prevention, surveillance, detection and diagnosis of diseases caused by microbial or other biological agents and toxins, in particular infectious diseases and to improve the capabilities of such laboratories and their effectiveness ...

(c) The improvement and development of the capabilities of States Parties, including laboratories, upon the specific request of, and in co-operation with, the State Party concerned, in the surveillance, prevention, detection, diagnosis and treatment of diseases caused by microbial or other biological agents and toxins, in particular infectious diseases as part of a global effort to improve the monitoring of emerging and re-emerging diseases in humans, animal and plants;

(f) The monitoring, diagnosis detection, prevention and control of outbreaks of diseases, ...

b. In paragraph 23 which provides for a visiting team to provide information and advice on:

(c) Diagnostic techniques for infectious diseases...

c. In paragraph 29 in which the Organization may conclude agreements and arrangements to:

(a) Derive the greatest possible synergy in, and benefits from:

(v) The collection and dissemination of information on the diagnosis, surveillance, detection, treatment and prevention of diseases caused by microbial or other biological agents and toxins, in particular infectious diseases;

(b) Co-ordinate its activities with those of international organizations and agencies on ... the diagnosis, detection, treatment and prevention of diseases caused by such microbial or other biological agents and toxins, in particular infectious diseases, and raise awareness of and facilitate access to those activities by States Parties to the Protocol;

74. Against this background, the question needs to be asked as to what does the United States proposal for strengthening international tools to detect serious illness and/or potential illegal use of biology, add? It is far from clear what the proposal adds to what is already being encouraged under the Final Declarations at the previous Review Conferences. The proposal provides nothing additional to the provisions that had been incorporated into the composite Protocol text. Furthermore, the proposal does not meet the criteria regarding agreements specified earlier in the United States statement.

75. **Providing assurance of help in the event of a serious disease outbreak.** The statement adds that *Parties could agree to provide rapid emergency medical and investigative assistance, if requested, in the event of a serious outbreak of infectious disease, and to indicate in advance what types of assistance they would be prepared to provide.* This proposal needs to be considered in the light of the provisions in Article VII of the Convention that:

Each State Party to this Convention undertakes to provide or support assistance, in accordance with the United Nations Charter, to any Party to the Convention which so requests, if the Security Council decides that such Party has been exposed to danger as a result of violation of the Convention.

Successive Review Conferences in their Final Declaration have in the Article VII section stated that:

3. The Conference takes note of desires expressed that, should a request for assistance be made, it be promptly considered and an appropriate response provided. In this context, pending consideration of a decision by the Security Council, timely emergency assistance could be provided by States Parties if requested.

76. The composite Protocol text has addressed this issue in Article 13 Assistance and Protection Against Bacteriological (Biological) and Toxin Weapons. This includes the following provisions:

a. In paragraph 4 for the Technical Secretariat to *establish ... and maintain ... a databank containing freely available information concerning various means of protection against bacteriological (biological) and toxin weapons as well as such information as may be provided by States Parties.*

b. In paragraph 6 assurance is provided that *nothing in this Protocol shall be interpreted as impeding the right of States Parties to request and provide assistance bilaterally and to conclude individual agreements with other States Parties concerning the emergency provision of assistance.*

c. In paragraph 7, *each State Party undertakes to provide assistance to the extent possible through the Organisation and to this end may elect to take one or more of the following measures:*

(a) To contribute to the voluntary fund for assistance to be established by the Conference at its first session;

(b) To conclude ... agreements with the Organization concerning the procurement, upon demand, of assistance;

(c) To declare ... the kind of assistance it might provide in response to an appeal by the Organisation....

d. In paragraph 8, *each State Party has the right to request and ... receive assistance and protection against the use or threat of use of bacteriological (biological) and toxin weapons if it considers that:*

(a) Bacteriological (biological) or toxin weapons have been used against it;

(b) It is threatened by imminent actions that are prohibited for States parties by Article I of the Convention;

(c) It has credible reason to believe it is confronted by imminent actions or serious threat with respect to actions that are prohibited for States parties by Article I of the Convention.

77. If the US proposal is intended to be broader than providing assistance in the event of attacks involving biological and toxin weapons -- and is intended to address the provision of assistance ***in the event of a serious disease outbreak***, then attention needs to be given to the provisions incorporated into the constitution of the World Health Organization. Several are relevant:

a. In Chapter II: Functions, Article 2 states that *the functions of the Organization shall be:*

(d) To furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of governments;

b. In Chapter VI: The Executive Board, Article 28 states that the functions of the Board shall include:

(i) To take emergency measures within the functions and financial resources of the organization to deal with events requiring immediate action. In particular, it may authorize the Director-General to take the necessary steps to combat epidemics, to participate in the organization of health relief to victims of a calamity and to undertake studies and research the urgency of which has been drawn to the attention of the Board by any Member or by the Director-General.

c. In Chapter XII: Budget and Expenses, Article 58 states that:

A special fund to be used at the discretion of the Board shall be established to meet emergencies and unforeseen contingencies.

78. In addition, it needs to be noted that the WHO has a Department of Emergency and Humanitarian Action (EHA) whose mission³³ is described as being:

Through a concerted effort across WHO, to increase the capacity and self-reliance of countries in the prevention of disasters, preparation for emergencies, mitigation of their health consequences and the creation of a synergy between emergency action and sustainable development.

The EHA website at <http://who.int/disasters/> includes a number of relevant documents addressing topics that include:

³³World Health Organization, *What Does EHA Do?*, <http://who.int/disasters/mission.cfm>

- a. *WHO: Disaster Preparedness and Response, March 2001*
- b. *WHO and Emergency Preparedness at Global Level, 13 September 2000*
- c. *A New Role for WHO in Emergencies, 17 December 1996*

These together provide a useful overview of the range of ongoing activities coordinated by the WHO for countering health emergencies and epidemics. It is also clear that within the United Nations system, WHO is responsible for coordinating the international response to emergencies in the health sector -- and consequently, the WHO maintains relationships with UN bodies such as UNICEF and UNHCR.

79. Against this background, the question needs to be asked as to what does the United States proposal for *providing assurance of help in the event of a serious disease outbreak*, add? It is far from clear what the proposal adds to what is already being encouraged under the Final Declarations at the previous Review Conferences -- or, if intended to be wider than assistance in the event of attacks involving biological and toxin weapons, then what does it add to what is already being coordinated by the WHO? The proposal provides nothing additional to the provisions that had been incorporated into the composite Protocol text. Furthermore, the proposal does not meet the criteria specified earlier in the United States statement.

80. **Analysis.** This section of the Bolton statement then continued with a further paragraph stating that:

Restricting access and enhancing safety procedures for use of dangerous pathogens, strengthening international tools to detect serious illness and/or potential illegal use of biology and providing assurance of help in the event of a serious disease outbreak -- these measures all enhance collective security and collective well-being -- which is, after all, our ultimate objective. With the exception of the final measure, none of these measures was contemplated in the draft BWC Protocol.

The recognition that measures to strengthen the implementation of Article X of the Convention *all enhance collective security and collective well-being* is to be welcomed as this has been argued strongly over the past few years.³⁴ However, as shown above, the assertion that *with the exception of the final measure, none of these measures was contemplated in the draft BWC Protocol* is not correct.

81. The statement then concludes this section by saying that:

The United States believes these proposals provide sound and effective ways to strengthen the Convention and the overall effort against biological weapons. These are measures State Parties can adopt now to make the world safer and proliferation more difficult. The choice is ours.

³⁴See for example, Graham S. Pearson, *Article X: Specific Measures to Achieve Implementation*, Briefing Paper No. 9, University of Bradford, Department of Peace Studies, July 1998 and Graham S. Pearson, *The Strengthened BTWC Protocol: An Integrated Regime*, Briefing Paper No. 10, University of Bradford, Department of Peace Studies, July 1998 . Available at <http://www.brad.ac.uk/acad/sbtwc>

Whilst this is a laudable statement, it is clear that these proposals actually add little if anything to what already exists in the Convention, in the Final Declarations of the successive Review Conferences and that most if not all were elaborated in the composite Protocol text. It is also evident that none of these proposals meet the criteria stated earlier in the Bolton statement that *The United States will simply not enter into agreements that allow rogue states or others to develop and deploy biological weapons.*

E. Review Conference Objectives

82. The final section of the United States statement starts by saying that:

To preserve international unity in our efforts to fight against terrorism and WMD proliferation, we need to work together, and avoid procedural or tactical divisiveness during the Review Conference that may hinder reaching our mutual goal of combating the BW threat.

Whilst there is no doubt at all that this expresses a laudable aim for the Review Conference, it is highly regrettable that the United States at the last moment, some two hours prior to the end of the Review Conference, proposed language which could not have been more divisive to the Review Conference. Late in the afternoon of the final day, Friday 7 December 2001, agreement had been reached on the language in the Final Declaration relating to the first eleven Articles of the Convention -- and it was known that consensus language was available for Articles XIII, XIV and XV -- when the United States tabled new language, without prior consultation with any of the other States Parties, for Article XII as follows:

"1. The Conference decides, beginning in November 2002, that States Parties will meet annually between the Fifth Review Conference and the Sixth Review Conference to

(a) consider and assess progress by States Parties in implementing the new measures adopted at the Fifth Review Conference; and

(b) consider new measures or mechanisms for effectively strengthening the BWC

2. The Conference decides that an Expert Group may meet, following each annual meeting of the States Parties if agreed at the annual meeting. The Experts group will examine matters as directed by the States Parties at the preceding annual meeting. The Experts Group will not negotiate measures, but may provide a report, adopted by consensus, to the States Parties on matters examined.

3. The Conference takes note of the work of the Ad Hoc Group, and decides that the Ad Hoc Group and its mandate are hereby terminated and replaced with the process elaborated in paragraphs 1 and 2.

4. The Conference decides that the Sixth Review Conference will be held in November 2006."

83. The third paragraph of this proposal by the United States was received with shock and anger not only because of its proposed termination of the Ad Hoc group and its mandate but also because of its unexpected introduction less than two hours before the Review Conference

was scheduled to end thereby jeopardizing the whole Review Conference and the progress towards agreement of a Final Declaration. In order to avoid complete failure of the Review Conference, there was no alternative other than to adjourn the Review Conference until 11 to 22 November 2002. Unfortunately, the United States was not living up to its own exhortation that *we need to work together, and avoid procedural or tactical divisiveness during the Review Conference that may hinder reaching our mutual goal of combating the BW threat* as it was evident that all the other States Parties participating in the Review Conference saw the mandate for the Ad Hoc Group *to strengthen the effectiveness and improve the implementation of the Convention* as being of continuing relevance and importance.

84. The United States statement concluded by saying that:

The time for "better than nothing" protocols is over. It is time for us to consider serious measures to address the BW threat. It is time to set aside years of diplomatic inertia. We will not be protected by a "Maginot treaty" approach to the BW threat. The United States asks the states assembled here to join us in forging a new and effective approach to combat the scourge of biological weapons. I have laid out serious proposals that the United States hopes will form the basis of this new approach. I ask that these proposals be endorsed in the Final Declaration.

By working together during this Review Conference, by exchanging ideas and proposals that will help us meet this critical challenge, I am confident this Convention can succeed in advancing the worldwide effort to reduce and ultimately eliminate the biological weapons threat.

This once again goes out of its way to criticize the Protocol. It really is not accurate -- and is certainly unfair -- to suggest that the composite Protocol text was in any way a *"better than nothing" protocol*. Careful analysis³⁵ of what was **actually** in the composite Protocol text -- and not of what was thought to have been in an earlier draft -- shows that the composite Protocol text would indeed provide an effective strengthening of the BTWC. It is also evident that the quality of the provisions in the composite Protocol text are worthy to stand comparison with the provisions of the Chemical Weapons Convention. Furthermore, an evaluation of the costs and benefits to States Parties of adopting the composite Protocol text led to the conclusions³⁶ that:

- a. In signing and ratifying the composite Protocol text, States Parties will be seen to have **taken all possible practicable** multilateral steps to **obstruct** the proliferation of biological weapons.
- b. Signing and ratifying the composite Protocol text will **reduce** the risk of biological weapons proliferation and use. Rejection of the Protocol would send the opposite signal and it can be argued that the risk of biological weapons proliferation and use will be increased.

³⁵Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Effective Strengthening of the Biological and Toxin Weapons Convention*, University of Bradford, Department of Peace Studies, Evaluation Paper No 20, April 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

³⁶Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Evaluation of the Costs and Benefits to States Parties*, University of Bradford, Department of Peace Studies, Evaluation Paper No 21, July 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

c. Signing and ratifying the composite Protocol text will bring significant benefits to the infrastructure of States Parties in the areas of combatting infectious disease, biosafety and good manufacturing practice and thereby **benefits in health, safety and prosperity** for all States Parties, both developing and developed.

d. Overall, signing and ratifying the composite Protocol text **enhances** the security of all States Parties. It provides **a net gain** to collective security. Rejection of the Protocol misses this opportunity and decreases collective security.

In evaluating the composite Protocol text, it has to be remembered that the BTWC with its basic prohibitions and obligations has been **in force** for over 25 years and that the Protocol is to strengthen the effectiveness and improve the implementation of the Convention. It is evident from the analysis of the principal costs and benefits on an Article by Article basis of the composite Protocol that the Protocol will bring significant and worthwhile benefits to **all** States Parties -- both developed and developing. A particular benefit from the Protocol arises from the establishment of the Organization to implement the Protocol and the benefits that this will bring to both the regime and to all States Parties. Furthermore, a consideration in a wider perspective shows that signing and ratifying the composite Protocol will bring a **net gain** for all States Parties. The Protocol will be effective, over time, in increasing transparency and building confidence between States Parties that other States Parties are indeed in compliance with the Convention, thereby reinforcing the norm that work on biological weapons, whether directed against humans, animals or plants, is totally prohibited. The Protocol will bring improved health, safety, security and prosperity to **all** States Parties.

85. The suggestion that *It is time to set aside years of diplomatic inertia.* is actually insulting to the States Parties who have worked extremely hard -- and effectively -- over the past decade to craft a Protocol that will indeed meet the aim of *strengthening the effectiveness and improving the implementation* of the BTWC.

86. As for the plea in which *The United States asks the states assembled here to join us in forging a new and effective approach to combat the scourge of biological weapons.*, it would have been hoped that the United States would have recognised that the lessons from the politically-binding measures agreed at previous Review Conferences -- such as the Confidence-Building Measures agreed in 1986 and enhanced and extended in 1991 -- is that legally-binding measures are the key to effective strengthening by **all** States Parties rather than implementation by the all too few States Parties which have chosen to do so as has been shown by the variable and patchy response to the CBMs.

A Further United States Statement

87. Subsequent to the Review Conference session in Geneva in November/December 2001, the United States has made a statement³⁷ to the Conference on Disarmament on 24 January 2002 which again needlessly goes out of its way to criticize the Protocol. This statement states that:

We flatly oppose flawed diplomatic arrangements that purport to strengthen the BWC but actually increase the specter of biological warfare by not effectively confronting

³⁷John R. Bolton, *Statement of the Honorable John R. Bolton, Under Secretary of State for Arms Control and International Security, United States Department of State to the Conference on Disarmament, 24 January 2002.* Available at <http://www.us-mission.ch/press2002/0124bolton.htm>

the serious problem of BWC noncompliance. It is for this reason that the United States rejected the draft protocol to the Biological Weapons Convention and the continuation of the BWC Ad Hoc Group and its mandate, and offered an alternative way ahead.

and goes on to say that:

.... After an exhaustive evaluation within the U.S. Government, we decided that the protocol was actually counterproductive. New approaches and new ways of thinking are needed to prevent the proliferation of biological weapons.

The United States presented a number of new proposals to do just this, including tightened national export controls, fully implementing the BWC by nationally criminalizing activity that violates it, intensified non-proliferation activities, increased domestic preparedness and controls, enhanced biodefense and counter-bioterrorism capabilities, and innovative measures against disease outbreaks. Many, if not all of these measures can begin to be implemented now. We look forward to discussing and refining them with all of you and hope that you will join us in endorsing and beginning to implement them as we prepare for the resumption of the BWC Review Conference next November.

88. As already noted above, it really is not true to suggest that the composite Protocol text would *actually increase the specter of biological warfare by not effectively confronting the serious problem of BWC noncompliance*. Careful analysis³⁸ of what is in the composite Protocol text shows that it would **indeed** provide an effective strengthening of the BTWC -- and would **reduce** not increase the danger of biological warfare as it would provide an effective mechanism to address any ambiguities, uncertainties, anomalies or omissions as well as non-compliance concerns -- a far better situation than the present situation in which States Parties such as the United States make statements expressing concern about non-compliance but yet do not utilise the procedures already available to them under the Convention to address these concerns and do not work to strengthen the regime effectively through a legally binding instrument such as that in the composite Protocol text.

89. The statement to the Conference on Disarmament says that the United States has presented a number of new proposals to prevent the proliferation of biological weapons -- yet these proposals, as the above analysis has shown, were not new and were virtually all within the composite Protocol text. There is a curious disconnect between the assertion of the United States statement of flat opposition to *flawed diplomatic arrangements that purport to strengthen the BWC but actually increase the specter of biological warfare by not effectively confronting the serious problem of BWC noncompliance* yet the new proposals, adopting a piecemeal approach, do not address how the United States sees them as actually strengthening the BTWC and not increasing the danger of biological warfare.

Conclusions

90. On the positive side, the proposal by the United States of measures to strengthen the BTWC is to be welcomed even though these proposals, on examination, are found to contain

³⁸Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Effective Strengthening of the Biological and Toxin Weapons Convention*, University of Bradford, Department of Peace Studies, Evaluation Paper No 20, April 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

little that is novel as most have long been the subject of language in the Final Declarations at previous Review Conferences -- and, more to the point, had been elaborated effectively in the composite Protocol text. Likewise, it is also encouraging that the United States does recognize that *this Convention can succeed in advancing the worldwide effort to reduce and ultimately eliminate the biological weapons threat.*

91. In contrast, the unfounded and repeated criticism of the Protocol does nothing for the credibility of the United States or for its political judgement given the virtually universal support for the composite Protocol text. This is not a situation in which one State, the United States, is right and all the other States Parties are wrong -- but rather the reverse. There are real **collective** security benefits to be gained from adoption of the composite Protocol text -- and those States Parties that recognise this are making **no** mistake.

92. It is especially to be regretted that it became evident during the Review Conference that the United States, whilst content to call for national measures, would not consent to any language which required multilateral action or sought to arrive at legally binding measures to strengthen the regime. It also apparently had difficulty in accepting language referring to other international treaties such as the Convention on Biological Diversity or the Cartagena Protocol on Biosafety to which the United States is not a Party even though such language had been agreed at a previous Review Conference. The tabling, within two hours of the end of the Review Conference, of language, without any prior consultation even with close allies, proposing termination of the Ad Hoc Group and its mandate showed a serious misreading of the widespread desire of all the other States Parties to strengthen the effectiveness and improve the implementation of the Convention in accordance with the mandate of the Ad Hoc Group. The attitude of the United States to the Review Conference and the Biological and Toxin Weapons Convention is very hard to understand let alone explain.

93. The rest of the world appreciates and recognizes the value of the multilateral regime against biological weapons in strengthening collective security and following the events of 11 September and the subsequent anthrax attacks in the United States, it would have been expected that the United States would have been aware of -- and would have wished to benefit from -- the considerable benefits that could accrue from multilaterally strengthening the BWC regime as national measures are always going to be subject to national interpretation and are unlikely to be harmonised internationally. The United States has missed a real opportunity to help to protect itself -- and its fellow States Parties -- from the dangers of biological weapons.

94. In looking ahead to the resumption of the adjourned Review Conference in November 2002, there is much to be said for like-minded States -- such as the 36 States Parties on whose behalf Brazil had spoken in support of the Chairman's composite text in July 2001 (Argentina, Australia, Austria, Belize, Brazil, Bulgaria, Canada, Chile, Croatia, Cyprus, the Czech Republic, Denmark, Ecuador, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Peru, Republic of Korea, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Turkey and Ukraine) together with the other members and associated countries of the European Union (such as Belgium, Estonia, Finland, France, Germany, Liechtenstein, Lithuania, Poland, Portugal, and United Kingdom) as well as States Parties such as Jamaica, Japan, Latvia, Monaco, Singapore, and Switzerland which together would come to over 50 States Parties -- to consult together to agree on how to proceed in November 2002 should the United States then still not recognise the importance to collective security of a multilaterally strengthened BWC regime. It is also worth remembering that the rules of procedure of the Review

Conference do state that *"If, notwithstanding the best efforts of delegates to achieve consensus, a matter of substance comes up for voting, the President shall defer the vote for 48 hours and during this period of deferment shall make every effort ... to facilitate the achievement of general agreement."* and then goes on to add that *"If by the end of the period of deferment the Conference has not reached agreement, voting shall take place and decisions shall be taken by a two-thirds majority of the representatives present and voting, providing that such majority shall include at least a majority of the States participating in the Conference."*

95. Whilst a Final Declaration agreed by consensus is greatly to be desired -- and all our efforts should be towards that end -- the satisfactory outcome of the Fifth Review Conference is too important for international collective security for this to be jeopardized by the mistakes of a single State Party, even if it is also a Depositary. Today, public and political awareness and concern about biological weapons is at an unprecedented level and the world expects **all** the States Parties -- large and small, developed and developing -- at the Review Conference to seize this opportunity to make the world a safer place for all of us by agreeing a Final Declaration which effectively strengthens the regime against biological weapons. Do not fail us.