

THE US REJECTION OF THE PROTOCOL AT THE ELEVENTH HOUR DAMAGES INTERNATIONAL SECURITY AGAINST BIOLOGICAL WEAPONS

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The twenty-fourth session of the Ad Hoc Group negotiating a protocol to strengthen the effectiveness and improve the implementation of the Biological and Toxin Weapons Convention (BWC) opened on 23 July (see *Report from Geneva* in this *Bulletin*). There had been broad support for the timely conclusion of the Protocol as emphasized, for example, in the final communiqué of the G8 after its summit meeting in Okinawa a year previously:

We commit ourselves to work with others to conclude the negotiations on the Verification Protocol to strengthen the Biological Weapons Convention as early as possible in 2001. [*News Chronology* 23 July 2000]

The breadth of this support for the Protocol was explicitly confirmed during the first two days of the session in plenary statements made by over 50 of the 55 or so states parties engaged in the negotiation of the Protocol who urged that the Chairman's composite text should form the basis for the political decisions to adopt the Protocol before the Fifth Review Conference later this year. Consequently, the contrast was all the more marked when on the third day, the United States delivered a 10-page statement in which it said:

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. ... 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.

It is immediately apparent from the statement that the United States is rejecting the approach that it — together with other states, most notably its NATO allies — has pursued over the past decade and more.

Analysis

The US statement of 25 July makes a number of assertions which do not stand up to detailed analysis.¹ It is evident that the United States, in rejecting the Protocol, is making a huge mistake — and, more to the point, one that is based on illogical assessments. The United States is primarily evaluating the Protocol against new national standards and not against the Protocol mandate that it not only agreed to but was instrumental in drawing up, having proposed many of the elements including mandatory declarations and facility visits. The end result of this rejection of the Protocol is that the United States will not be trusted by other states parties as a nation that lives up to its earlier promises as set out in official statements at the highest level. The damage that this mistrust will cause to international security when it involves the world's leading power will be incalculable.

In the days following 25 July, a number of statements were made by very senior members of the US administration that indicate serious misunderstandings about the draft Protocol. For example, Deputy Secretary of Defense Paul Wolfowitz said on 28 July:

What is at issue is a 210-page document which I doubt any other head of state has even bothered reading which in the name of making the treaty more enforceable would actually allow Libyan and Iraqi inspectors to start poking around American pharmaceutical companies. It's ill conceived, and that's the problem.

Another example is a letter from the US Ambassador to the United Kingdom published in *The Independent*, a London daily newspaper, on 28 July:

After long analysis, we have concluded that the protocol will not do the intended job. We believe, in fact, that it will make the world a more dangerous place. People would labour under a false sense of security: our defences would be exposed. ... Many nations believe that the proposed protocol is badly flawed, but argue that a bad agreement is better than nothing at all.

These statements are both factually incorrect — there is no provision in the draft Protocol for national inspectors to carry out visits, and a state may exclude international inspectors of a particular nationality if it wishes: as in the Chemical Weapons Convention. As to many nations agreeing that the proposed protocol is badly flawed, this is not borne out by the statements by the overwhelming majority of the states parties engaged in the negotiations. Whilst many states parties would have liked to see differences in the compromises adopted in the Chairman's draft Protocol, these states parties realise that the composite text has been skillfully crafted so as to provide a Protocol that will achieve the objectives of the mandate — the effective strengthening and improved implementation of the Convention.

The nub of the US rejection of the Protocol appears to be encapsulated in the briefing of 25 July at which the State Department said:

The protocol which was proposed adds nothing new to our verification capabilities. And it was the unanimous view in the United States government that there were significant risks to US national interests and that is why we could not support the protocol. Implementation of such a protocol would have caused problems ... for our biological weapons defense programs, would have risked intellectual property problems for our pharmaceutical and biotech industries and risked the loss of integrity and utility to our very rigorous multilateral export control regimes.

These assertions are all incorrect.

First, that the composite Protocol adds “nothing new” to US verification capabilities is not true. The Protocol requires mandatory declarations of the activities and facilities of greatest relevance to the BWC; the declaration

follow-up procedures through the randomly-selected transparency visits promote the consistency of declarations and address any ambiguity, uncertainty, anomaly or omission through the tiered declaration clarification procedures; the Protocol has measures to ensure the submission of declarations; and it also provides for field and facility investigations of compliance concerns. To assert that these add “nothing new to our verification capabilities” fails to recognize that there are no such provisions under the BWC alone. The question that states parties need to address is whether the Protocol with its declarations, visits and investigations add significantly to the apprehension of a potential violator that he might be exposed. There is no doubt that elements of the Protocol would together provide information, pieces of the jigsaw, that together build a consistent picture — or raise questions, anomalies and ambiguities which other states parties will seek to clarify through the Protocol provisions thereby enabling them to gain a much clearer appreciation, and understanding, of countries’ activities and programmes. There is likewise no doubt that the Protocol provisions would help significantly to clarify any remaining ambiguities about military facilities such as the status of the former Soviet facilities at Kirov, Sergiyev Posad and Ekaterinburg.

Second, the assertion that the Protocol would cause problems for the biological defence programmes of the United States is notably at complete variance with the assessments of all the other states parties engaged in the negotiations who also have biodefence programmes. There is nothing in the Protocol that requires the provision of any national security information in the declarations of biological weapons defence programmes. It is clear that international security — and confidence between states parties — would have not been as shaken as they were when *The New York Times* on 4 September disclosed programmes to create an anthrax “superbug” (previously created openly in Russia), to build a germ factory from commercially available materials and to build and test a Soviet-designed germ bomb if these had been the subject of declarations under the Protocol. It is indeed worrying when *The New York Times* says that “Administration officials said the need to keep such projects secret was a significant reason behind President Bush’s recent rejection” of the Protocol. Moreover, Article 13 of the Protocol explicitly states:

Nothing in this Protocol shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against bacteriological (biological) and toxin weapons, for purposes not prohibited under the Convention.

This is language identical to that in the Chemical Weapons Convention — and the United States has not protested that the CWC would cause problems for its chemical weapons defence programmes.

Third, the assertion that the Protocol would have risked “intellectual property problems” for the US pharmaceutical and biotech industries ignores the fact that the Protocol contains stronger provisions for the protection of confidential proprietary information (CPI) than are within the Chemical Weapons Convention. Furthermore, there are no requirements for the provision of CPI in any of the mandatory declarations. To believe the assertion would be to forget that under the CWC these same pharmaceutical and

biotech industries may be subjected to inspections — recognising that there is a continuum between chemical and biological agents and that toxins are covered by both Conventions. The frequency of visits to such facilities in the US under the projected Protocol is necessarily seven or less per year — a minute fraction of the numbers of inspections carried out by regulatory agencies. In Europe, industry recognizes that such visits will be rare and will not be nearly as intrusive as the visits carried out much more frequently by international, national and regional regulatory agencies whether concerned with health and safety of employees or with the safety and quality of pharmaceutical products.

Fourth, the assertion that the Protocol would have risked the loss of integrity and utility to the “very rigorous” multilateral export control regimes is simply not true. A study of Article 7 of the Protocol would conclude that the very opposite is the case. That article requires:

each State Party ... to 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 ...

There are thus clear benefits — both in deterring and countering proliferation and in limiting the availability of materials and equipment for bioterrorism — for the international community and the United States from this requirement for all states parties to establish the regulation of such transfers. The Protocol makes no provisions, one way or the other, requiring the coordination of these national export control systems through any multinational framework although there are provisions enabling states parties to consult directly on transfers and, should they so agree, to inform the Executive Council and the Director-General about the consultations.

Conclusions may be drawn from this analysis of the US statement of 25 July for the United States and for other states engaged in negotiation of the Protocol.

Conclusions for the United States

The analysis makes a clear case for urging the United States to reevaluate the gains and costs of signing the Protocol compared to the costs and gains of rejecting it. Such an evaluation should especially take note of the comparison between what the Protocol regime would provide and what is available under the Convention alone.

A tabulation of the principal measures in the proposed enhanced regime compared with the procedures of the BWC alone was published in the last *Bulletin* which clearly illustrates the significant benefits from the Protocol. Such comparisons show that the Protocol regime brings significant and worthwhile benefits to the United States and to all states parties — both developed and developing — over and above the provisions to uphold the basic prohibitions and obligations of the BWC. In addition, the Protocol will be effective, over time, in 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.

An evaluation² of the gains and costs of signing the Protocol compared with those of rejecting it has shown that:

- In adopting the Protocol, states parties will be seen to have taken all possible practicable multilateral steps to obstruct and deter the proliferation of biological weapons.
- Signing and ratifying the Protocol 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.
- Signing and ratifying the Protocol 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.
- Overall, the adoption of the Protocol enhances the security of all. It provides a net gain to collective security. Rejection of the Protocol misses this opportunity and decreases collective security.

Conclusions for other states parties

The other states parties engaged in the Protocol negotiations should recognize that the product of their work over a decade of negotiations embodied in the Chairman's text would indeed provide an effective strengthening of the BWC. They should also recognize that the basis for the rejection of the Protocol by the United States at the eleventh hour is unsound. Consequently, the rejection by the United States should not be seen as providing a basis for the other states parties to abandon the negotiations.

Although, following the US statement of 25 July, there have been some suggestions that the composite Protocol text should be put onto the shelf for the time being, one has to ask the question — for what purpose? It is very clear that if at some future time, a couple of months, a couple of years or a decade or more hence, the United States indicates that it is ready to give further consideration to a Protocol to strengthen the Convention, it would be unrealistic not to expect the other states parties at that time not to want to reexamine the provisions in the composite Protocol text and there will then be extensive unravelling of what is an excellent package of measures in the Chairman's text resulting in a net loss of the benefits for security, safety, health and prosperity that are available from the Protocol. The United States statement that it intends to develop other ideas and different approaches to effectively strengthen the Convention ignores the reality that by having withdrawn from the Protocol at the eleventh hour, the United States has effectively killed any favourable multilateral consideration of any ideas, however meritorious, that it may now bring forward. There is simply no prospect of any strengthening of the biological weapons multilateral prohibition regime by any means other than the Protocol in the foreseeable future.

The other states parties should explore ways of taking the Chairman's text forward, perhaps in a resolution of the United Nations General Assembly, and start to bring the Protocol into force. After all, given that 65 states parties have to ratify to achieve entry into force and that it took the Chemical Weapons Convention, which had a similar requirement, four years to enter into force, the Protocol is likely to require at least four years. This provides time for

both the states parties and for the Provisional Technical Secretariat to work on persuading the United States that the Protocol is indeed in the best interests of both the United States and international collective security:

- The Ad Hoc Group has essentially three options.
- To abandon the decade of effort to strengthen the BWC through a Protocol and send the message to the world that the other states parties do not have the political will and conviction to help themselves make a significant step forward by adopting the Protocol to strengthen the norm against biological weapons.
 - To suspend negotiations for a period — which might be two months, two years or a decade. Realistically, this option is likely to result in unravelling of the Protocol text, achieving the same overall result of abandoning the effort to strengthen the BWC through a Protocol.
 - To recognize that, in the Chairman's text, the Ad Hoc Group has crafted a Protocol that will successfully strengthen the effectiveness and improve the implementation of the BWC and to take this forward through a resolution to the General Assembly co-sponsored by all those states parties who spoke on 23, 24 and 25 July in favour of the early completion of the Protocol.

It is the last of these options that provides real benefits for all states parties — both developing and developed — and which would enhance global security. In parallel, the United States should be encouraged to reconsider its position and join the Protocol — but, if the United States does not, then the rest of the world should not miss the opportunity that the Protocol provides for a safer, more secure world.

It has long been recognized that there is a window of opportunity now for the completion and adoption of the Protocol to the BWC. Although the United States regrettably is failing to see the benefits of the Protocol for either itself or for global security, the other states parties should have the courage of their convictions and take the Chairman's composite Protocol text forward. History will show that in so doing the other states parties have taken a significant step forward to make the world a safer more secure place for all mankind.

Postscript

In the days following 11 September, UK Prime Minister Blair said: "We know that they would, if they could, go further and use chemical, biological, or even nuclear weapons of mass destruction"; UK Foreign Secretary Straw, also addressing Parliament, said: "We must therefore redouble our efforts to stop the proliferation and the availability of such weapons"; and President Bush, in his address to the US Congress, said: "We will direct every resource at our command — every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war — to the disruption and defeat of the global terror network". Here is case for further urging the United States to reconsider its rejection of the Protocol.

Notes

1. Graham Pearson, Malcolm Dando and Nicholas Sims. "The US rejection of the Composite Protocol: a huge mistake based on illogical assessments", in Graham S Pearson and Malcolm R

Developments in the Organization for the Prohibition of Chemical Weapons

The period under review, from early June until the first week of September, saw the OPCW reach the notable benchmark of having completed 1000 inspections. The 1000th inspection was concluded at an industrial site in Iran on 20 June. Of the inspections completed by 24 August, 649 were related to chemical weapons — conducted at chemical weapons production, destruction, or storage facilities or in relation to stockpiles of old or abandoned chemical weapons — and 397 inspections were carried out under the Article VI regime for chemical industry. Forty-nine states parties and 479 facilities and/or sites had received inspections during the first four years and four months of CWC implementation.

Other notable events included a planning meeting with the President of the International Union of Pure and Applied Chemistry (IUPAC). IUPAC has proposed to undertake a review of scientific and technological developments relevant to the implementation of the Convention — in preparation for the First Review Conference. Furthermore, the Secretariat completed a simulated challenge inspection in the United States and kicked-off the OPCW Associate Programme 2001 — now a key component of the Secretariat's efforts to promote scientific and technological development for the peaceful uses of chemistry, increase transparency in the chemical activities of member states, and improve the quality of national implementation.

The ongoing financial crisis at the OPCW continued to impair the ability of the Organization to implement its full programme of work for 2001, and all states parties in arrears to the Organization, including those who owe reimbursements under Articles IV or V, were encouraged to pay their outstanding amounts as soon as possible.

Executive Council

The Executive Council convened its twenty-fifth session during 27–28 June. This was the first regular session of the Council chaired by its new chairman Dr Abdel Babu Fatih of Sudan. As this session was convened to discuss mostly administrative issues, the agenda did not include items relating to industry verification and the unresolved issues under Article VI.

The Council also met informally on 26 June and on 30 August. On the first occasion, it discussed the 2000 *Verification Implementation Report*. The later meeting provided an opportunity for the Director-General to brief the permanent representatives on the current financial situation of the OPCW. During the period under review, informal consultations were held only once, on 14 June, to discuss sampling procedures. Additional informal consultations on

various issues under Article VI were scheduled to be conducted in early September, prior to the opening of the twenty-sixth session of the Council, scheduled to be held during 25–28 September.

The fourteenth meeting of the Council was convened on 15 August at the behest of Director-General and the permanent representation of the United States. The impetus for this meeting was the US plans for destruction and verification of the chemical weapons production facility (GB production and filling) at the Rocky Mountain Arsenal in Colorado. The Council would continue to examine the plans for destruction and verification of the CWPf at its next session in September.

New coordinators were appointed for the various clusters of issues under discussion by the Council: Santiago Onate Laborde (Mexico) on chemical weapons issues, Yong-kyoo Kim (Republic of Korea) on administrative and financial issues, Alexander Georgievich Khodakov (Russia) on legal, organizational, and other issues, and Richard Ekwall (Sweden) on chemical industry and other Article VI issues.

In his opening statement to the Council at its twenty-fifth session, the Director-General issued a call for states parties to demonstrate the political and financial will to support the full implementation of the Convention, and thus the work of the OPCW. In this context, he outlined for the Council members the current financial situation of the Organization.

The Director-General went on to emphasise that the Secretariat was conducting an ongoing analysis of the results of the industry verification regime. Through the end of 2000, 342 inspections had been completed under Article VI. As of 1 June 2001, 15 Schedule 1 facility agreements had been approved by the Council, and all but two of the states parties in which Schedule 1 facilities were located were actively working toward the completion of such agreements. The unresolved issues with respect to Schedule 2 facilities, such as the frequency of inspections and the declaration of imports and exports, had so far prevented meaningful progress on the conclusion of facility agreements for the majority of Schedule 2 facilities.

In pursuit of the fundamental goal of universality, the attention of the Council was brought to the impending visit of the Chairman to the Organization of African Unity (OAU) meetings in Lusaka, Zambia, as well as regional seminars in both the Republic of Korea and Jamaica, planned for October and November 2001, respectively. The Director-General proposed the convening of an "OPCW internal seminar" on universality in the Middle East before the end of the year. The Council noted both this proposal in particular and the Director-General's statement as a whole.