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INTERNATIONAL CRIMINAL LAW AND SANCTIONS TO REINFORCE THE BWC

Prospects for strengthening the Biological Weapons Convention any time soon appear to have faded still further since their setback in July, when the United States withdrew its support for the efforts of the Ad Hoc Group of States Parties to design a legally binding instrument to strengthen the Convention. It was then widely expected that the Bush Administration would present new proposals at the Convention's Fifth Review Conference, which took place in Geneva from 19 November to 7 December. However, as described in "Report from Geneva" in this issue of the *Bulletin*, what the US proposed was a set of mostly old ideas for voluntary measures by individual states, without any binding treaty commitment.

Chances that the US proposals, or any others, would be endorsed by the Conference were torpedoed when, near the end of the last day, the US delegation sought to include in the Conference's Final Declaration words that would terminate the Ad Hoc Group and its mandate to consider measures to strengthen the BWC, including verification measures, to be included in a legally binding instrument.

As it was well-known that such termination is opposed by the majority of delegations and as BWC review conferences normally adopt their final declarations by consensus, the US proposal was, in effect, a poison pill that forced immediate adjournment, with only an agreement to resume the Conference a year later. With no Final Declaration and therefore no international endorsement of any of its proposals, it is hard to see what the US was seeking to accomplish with its last-minute action. Rather, it appeared that the Administration was internally divided even as regards its own proposals put forward earlier during the Review Conference.

Opposed to verification measures that it fears might reveal biodefence and intelligence activities it hopes to keep secret; ill-disposed to multilateral arms-control measures generally; and yet deeply worried about the menace of biological weapons, the White House seems to have no integrated long-term strategy to keep the barriers against these weapons from eroding. In promising much but so far delivering only an adjourned BWC Review Conference, the US has dismayed governments elsewhere that share the same worry, including those of close allies.

What then can be done? One priority must be to lay the groundwork for a successful conclusion of the Fifth BWC Review Conference that will resume in November 2002. More generally, the time is right for a review of the entire

architecture of international measures to strengthen the BWC. Controls on access to dangerous pathogens and certain dual-use equipment can impede their acquisition by non-state actors and non-self-sufficient states seeking biological weapons. But the widespread natural occurrence of most pathogens that have been or can be developed as weapons, and the accelerating worldwide diffusion of biotechnology, make only temporary the effect of such controls on any nation or group determined to have the weapons.

Intent, more than denial, is the crucial element to be addressed in seeking to strengthen the Convention. To some extent, this can be done by propagating among scientists and others the humanitarian norm against biological weapons as abhorrent and illegal. But any effective system must include not only positive elements of cooperation and openness but also the element of deterrence that stems from a risk of violations being detected and credible sanctions if they are.

Deterrence is at the heart of the international system of declarations, on-site visits and challenge investigations that has been under discussion by the Ad Hoc Group. Properly designed, such a system can deprive states considering violation of the BWC of confidence that their attempts at deception and coverup will not arouse suspicion and trigger investigation and that their prohibited activities can be kept hidden. Indeed, even the minimally intrusive system envisaged in the latest draft BWC Protocol would help undermine confidence that such activities could be kept secret, as evidenced, for example, by US anxiety that implementation of such a scheme would risk disclosure of its own biodefence activities. The further design and evaluation of such a system could benefit from voluntary bilateral and multilateral field trials of transparency and compliance measures at biodefence and industrial facilities, beyond those few that have so far been carried out, possibly followed by their actual implementation on a regional basis.

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The ultimate goal, however, must be the implementation of such a system globally.

That leaves the problem of sanctions, without which detection of noncompliance lacks effect. As the *Bulletin* has long urged, the acquisition and use of biological and chemical weapons should be criminalized under international law, like aircraft hijacking and torture. A new international treaty is needed, one that would confront any individual who orders or knowingly renders substantial aid in the production or use of biological or chemical weapons with the risk of prosecution or extradition should that person be found in a state that supports the treaty. A draft of such a treaty, prepared by the Harvard Sussex Program with advice from international legal authorities, may be found on the HSP website at <www.fas.harvard.edu/~hsp/crim01.pdf>.

Enactment of national criminal legislation, as some states have already done pursuant to Article IV of the BWC, and enhancement of bilateral extradition agreements as proposed by the United States, while desirable are no substitute for international criminalization. Purely national statutes and bilateral extradition agreements present daunting problems of harmonizing their separate provisions regarding the definition of crimes, rights of the accused, dispute resolution, judicial assistance and other important matters. Neither does national criminal legislation convey the universal condem-

nation implicit in international criminal law. Moreover, purely national legislation would generally have no applicability, for example, in the case of an offender present in state A who has produced or ordered the production of biological weapons in state B, of which he or she is a national but which, for one reason or another, has no intention to take action. An international criminalization treaty, however, would subject such a person to the risk of prosecution or extradition should he or she be found in any state that supports the treaty. Some states are giving favorable consideration to international criminalization and some, notably Switzerland, have said so publicly.

Modern treaties now in force creating international criminal law have typically been elaborated within the Sixth (legal) Committee of the United Nations General Assembly. An alternative route would be to develop an agreed text within some other international group of states, either constituted ad hoc or based on an established regional grouping. In any case, the proposed treaty would be open to any state wishing to join.

Despite recent setbacks, the way remains open for strengthening the BWC. This can be done both in the further design, trial and implementation of verification and transparency measures and in the creation of international law criminalizing biological and chemical weapons.

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