

# Managing the Biological Weapons Problem: From the Individual to the International

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THE WEAPONS OF  
MASS DESTRUCTION  
COMMISSION

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# **Managing the biological weapons problem: from the individual to the international**

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## **Executive Summary**

1. The problem posed by biological weapons is very complex. It encompasses attempts to ensure biological disarmament under the BWC has real meaning, the prohibition on use of biological weapons in the Geneva Protocol remains the international norm, and that the proliferation of *capabilities* is not transformed into actual weapons. There are no easy solutions to the biological weapons issue.
2. Any attempt to model solutions to the biological weapons problem based *only* on international treaties and agreements will fail. This is not an issue which can be resolved by a treaty on its own.
3. If the Weapons of Mass Destruction Commission seeks to identify realistic proposals to reduce the dangers posed by biological weapons in the short to long term it will have to advocate a break with past policies. Efforts such as those enshrined in the negotiations on the BWC Protocol (1995-2001) are no longer workable.
4. The issue is not biological weapons and states: the issue is the biological weapons problem itself, which encompasses states, non-state actors, and individuals. Efforts at control must address each of those discrete areas of concern through a variety of measures.
5. Any effort to ameliorate the problems posed by biological weapons requires six components:
  - (1) a real understanding of the problem such weapons pose;
  - (2) a willingness to go well beyond the traditional arms control/disarmament paradigm;
  - (3) a short-term strategy to overcome the political difficulties in the BWC;
  - (4) a medium-term strategy to strengthen the BWC;
  - (5) a willingness to actually enforce – by putative means if required – existing law and norms;
  - (6) a recognition that there is no solution to this problem: it requires on-going and permanent management.

**Introduction**

1. Until recently international action against biological weapons was focussed on strengthening the 1972 Biological Weapons Convention (BWC). This focus skewed thinking away from other activities which existed prior to the BWC, or were developed to supplement it, such as existing treaties and agreements (1925 Geneva Protocol), deterrence and security policy, biological defence and protective measures (hereinafter 'biodefence'), export controls, and national and regional initiatives. In reality most states, and particularly most Western states, employed a variety of policies to reduce the threat posed by biological weapons. They included treaties and international law (BWC, Geneva Protocol), non-proliferation activities (export controls), biodefence, and deterrence.

2. The weaknesses of the BWC, and in particular the lack of compliance mechanisms, are well known. Indeed, states parties to the BWC have attempted to strengthen the Convention since the First Review Conference in 1980. This began with politically binding measures and information exchanges but the failure of these efforts to increase confidence in compliance led to a major push for strengthening the BWC via a legally binding agreement. This resulted in the negotiations on the BWC Protocol (1995-2001) among its states parties, which failed. The failure of the BWC Protocol negotiations has had three immediate impacts: first, the diplomatic impasse among the states parties to the Convention which shows few signs of being overcome in the next few years; second, the aspirations of states parties that consistently supported the BWC Protocol has dissipated and collectively there now exists a pervasive lack of ambition; third, states have been forced to consider other means to address the biological weapons problem, but most appear bereft of meaningful ideas.

3. Each of these problems will have to be overcome if the moral, normative, and legal framework prohibiting the use of biological weapons is not to be eroded over the next decade and a half. How then to go about tackling these problems? First develop a new way of thinking about the problems biological weapons pose and how such issues can be managed. Second develop a strategy to overcome the political difficulties at the international level related to the BWC. Third, put in place a medium to long-term plan to oversee efforts to prevent the development and use of biological weapons by any one under any circumstances.

4. A framework for overcoming these problems is outlined in this paper. Reducing the threat posed by biological weapons will be based on policies and action under three areas: (1) International law prohibiting the use of BW (Geneva Protocol); (2) Legal commitments to biological disarmament under the BWC; (3) Health, safety, and security regulations related to pathogens, dual-use materials,

equipment and knowledge. As it currently exists these foundations are necessary, indeed essential, but they need to be built upon and bolstered.

5. The central element of this paper proposes a new framework under which to consider biological weapons and efforts to counter, roll back, reduce, and prevent their use and development. Resolving the current crisis in biological disarmament (the international political difficulties in the BWC) is technically simple, but depends on the will and ambition of states parties. Either the states parties will begin to engage with reality – which means they will address some of the most invidious issues related to biological weapons and biological disarmament that they have avoided over the last fifteen years – or the BWC will remain peripheral to those states which perceive a significant biological weapons threat against them. Fundamental to the approach in this paper is the notion of the ‘biological weapons problem’ which stretches beyond concerns about states, terrorists, and the BWC *per se*. Furthermore its contention is that managing the biological weapons problem requires a set of policies and commitments stretching from the individual to the international.

### **The General Approach**

6. The biological weapons problem is not about ‘disarmament’ or ‘arms control’ as traditionally understood: it has no connection to the problems under the NPT related to discrimination between different categories of states; it is not about attempting to achieve disarmament because no state under the BWC is permitted to have biological weapons; it has no connection to oversight of destruction of tens of thousands of chemical weapons within six states (Albania, India, Libya, Republic of Korea, Russia, US) under the 1993 Chemical Weapons Convention. No state may use biological weapons *if* one accepts that the 1925 Geneva Protocol prohibition on the use of chemical and biological weapons represents customary international law. All states parties to the BWC are prohibited from developing, producing or stockpiling such weapons. The biological weapons problem is therefore a post-disarmament issue which requires ‘management’ or ‘governance’ by a collection of both connected and unconnected measures. Some of these measures already exist, others do not. Moreover, the biological weapons problem encompasses a risk spectrum covering everything from individual biocrimes to terrorist and state use of biological weapons. States are not only prohibited from having biological weapons in their own armouries: they are also required to ensure their nationals do not develop or produce biological weapons.

7. Wherever one stands on the issue of biological weapons there can be little doubt that the future is looking increasingly dangerous because of a number of factors, each independent of the others, which collectively raise considerable doubts about the ability of existing control mechanisms to prevent the norm against biological weapons being eroded. It is the convergence of these factors

which is putting so much pressure on the BWC and the norm against biological weapons in the first few years of the twenty-first century.

8. The factors which effect the issue of biological weapons include: the dual-use problem involving materials, equipment, and knowledge which has both legitimate peaceful and (illegitimate) hostile applications; the biotechnology revolution and related developments (e.g. synthetic biology); globalization and the increase in trade; the inherent weaknesses in the existing law against the use and development of biological weapons in the 1925 Geneva Protocol and the 1972 Biological Weapons Convention; the fractious politics of biological disarmament within the BWC following the failure of the negotiations on the BWC Protocol in 2001; the threat posed by terrorists and non-state actors and their increased interest in biological weapons; public and government fear of biological weapons use (particularly in Western states) that may have an impact physically, economically, and psychologically well beyond any actual 'success' rate; renewed interest in incapacitating and disabling chemical and biological substances; and, a crisis of legitimacy related to the actions and policies to counter the biological weapons threat.

9. There is no direct causal relationship between each, or all, of the factors which contribute to heightened concern about biological weapons and the increased risk of use. The convergence of factors referred to above does not make the use of biological weapons by an individual, terrorists, or a state inevitable. Unlike 25 years ago, however, one can have little confidence that the most likely use of such a weapon comes from a state – and particularly a non-Western state – during a period of war.

10. To develop realistic proposals to reduce the dangers posed by biological weapons all must become less beholden to past practice(s). For example, devising mechanisms based on actual pathogens themselves when the synthetic creation of pathogens from DNA strands is already possible is clearly limited. There is no equivalent to the nuclear weapons solution that prevents access to Highly Enriched Uranium or Plutonium. There is also no equivalent to the Schedules of chemicals under the 1993 Chemical Weapons Convention whereby certain chemicals with no or very few peaceful applications can be identified. That said, in the short to medium term controls on certain pathogens serve a necessary purpose – otherwise there would be no select agent list – even if there are limitations to such measures. The point of this example is to highlight that the possibilities at the cutting edge of science must be taken into account, but must not dictate the solution because at this juncture few can exploit such possibilities. In addition, the search for a 'solution' to the problem must end and be replaced by a management approach which both develops new policy responses as they are required and ends existing policy when it has run its course. Just because something worked 20 years ago does not mean it will work now; what works in the contemporary period will probably not work in 20 years time.

### **The biological weapons problem**

11. To understand how to deal with the threat posed by biological weapons in the opening decades of the twenty-first century one first needs to grasp the scale of the problem. The key issue is the ‘problem’ and not the ‘threat’; the threat changes and will continue to change. It is dynamic whereas the problem is the same as it has always been. Hence the ‘biological weapons problem’ is the issue: not the biological weapons threat; not the BWC; not biological disarmament; not bioterrorism; and, not biocrimes involving assassination, deliberate contamination, or harm using a pathogen.

12. Whether or not a pathogen is used deliberately by an individual, a group to achieve political objectives by terror and violence, an actor (state or non-state) to achieve an objective through the dissemination of disease, or by a state in war or by covert means; whether or not the use of the pathogen is against humans, animals, or plants; and whether or not the pathogen is lethal or incapacitating, the problem is still one that involves the deliberate use of a biological agent. That is the biological weapons problem; a spectrum of risks and threats involving biological weapons.

13. It is important to note that this spectrum is itself only part of a number of risks related to biological organisms and/or the life sciences, such as genetically modified organisms, synthetic biology, accidents involving pathogens, natural outbreaks of disease etc. This latter set of risks will influence how the biological weapons problem is managed, but they are not dealt with in this paper. The key point to understand is that action does not require a simplistic choice between multilateralism and unilateralism. National action alone cannot resolve or manage all the security problems within this spectrum; likewise, neither will action at the international level only.

14. The second underpinning element in the approach advocated in this paper is recognition that there is no solution to the biological weapons problem. Searching for a ‘silver bullet’ to the biological weapons problem is chasing a dream. The dual-use problem cannot be eradicated. Everything else hinges on that reality. As a consequence there is no solution: we must live with it, manage it, and have in place a set of measures, policies, safeguards, laws, and means to address the problem at all its levels. Hence, the biological weapons problem is one to be ‘managed’; not solved.

#### *A new framework*

15. The process of disarmament entailed the creation of a number of organizations, arrangements, and agreements to give effect to the obligations

contained in bilateral or multilateral treaties. Thus, with regard to nuclear disarmament and non-proliferation a multiplicity of arrangements evolved including: nuclear weapon free zones (NWFZs); the Non-Proliferation Treaty (NPT); the Safeguards agreements under the International Atomic Energy Agency (IAEA); the Comprehensive Test Ban Treaty (CTBT) and its predecessors, the Partial or Limited Test Ban Treaties (PTBT or LTBT); the Outer Space Treaty; the Seabed Treaty; the Nuclear Suppliers Group (NSG); the Zangger Committee; Euratom; and, the whole range of national legislation and regulations related to nuclear weapons, nuclear safety, and the nuclear industry. The architecture related to nuclear weapons developed as a series of separate measures. The multiplicity of arrangements under this architecture is generally accepted as the correct approach: there is no attempt to put these arrangements under a single authority or a 'super-treaty' covering every aspect of the problem. The separate elements are connected in their overall objective, but not always directly linked; certain parts of the architecture can be changed e.g. national safety legislation or IAEA Safeguards, without unravelling the whole system. The multilayered approach has its weaknesses, but it also has inherent strengths not least of which is its adaptability to changing environments.

16. In contrast the attempt to develop a comprehensive chemical disarmament agreement, the 1993 Chemical Weapons Convention (CWC), resulted in an explicit prohibition on use of chemical weapons even though such a prohibition was already in existence under the Geneva Protocol; it included its own non-proliferation obligations and commitments related to trade and licensing of certain goods, even though a significant proportion of the main chemical supplier states were co-ordinating their export licensing requirements under the auspices of the Australia Group; it created its own investigation mechanism even though the UN Secretary General held such powers under the UNGA and UNSC Resolutions passed in the 1980s and early 1990s. The shift in the late 1980s and early 1990s to a single organization or agreement included a tendency to centralisation. The CWC did not, and does not, supersede the Geneva Protocol or the powers of the UN Secretary General, but it did – at least implicitly – attempt to reduce the importance of other existing mechanisms like the Australia Group. Such *ad hoc* creations were viewed as legitimate because of the absence of an international agreement on such matters. Consequently, with the entry into force of a comprehensive international treaty (the CWC) many argued that the need for the Australia Group would wither away: with one internationally agreed standard there would be no need for *ad hoc* or differentiated standards. Without being too simplistic the tendency and preference was to aim for the single-treaty solution to the problem. When one thinks about chemical weapons, the CWC is the starting point (indeed the only point for some), and little consideration is given to the role of the Geneva Protocol, the Australia Group, the powers of the UN Secretary General, or the different security, health, environmental, and safety regulations at the national level, even though all those elements still exist and still have a role to play in ensuring chemical disarmament. This is not to say the CWC is an



inappropriate model; rather it is to point out that completion of the CWC and the centralisation of authority in an international organization represented a political culture and context which no longer exists.

17. The BWC Protocol negotiations of 1995 to 2001 attempted to follow the single treaty model. It was an aggregative approach to the biological weapons issue. Managing the biological weapons problem, however, requires – and will be marked by – a disaggregated approach.

*Individual, Sub-National, and National approaches*

18. Individual pledges not to partake in the development of biological weapons form one layer, be they linked to an individual's religious beliefs, professional ethics, informal, or more formal, codes of conduct, or professional body guidelines. Above that stands the scientific and ethical consideration or oversight of certain activities. This may include safety aspects (such as biosafety) and/or ethical considerations (such as that on cloning), or more specifically in this case whether or not such an activity should be permitted to take place (creating vaccine resistant anthrax strains in a classified defence programme). Upon completion of such research, there may be publication guidelines on what information can (or should) be released into the public domain. Much of the recent activity in these areas has focussed on the implications for terrorism, but it is as valid to state programmes as to non-state activities.

19. More traditional implementation measures include health and safety legislation such as biosafety, transport and handling of potentially dangerous materials, environmental regulations, national and international licensing requirements for products (such as Good Laboratory Practice) and other product licensing standards. Such activities have, again, been bolstered in recent times with a drive towards Biosurety – who has access to what etc. – and Biosecurity – is a facility secure and safe?

20. Synergy is the most important aspect here. Regulations, guidelines and health, safety, and environmental protection requirements initially devoid of any link to security or biological weapons do in fact play a role in managing the biological weapons problem. This much was evident in the detailed responses on national legislation and implementation information submitted by some states parties at the 2003 Meeting of Experts in Geneva.

21. The next level of activity is that more traditionally understood to represent national measures: penal legislation, public health, biodefence, and defence and security policy. Legislation prohibiting the production and development of biological weapons exists in a number of states, but not all, so safe havens do exist. Public health responses to disease outbreaks – and the role such measures play in managing the consequences of a biological attack – have also come back

into vogue with the threat of terrorism. Likewise renewed interest in biodefence and the reformulation of security policy to counter proliferation and potential use of such weapons. While there is recognition that public health 'is just one layer in a comprehensive biological defence'<sup>1</sup> its link to a broader international effort has been lost. National measures such as Project Bioshield have value, but also present some new dangers in terms of an increase in the number of facilities and individuals working with potentially dangerous pathogens. In practical terms what has been done to strengthen international health preparedness since the World Health Assembly resolution WHA55.16 in May 2002? Or give real meaning to Article VII of the BWC? The WHO resolution called on member states to treat deliberate use of biological and chemical agents and radionuclear attack as a 'global public health threat' and all states must realise that they may not be as secure as they think unless response plans include an international component. Hence, even the most critical observers of the approach taken by the BWC Protocol have suggested that an international disease surveillance mechanism would bring with it benefits linked to security.<sup>2</sup> Synergy is also important in two areas here: first, 'the importance of using existing systems to protect public health and to augment these where appropriate.'<sup>3</sup> Second, the overlap between national, regional and international measures in any layered response to managing the biological weapons problem.

#### *Regional, and Like-Minded approaches*

22. Bilateral and regional agreements can take various forms such as licensing agreements for the import and export of goods; Prior Informed Consent and biocontrol agreements; disease surveillance at the regional level; and, export controls such as those embodied in Wassenaar. They can also include a strategy for dealing with proliferation, such as the European Security Strategy (ESS), or more traditional alliances such as NATO. Declaratory forms, such as the Mendoza agreement in Latin America, are also common.

23. Outside the regional context there are also like-minded groups. Like-minded approaches to biological weapons are the source of significant political difficulties in the contemporary period because of the perception that they constitute a less-than-multilateral approach, and as such have been so heavily criticised in some quarters. Like-minded approaches existed, however, before the current difficulties emerged: long standing precedents are provided by arrangements such as the Nuclear Suppliers Group and the Australia Group. The Co-operative Threat Reduction Programme in Russia and the FSU developed

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1. Rebecca Katz, 'Public Health Preparedness: The Best Defense against Biological Weapons' *The Washington Quarterly* Volume 25, Number 3 (Summer 2002), p.70
  2. Alan P. Zelicoff, 'An Impractical Protocol' *Arms Control Today* Volume 31, Number 4 (May 2001) p.27
  3. World Health Organization, 'Public health response to biological and chemical weapons: WHO guidance' Second Edition, (Geneva, World Health Organization, 2004) p.vii.

from a bilateral US-Russia arrangement into a like-minded approach supplemented more recently by the G8 Global Partnership. The development of the Proliferation Security Initiative constitutes a like-minded approach to a problem. What is important here is an understanding that such like-minded groups did not emerge because of a desire to restrict certain activities to a 'club' of states or some desire to push forward the boundaries of international law or control mechanisms *per se*. They were created because of the perception that they were required to perform necessary tasks. Non-proliferation policies and obligations could be better enforced if as many as the main supplier states as possible acted in a co-ordinated manner. Enhancing security of 'loose nukes' was best done by those with a direct interest in managing the problem and the means to carry out effective action, rather than waiting for international consensus to emerge on the issue. The PSI represents a further evolution towards active enforcement and counter-proliferation when non-proliferation fails.

24. Such activities are perceived as a Western initiative, but they could be developed beyond the EU, NATO, G8, Western Group by other like-minded groups of states such as ASEAN, the African Union, or the OAS. Furthermore, the activities could include regional disease surveillance, agreements on assistance and protection in the event of the use or threat of use of biological weapons, or indeed co-operation agreements related to the transfer of certain materials. Such activities are not necessarily only limited to the area of putative action and enforcement (although these are necessary).

#### *Multilateral and International approaches*

25. The multilateral approach is understood to be embodied in treaties such as the Geneva Protocol, BWC, and the CWC. International approaches in the form of UN Resolutions, the UN Counter-Terrorism Committee, UN Secretary General Investigations into alleged use, WHO disease surveillance and response, and WHO Emergency Response are also well established. Other linkages and synergies were widely recognised in the 1990s including the Food and Agriculture Organization, the Organisation International des Epizooties, and the Convention on Biological Diversity. Much may be done beyond the formal weapons conventions themselves. For example, the UNSC may act to co-ordinate with relevant bodies and outline a plan of action in the event of the use of biological weapons. This will serve both to reassure states parties that international commitments are being taken seriously and act as a deterrent by putting on notice any state or non-state actor that any use of biological weapons will result in an effective response at the humanitarian, political, and security levels. One important dimension is currently missing: the legal authority and determination to pursue and punish under the law those who use such weapons and assisted such

use. This approach, the criminalization of the use of biological weapons, has its supporters and well developed ideas already exist in this area.<sup>4</sup>

*Tying it all together*

26. Much of the above may seem unconnected to the issue of biological weapons control and disarmament efforts as traditionally understood. However, if one considers the above measures in light of the objectives and obligations under the BWC the linkage becomes more readily identifiable.

27. The precise legal formulation of the BWC needs to be taken into account, but in summary, the development, production, stockpiling, acquisition, retention, and transferring of biological and toxin weapons is prohibited. Furthermore, assisting, encouraging, and inducing any state, group of states or international organization to manufacture or acquire biological weapons – which may be stretched to include *any recipient whatsoever* – is also prohibited. To give effect to the prohibitions states parties are required to, '[t]ake any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention' of such weapons.

28. An assumption that giving effect to biological disarmament must happen via consensus agreement among all the states parties under the BWC has resulted in any measure taken outside the BWC context being treated with suspicion. This has allowed states to ignore their national responsibilities to give effect to their international obligations; resulted in lowest common denominator solutions; and, allowed some states to veto useful policy developments and tools. The knock-on effect of this in the wake of the failure of the Protocol is to give some credence to the claim that the BWC is 'ineffective' and has no useful role to play.

29. Any approach to dealing with biological weapons that is based *only* on the BWC or, alternatively, based on *anything but* the BWC is politically simplistic and fails to grasp the scale of the biological weapons problem. Recognition of what is actually happening at the different levels and how these discrete and currently unconnected approaches contribute to the overall objective (preventing the use of biological weapons) is necessary. Many of these measures gain their legitimacy from the obligations under the Convention, but they will not necessarily be developed or implemented by the states parties collectively.

30. This brings us to the crucial difficulty related to the politics of biological disarmament: accepting that the BWC will not be the only component in managing the biological weapons problem, but recognising that the biological

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4. 'A Draft Convention to Prohibit Biological and Chemical Weapons Under International Criminal Law' *The CBW Conventions Bulletin* Issue Number 42 (December 1998) pp1-5. 'International Criminal Law and Sanctions to Reinforce the BWC' *The CBW Conventions Bulletin* Issue No. 54 (December 2001) pp1-2.

weapons problem cannot be addressed seriously without a meaningful and effective BWC.

31. Therein lies the main political problem for the true proponents of effective biological disarmament: they must simultaneously develop and implement a strategy that enhances the effectiveness of the BWC and simultaneously accept, promote, and implement numerous other measures at the sub-national, national, regional, and like-minded levels that are in fact required, linked to, but not part of, the BWC itself. To achieve this states parties must develop a new strategy that circumvents the political difficulties in the Convention and provides a basis for action and policy development from 2006 onwards.

### **A strategy to overcome current problems**

32. No attempt to develop measures which reduce the threat posed by biological weapons can ignore the realities of the politics of biological disarmament. As in many other areas there is a clash between the multilateralists and those more concerned about state sovereignty and state primacy. Of the 151 states parties to the BWC there are approximately 75 states parties who usually attend and take part in the meetings. Of these, approximately 25 are active members, seeking to drive the agenda at different times to use the BWC to pursue their national interest, and make an effort to come to an agreement. While all 151 states parties have a voice and all are equal under the Convention, it is the 25 active parties that matter in terms of policy formulation and determining success or failure. In the BWC they are: Argentina, Australia, Brazil, Canada, China, Cuba, Finland, France, Germany, Hungary, India, Iran, Italy, Japan, Netherlands, New Zealand, Norway, Pakistan, Republic of Korea, Russia, South Africa, Sweden, Switzerland, UK, US. Overcoming the existing political difficulties requires these states parties to lead. However, within this group there is a split between those who have traditionally acted with ambition – to empower the states parties collectively to counter biological weapons – and those who employ a deliberate policy of stalling any strengthening process to protect national sovereignty. The former includes Australia, Canada, Finland, France, Germany, Hungary, Italy, Netherlands, New Zealand, Norway, South Africa, Sweden, Switzerland, and the UK: the latter, China, Cuba, India, Iran, Pakistan, Russia, and the US. The positions of the others – Argentina, Brazil, Japan, and Republic of Korea – go some way to deciding the balance of power in the BWC.

33. The current political reality is quite simple: unless Australia, Canada, Finland, France, Germany, Hungary, Italy, Netherlands, New Zealand, Norway, South Africa, Sweden, Switzerland, and the UK come forward with realistic proposals to overcome the impasse in the BWC, win over and convince the likes of Argentina, Brazil, Japan, and the Republic of Korea, and through that the remainder of the European Union states, and the majority of states parties likely to

accept a meaningful new work programme – such as Chile, Mexico, and Ukraine – the BWC will remain mired in a mess of its states parties making. Convincing the US that the BWC has a meaningful role to play is crucial because it is the US which tips the balance of power in the BWC between those wishing to endow it with greater collective powers to enforce disarmament and those wishing to maintain the status quo of a weak Convention.

34. Complicating this is the fact that politics in the BWC is also caucus group led. In reality, the Eastern Group is non-existent as an actor; the Western Group ineffective because of the schism between the US and the rest of the Western Group on how to tackle the problems in the BWC; and, the NAM extremely conservative in its approach. Unlike in the NPT context, something akin to the New Agenda Coalition is unlikely to emerge as an agenda-setting group and catalyst for action, even though such a group is precisely what is required in the current environment.

35. What that translates into is the necessity for a long term commitment to the BWC; deliberate planning for the Review Conference in 2006 and beyond; and, a willingness to accept and overcome the difficulties the BWC faces. In short, a lot of hard work will have to be undertaken by the few states capable of changing the politics of biological disarmament.

#### *The BWC new process*

36. The BWC new process of expert and annual meetings between 2003 and 2005 is a means to an as yet undefined end. Its principal purpose remains to keep the BWC on the agenda and to provide a forum for meetings of states parties. Of itself this is no small feat given the disputes of 2001 and 2002. Moreover, it provides as a secondary effect a means whereby meetings of states parties are becoming the norm rather than the exception, and has generated some measure of institutional support for the BWC.<sup>5</sup> Such standardisation is not to be ignored, or its importance underestimated. However, despite the benefits offered by the new process, the key issue remains the Sixth Review Conference of the BWC in 2006. The new process must be tied into that – its recommendations and ‘effective action’ given some meaning. In addition, a new agenda must be developed for the BWC for action between 2006 and 2011 (the Seventh Review Conference if existing practice is followed) *if* the Convention is to be taken seriously by its states parties – and more importantly provide an obstacle that gives pause for thought by those who may breach its provisions.

37. Existing realities and the lessons from the Protocol negotiations indicate that a new agenda for 2006-2011 will be extremely difficult to create. Significant

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5. Between 1986 and 2006 the states parties to the BWC will have met annually for one purpose or another every year except 1988, 1989, and 1990. States parties have paid for additional Secretariat assistance since 1997.

political and diplomatic effort will be required to forge any new agenda. It is a false hope to believe that a change in the US Administration, whether in 2004 or 2008, will lead the US back to the negotiating table to develop some kind of Protocol. Furthermore, it is disingenuous to pretend that the US was the only 'problem state' in the Protocol negotiations. Those states which have protested publicly and loudest in the BWC since 2001 about the US decision to reject the Protocol were in fact (mostly) hiding behind the US. Many of these states protest merely to gain political capital and were in fact responsible for the slow progress of the negotiations and the weaknesses in many of the Protocol's provisions.

38. The opportunity to create a BWC Protocol has been lost. Any policy that hinges on the creation of an all encompassing legally-binding Protocol to the BWC is doomed for the foreseeable future. This is because the states parties had their opportunity to develop a new legally binding instrument and the convergence of factors which made that possible in the early 1990s – the end of Cold War, consensus over WMD breaches by Iraq, significant NGO involvement and proposals for the BWC, active and dynamic arms control/disarmament agenda, prospect and promise of a new world order, leadership in BWC by a sizable group of states parties, ambitious but feasible agenda for strengthening the BWC – had dissipated by the end of 1998 and are highly unlikely to re-appear. Even the use of biological weapons by terrorists or a state may not automatically develop renewed interest in strengthening the Convention. In addition, the US remains paranoid about the prospect of a BWC Protocol-type agreement emerging, whether by design or by stealth. Its current bottom line of 'no negotiations' is based on such paranoia. This underlines the importance of other states developing a new strategy and that much of this effort may well have to go into convincing the US that a stronger BWC is in its interests.

#### *The importance of the 2006 Review Conference*

39. Existing difficulties should not blind proponents of the BWC to what can be done with it in 2006. The first task is to make use of the information and recommendations resulting from the new process. This issue has not been given serious consideration by the states parties collectively because of the difficulties of getting an agreement in 2002 and the insistence on each of the three sets of meetings being a separate and unconnected event. Submitting the final report from each meeting of experts (MX) and the final report of each annual meeting as Conference documents will yield few practical results: states parties will ignore them. Either the states parties will have to request each Chairman to submit a separate report, or a troika report by all three, via a decision of the Preparatory Committee of the Review Conference, or the Chairmen will have to take upon themselves such a task (perhaps in a national capacity), or another state – or group of states – will have to submit a report. Failing any of these it is highly likely that an NGO – or coalition of NGOs – will submit a report on the process; a prospect which if permitted further undermines confidence that states parties to the BWC

are equal to the task of biological disarmament. (NGOs have an important role to play but if the long-term interests of the BWC are considered, NGOs taking on the tasks which the states parties should fulfil is not an outcome that is at all desirable.)

40. The second issue to be considered relates to actual implementation of existing politically-binding commitments under previous Final Declarations: how many have been fulfilled? What is still left outstanding? What has not been undertaken at all? Something as simple as an inventory of decisions and action taken between 1980-2006 could focus both minds and efforts in 2006 to establish certain benchmarks for future action. (There is a lesson in the timelines for action established by the CWC Review Conference in 2003 which states parties to the BWC should take on board.) Linked to this it is also time to streamline the text of any Final Declaration rather than continue adding further layers of *diplomatise* to what, in some cases, is already vacuous language.

41. The third area is where current decisions and obligations underpin the BWC but require attention and have not been addressed for some time. Among these is the question of CBMs and the need to consider the existing CBM formats, whether or not new CBMs are required, submission and distribution (electronic submission), translation and implementation (a database of information), and an agreed consultation/clarification process for states parties vis-à-vis the CBMs (this assumes that states parties are not willing to use Article V of the BWC for this process even though they could do if they wished). A further issue in this area is the question of supporting mechanisms such as a Scientific Advisory Panel, a Committee of Oversight or Standing Bureau between the Review Conferences, and the question of Secretariat support.

42. The fourth area concerns those issues often neglected as peripheral but which require attention and can be used to strengthen confidence in the BWC such as, developing meaningful assistance and protection mechanisms and procedures (Article VII), applying pressure on those states with reservations to the Geneva Protocol (Article VIII), picking up lessons from the implementation of the CWC, and devising a plan for universal adherence to the Convention so it does not continue to fall behind the CWC, and well short of the NPT.

43. The fifth area is where the substantive and invidious problems are located. These include the issue of compliance which can no longer be shirked by the states parties (Article I); biodefence issues; disabling and incapacitating pathogens and interest in 'non-lethal' weapons; questions relating to biocontrol agents; national implementation and legislation (Article IV); non-proliferation (Article III) and its relationship to peaceful co-operation (Article X); investigations of non-compliance (Article VI); and, disease surveillance (Article X).

44. It is highly unlikely that the states parties will be able to gain any meaningful agreement on these issues at the three-week meeting of the Review



Conference. Further work on these issues will be necessary and may form the basis of the 2006-2011 work programme.

45. All of this requires significant effort, but consideration should be given to the implications of not bolstering the BWC in 2006. When major charitable foundations such as the Carnegie Corporation refer to the BWC as ‘the existing, ineffective treaty regime’<sup>6</sup> and the most august scientific body in the United Kingdom considers the BWC ‘critically weakened’<sup>7</sup> it is a fair bet to assume some states parties are also questioning seriously the utility of the BWC. If the BWC continues to remain peripheral to efforts to counter biological weapons – as it currently does – its purpose and function will be thrown further into doubt. That will lead only to erosion of the law underpinning biological disarmament, the law and the norm against the use of such weapons, and the moral revulsion against them (which itself is routinely cited but rarely given any meaning).

### **The wider picture**

46. Linked to the BWC and the issue of biological weapons is the Geneva Protocol. The Geneva Protocol prohibits the use of chemical and biological weapons in war but is widely taken as representing customary international law. However, how far does that customary interpretation of the Geneva Protocol stretch? One area where the WMD Commission could make an impact is to pose a series of questions on the Geneva Protocol with respect to biological weapons (if one assumes the CWC adequately covers chemical weapons). Such questions may include: Does the Geneva Protocol represent customary international law? If ‘yes’ is all use prohibited? And at what level: international (state-state); national (state against its own population); sub-national (by non-state actor)? Does it apply to only lethal biological weapons? Lethal to humans only; or animals and plants? What about materials? Does it cover disabling, incapacitating, or ‘non-lethal’ microbial and other biological agents?

47. Taking the linkage issue further, what actually happens in the event of alleged use of a biological weapon? This raises questions the states parties to the BWC should address in 2004, but also ties into the powers granted to the United Nations Secretary General under UN resolutions. Regardless of the outcome of the 2004 Meeting of Experts (19-30 July) or the Annual Meeting (6-10 December) this issue will have to be considered at the BWC Sixth Review Conference and in a wider framework. In addition, if alleged use is proven, what actually happens to

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6. CEIP, ‘The Corporation’s Program: International Peace and Security’:  
[http://www.carnegie.org/sub/program/intl\\_peace.html](http://www.carnegie.org/sub/program/intl_peace.html) [downloaded 18 August 2004]

7. The Royal Society, Media Releases, ‘Controls of biological weapons critically weakened 19 January 2004’ [downloaded 20 January 2004]  
<http://www.royalsoc.ac.uk/templates/press/showpresspage.cfm?file=499.txt>

the perpetrator: breaching the law has few consequences for a state in reality, and even fewer that are established by the international community.

48. The overlap between the BWC and the CWC regarding the issue of toxins can also not be ignored. At one level the existence of agreed mechanisms to investigate alleged use of a toxin weapon under the CWC – as well as the powers of the UN Secretary General – mitigates the weaknesses in the BWC and its reliance on the UN Security Council. However, if issues directly related to the BWC continue to be ‘contracted out’ to other organisations or if a stance is taken that the BWC does not need strengthening because other mechanisms exist, then the purpose of the Convention is again undermined. At the very least, consideration should be given to establishing some kind of formal understanding that any investigation of alleged use of toxins will take into account the overlap with the BWC and views presented by its states parties. This is not only to ensure the BWC remains relevant to any investigation process: it also serves to require the states parties to the BWC to acknowledge formally events related to the Convention.

49. The BWC’s states parties have a poor record of taking an interest in issues related to the Convention and recording, even in a customary manner, the existence of activities which have an impact on the BWC. During the 1990s the activities under the Trilateral Process were never formally reported to the states parties; only the briefest of mentions was made of the activities of UNSCOM, and later UNMOVIC, in the BW area; and, even the Formal Consultative Meeting of 1997 was edited down to the barest mention in the draft Final Declaration of the Fifth Review Conference at the 2001 meeting (a Final Declaration was never agreed). Collectively agreeing to turn a blind eye or pretend something is not happening may well be acceptable for short-term diplomatic reasons of securing agreement on a particular issue, but is detrimental to the Convention and brings into question its actual purpose. If the admission of non-compliance by a depositary power (the former USSR), or the intransigence of a state party towards a UN Security Council mandated disarmament process (Iraq) is not of interest to the BWC and its states parties, what – one may ask – exactly is?

50. Focussing attention to this issue is not to ignore or deny the necessities of diplomacy. Furthermore, given the efforts under the BWC Protocol during the 1990s the states parties could be forgiven for not paying attention collectively to a number of activities as they attempted to develop mechanisms which would have strengthened the Convention. This, however, is no longer the reality. No coherent strategy to strengthen the BWC exists; long-standing questions about the compliance of certain states parties remain unaddressed; no serious effort exists to bring more states (signatories and non-signatories) into the BWC; and tensions between non-proliferation obligations, peaceful co-operation and economic development remain politicised. Of greater import far too many states parties still have inadequate national legislation and regulations in place to actually give

effect to their obligation to prohibit and prevent the development of biological weapons *by anyone* on their territory; and few actually submit the required information under the annual Confidence Building Measures. States parties cannot afford the luxury of being officially ignorant of events directly related to the Convention. Short-term diplomatic niceties of agreeing not to mention something are dangerous to a Convention many consider too weak and some consider wholly ineffective.

51. Those states parties rueing the sidelining of the BWC in recent years have yet to develop any feasible ideas on how to rectify the situation. The BWC is at the periphery of most efforts to prevent the further proliferation or development of biological weapons by both non-state actors and states. The BWC, however, will not magically strengthen itself as if it was an organism with some kind of immune system to ward off threats to its existence; its states parties must act on its behalf.

### **Conclusion**

52. The task facing states, individuals, NGOs, and other interested parties truly in favour of preventing biological weapons from being used should not be underestimated. The knowledge, materials, and equipment necessary for the development of biological weapons will spread further over the next decades. It is impossible to contain the dissemination of such *capabilities* because of the dual-use problem.

53. The biological weapon problem is not, however, beyond our ability to manage and there is certainly no shortage of policy responses and tools that can be employed against biological weapons. The biggest challenge is changing the mindset – or the paradigm – related to biological weapons controls. Reliance on past practice(s) and a ‘more of the same’ approach to biological disarmament will not yield the necessary results. An alternative to the BWC Protocol – on which so many hopes (and fears) were pinned – must be developed; the US must be convinced that a robust BWC is in its national security interests; and, all must recognise that the BWC alone is insufficient as a response to managing the biological weapons problem. Because the biological weapons problem stretches beyond states and terrorists, includes more than concerns over lethal pathogens such as *bacillus anthracis*, and that the dual-use problem means it can never be ‘solved’, all must realise that a whole new way of thinking is required. The biological weapons problem has to be managed and the moral, normative, and legal framework employed to manage it has to stretch from the individual to the international.

## ANNEX

### **A brief guide to the Biological Weapons Convention and recent efforts at controlling biological weapons**

(1) The 1972 Biological Weapons Convention (BWC) was the product of a superpower deal between the US and the then USSR. During the late 1960s most states aimed for a ban on chemical and biological weapons in one agreement. Chemical and biological weapons were traditionally dealt with together – as in the 1925 Geneva Protocol – and the BWC split them.

(2) The BWC was, and is, a weak agreement in terms of the mechanisms within it to oversee implementation and enforce compliance. States parties to the BWC have to trust one another. Discontent with these weaknesses meant that in each Review Conference of the BWC (1980, 1986, 1991, 1996, and 2001-2002) efforts have been made to clarify and enhance the mechanisms in the Convention. This has included the development of annual information exchanges and agreement on procedures for consultation and clarification to resolve any problems brought to the attention of states parties. In 1991 at the Third Review Conference a study of the technical and scientific aspects of verification of the BWC was initiated. A group of governmental verification experts (VEREX) met in 1992 and 1993 and identified 21 measures which would go some way to alleviating the weaknesses in the BWC. At a subsequent meeting of a Special Conference of the states parties in 1994, it was decided to form an Ad Hoc Group to negotiate a legally binding agreement to strengthen the BWC. It was widely expected to take on board the lessons from VEREX and incorporate additional confidence building measures, definitions of terms and objective criteria, and enhance peaceful co-operation among states parties.

(3) The Ad Hoc Group negotiations occurred between 1995 and 2001 spread over 24 sessions. A rolling text of the draft BWC Protocol was developed in 1997. A ‘composite text’ by the Chairman of the negotiations was delivered to states parties in March 2001. At its last scheduled meeting in July-August 2001 the Ad Hoc Group was unable to agree a final version of the text. Approximately 80 changes had been requested to the composite text (many incompatible with each other) but before negotiations could begin on these the US stated it could not accept the Protocol even with further changes.

(4) At the Fifth Review Conference in 2001 states parties were unable to reach agreement and a further meeting in 2002 resulted in a consensus decision to hold a two-week meeting of experts and a one-week annual meeting of states parties in each of 2003, 2004, and 2005. Each year would address separate topics as identified in the consensus decision. The Sixth Review Conference will be held in 2006 and is mandated to consider the outcomes of each meeting of experts and annual meeting, as well as perform its usual review function.

### **List of published studies and papers**

All papers and studies are available as pdf-files at the Commission's website: [www.wmdcommission.org](http://www.wmdcommission.org)

**No 1** "Review of Recent Literature on WMD Arms Control, Disarmament and Non-Proliferation" by Stockholm International Peace Research Institute, May 2004

**No 2** "Improvised Nuclear Devices and Nuclear Terrorism" by Charles D. Ferguson and William C. Potter, June 2004

**No 3** "The Nuclear Landscape in 2004: Past Present and Future" by John Simpson, June 2004

**No 4** "Reviving the Non-Proliferation Regime" by Jonathan Dean, June 2004

**No 5** "Article IV of the NPT: Background, Problems, Some Prospects" by Lawrence Scheinman, June 2004

**No 6** "Nuclear-Weapon-Free Zones: Still a Useful Disarmament and Non-Proliferation Tool?" by Scott Parrish and Jean du Preez June 2004

**No 7** "Making the Non-Proliferation Regime Universal" by Sverre Lodgaard, June 2004

**No 8** "Practical Measures to Reduce the Risks Presented By Non-Strategic Nuclear Weapons" by William C. Potter and Nikolai Sokov, June 2004

**No 9** "The Future of a Treaty Banning Fissile Material for Weapons Purposes: Is It Still Relevant?" by Jean du Preez, June 2004

**No 10** "A Global Assessment of Nuclear Proliferation Threats" by Joseph Cirincione, June 2004

**No 11** "Assessing Proposals on the International Nuclear Fuel Cycle" by Jon B. Wolfsthal, June 2004

**No 12** "The New Proliferation Game" by William C Potter, June 2004

**No 13** "Needed: a Comprehensive Framework for Eliminating WMD" by Michael Krepon, September 2004

**No 14** "Managing the Biological Weapons Problem: From the Individual to the International" by Jez Littlewood, August 2004

**No 15** "Coping with the Possibility of Terrorist Use of WMD" by Jonathan Dean, June 2004

**No 16** "Comparison of States vs. Non-State Actors in the Development of a BTW Capability" by Åke Sellström and Anders Norqvist, October 2004

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