

ARTICLE III: NON-TRANSFER

by Graham S. Pearson

Consideration of Article III at the Fourth Review Conference

1. Article III of the Convention states that:

Each State Party to this Convention undertakes 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 or means of delivery specified in article I of the Convention.

2. At the Fourth Review Conference of the BTWC held on 25 November to 6 December 1996, the Final Declaration¹ in respect of Article III stated that:

1. The Conference notes the importance of Article III and welcomes the statements which States that have acceded to the Convention have made to the effect that they have not transferred agents, toxins, weapons, equipment or means of delivery as specified in Article I of the Convention, to any recipient whatsoever and have not furnished assistance, encouragement or inducement to any State, group of States or international organizations to manufacture or otherwise acquire them. The Conference affirms that Article III is sufficiently comprehensive to cover any recipient whatsoever at international, national or subnational levels.

2. The Conference notes that a number of States Parties stated that they have already taken concrete measures to give effect to their undertakings under this Article and in this context also notes statements made by States Parties at the Conference about the legislative or administrative measures they have taken since the Third Review Conference. The Conference calls for appropriate measures by all States Parties. Transfers relevant to the Convention should be authorized only when the intended use is for purposes not prohibited under the Convention.

3. The Conference discussed the question whether multilaterally-agreed guidelines or multilateral guidelines negotiated by all States Parties to the Convention concerning the transfer of biological agents, materials and technology for peaceful purposes to any recipient whatsoever might strengthen the Convention. 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. The Conference notes that these issues are

¹United Nations, *The Fourth Review Conference 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*, Geneva, 25 November - 6 December 1996, BWC/CONF.IV/9, Geneva 1996.

being considered as part of the ongoing process of strengthening the Convention.

4. The Conference reiterates that the provisions of this Article should not be used to impose restrictions and/or limitations on the transfers for purposes consistent with the objectives and purposes of the Convention of scientific knowledge, technology, equipment and materials under Article X.

3. The four paragraphs in this Final Declaration had developed from the three paragraphs on Article III in the Final Declaration of the Third Review Conference². The first paragraph in the Fourth Review Conference Article III Final Declaration is identical to the first two sentences of the first paragraph of the Third Review Conference Final Declaration. The second paragraph was developed from the third and fourth sentences of the first paragraph of the Third Review Conference Final Declaration with the addition of the words shown in bold in the following "*a number of States Parties **stated that they** have already taken concrete measures to give effect to their undertakings under this Article and **in this context also notes the statements made by States Parties at the Conference about the legislative and administrative measures they have taken since the Third Review Conference.***" The final sentence of the Third Review Conference Final Declaration stating that "*The implementation of this Article with respect to such transfers should continue to be the subject of multilateral consultation*" was developed into a new third paragraph in the Fourth Review Conference Final Declaration. The fourth paragraph in the Fourth Review Conference Final Declaration was essentially the same as that in the Third Review Conference Final Declaration with the addition of the words shown in bold in the following: "*The Conference **reiterates** that the provisions of this Article should not be used to impose restrictions and/or limitations on the transfers for purposes consistent with the objectives and purposes of the Convention of scientific knowledge, technology, equipment and materials **under Article X.***" where the words "*under Article X*" replaced the previous "*to States Parties*".

Developments since the Fourth Review Conference

4. The implementation of Article III has been one of the contentious topics in the negotiations in the Ad Hoc Group with divergent views being expressed. A recent analysis³ of several control regimes for dual-use materials:

- a. Chemical Weapon Agents and Precursors
- b. Banned and Severely Restricted Chemicals
- c. Pathogens and Genetically Modified Organisms
- d. Narcotic Drugs and Psychotropic Substances
- e. Chemical and Biological Terrorism Preparedness

²United Nations, *The Third Review Conference 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*, Geneva, 9–27 September 1991, BWC/CONF.III/23, Geneva 1992.

³Graham S. Pearson, *The BTWC Protocol: Improving the Implementation of Article III of the Convention: Pragmatic Considerations*, Briefing Paper No. 33, University of Bradford, February 2001. Available on <http://www.brad.ac.uk/acad/sbtwc>

showed that the monitoring and control of exports and imports in dual-use materials is becoming the standard as more and more countries around the world want to safeguard the public health and the environment and thereby promote safety, security and prosperity. The trend is increasingly towards more controls over potentially harmful materials to ensure that these are not misused to cause harm to people or to States.

5. It was argued in an earlier analysis⁴ in January 2000 that for transfers of biological materials and technology to be made, the obligations under Article III require that an exporting State Party needs to have confidence that the transfer to a State Party is:

- a. **only** being used for permitted purposes;
- b. **not** being retransferred, without approval, to another facility within the receiving State Party; or
- c. **not** being retransferred, without approval, to another State Party.

There are thus three requirements. First, that there should be **transparency** as to what the transferred materials and equipment are being used for. Secondly, there should be **national internal** controls on the facilities within a State Party in which particular agents are handled and on transfers between such facilities. Thirdly, there should be **national** controls of **interstate** transfers from one State Party to other States Parties.

6. Some States Parties to the BTWC have already taken steps to implement controls on transfers of biological materials and equipment that seek to prevent transfers should there be concerns and doubts as to whether the transfers are for legitimate purposes. These States Parties recognize that such controls enhance both their safety and security and that of the international community as misuse of biological materials to attack humans, animals or plants whether by States or by non-State actors will have widespread ramifications and cause harm to many States. Other States Parties have yet to take such steps.

7. Recently, some States Parties have reviewed and strengthened their national controls. For example, following the events of 11 September 2001, the United Kingdom has introduced a new Anti-Terrorism, Crime and Security Bill⁵ into parliament on Monday 12 November 2001 which strengthens the UK law, the Biological Weapons Act of 1974, prohibiting work on biological weapons and introduces new national security controls on pathogens and toxins. The extension of the law on biological weapons includes language making it an offence to transfer biological agents or toxins outside the United Kingdom or to assist another person to do so:

(1A) A person shall not—

⁴Graham S. Pearson, *The BTWC Protocol: Improving the Implementation of Article III of the Convention*, Briefing Paper No. 28, University of Bradford, January 2000. Available on <http://www.brad.ac.uk/acad/sbtwc>

⁵House of Commons, *Anti-Terrorism, Crime and Security Bill*, 12 November 2001. Available at <http://www.publications.parliament.uk/pa/cm200102/cmbills/049/2002049.htm>

(a) transfer any biological agent or toxin to another person or enter into an agreement to do so, or

(b) make arrangements under which another person transfers any biological agent or toxin or enters into an agreement with a third person to do so, if the biological agent or toxin is likely to be kept or used (whether by the transferee or any other person) otherwise than for prophylactic, protective or other peaceful purposes and he knows or has reason to believe that that is the case.”

In addition, language is included to extend UK jurisdiction to offences under the Biological Weapons Act carried out overseas by a UK person:

1A Extraterritorial application of section 1

(1) Section 1 applies to acts done outside the United Kingdom, but only if they are done by a United Kingdom person.

(2) Proceedings for an offence committed under section 1 outside the United Kingdom may be taken, and the offence may for incidental purposes be treated as having been committed, in any place in the United Kingdom.

(3) Her Majesty may by Order in Council extend the application of section 1, so far as it applies to acts done outside the United Kingdom, to bodies incorporated under the law of any of the Channel Islands, the Isle of Man or any colony.

(4) In this section “United Kingdom person” means a United Kingdom national, a Scottish partnership or a body incorporated under the law of a part of the United Kingdom .

Language is also included to make it an offence for a UK person outside the UK to assist a foreigner to do an act which would, for a UK person, be contrary to the Biological Weapons Act of 1974. Such offences carry a sentence of up to life imprisonment:

Assisting or inducing weapons-related acts overseas

50 Assisting or inducing certain weapons-related acts overseas

(1) A person who aids, abets, counsels or procures, or incites, a person who is not a United Kingdom person to do a relevant act outside the United Kingdom is guilty of an offence.

(2) For this purpose a relevant act is an act that, if done by a United Kingdom person, would contravene any of the following provisions—

(a) section 1 of the Biological Weapons Act 1974 (offences relating to biological agents and toxins);

(b) section 2 of the Chemical Weapons Act 1996 (offences relating to chemical weapons); or

(c) section 47 above (offences relating to nuclear weapons).

(3) *Nothing in this section applies to an act mentioned in subsection (1) which—*

- (a) relates to a relevant act which would contravene section 47; and*
- (b) is authorised by the Secretary of State; and section 48(2) applies for the purpose of authorising acts that would otherwise constitute an offence under this section.*

(4) *A person accused of an offence under this section in relation to a relevant act which would contravene a provision mentioned in subsection (2) may raise any defence which would be open to a person accused of the corresponding offence ancillary to an offence under that provision.*

(5) *A person convicted of an offence under this section is liable on conviction on indictment to imprisonment for life.*

(6) *This section applies to acts done outside the United Kingdom, but only if they are done by a United Kingdom person.*

(7) *Nothing in this section prejudices any criminal liability existing apart from this section.*

8. The new security controls identify a list of pathogens and toxins and define a dangerous substance as being one of these pathogens or toxins or anything infected by or a carrier of such pathogens. Notification is required prior to keeping or using any dangerous substance and information can be sought about the security of dangerous substances and the premises in which these are held as well as about persons with access to such dangerous substances. The definition of dangerous substance is as follows:

(4) *In this Part “dangerous substance” means—*

- (a) anything which consists of or includes a substance for the time being mentioned in Schedule 5; or*
- (b) anything which is infected with or otherwise carries any such substance.*

Schedule 5 lists the pathogens and toxins that potentially pose the greatest risk to human life if misused by terrorists -- it will be observed that the Notes extend the Schedule to include genetic modifications:

SCHEDULE 5

PATHOGENS AND TOXINS

VIRUSES

- Chikungunya virus*
- Congo-crimean haemorrhagic fever virus*
- Dengue fever virus*
- Eastern equine encephalitis virus*
- Ebola virus*
- Hantaan virus*
- Japanese encephalitis virus*

Junin virus
Lassa fever virus
Lymphocytic choriomeningitis virus
Machupo virus
Marburg virus
Monkey pox virus
Rift Valley fever virus
Tick-borne encephalitis virus (Russian Spring-Summer encephalitis virus)
Variola virus
Venezuelan equine encephalitis virus
Western equine encephalitis virus
White pox
Yellow fever virus

RICKETTSIAE

Coxiella burnetii
Bartonella quintana (Rochalimea quintana, Rickettsia quintana)
Rickettsia prowazeki
Rickettsia rickettsii

BACTERIA

Bacillus anthracis
Brucella abortus
Brucella melitensis
Brucella suis
Chlamydia psittaci
Clostridium botulinum
Francisella tularensis
Burkholderia mallei (Pseudomonas mallei)
Burkholderia pseudomallei (Pseudomonas pseudomallei)
Salmonella typhi
Shigella dysenteriae
Vibrio cholerae
Yersinia pestis

TOXINS

Botulinum toxins
Clostridium perfringens toxins
Conotoxin
Ricin
Saxitoxin
Shiga toxin
Staphylococcus aureus toxins
Tetrodotxin
Verotoxin

Microcystin (Cyanginosin)
Aflatoxins

Notes

1 Any reference in this Schedule to a micro-organism includes—

- (a) any genetic material containing any nucleic acid sequence associated with the pathogenicity of the micro-organism; and
- (b) any genetically modified organism containing any such sequence.

2 Any reference in this Schedule to—

- (a) a biological agent does not include an agent in the form of a vaccine;
- (b) a toxin does not include any immunotoxin (but does include subunits of a toxin); and
- (c) a botulinum toxin does not include a botulinum toxin which satisfies prescribed conditions.

Provision is also included for extension of these provisions to include animal and plant pathogens, pests or toxic chemicals:

75 Power to extend Part 7 to animal or plant pathogens, pests or toxic chemicals

(1) *The Secretary of State may, in relation to anything to which this section applies, make an order applying, or making provision corresponding to, any provision of this Part, with or without modifications.*

(2) *This section applies to—*

- (a) *toxic chemicals (within the meaning of the Chemical Weapons Act 1996 (c. 6));*
- (b) *animal pathogens;*
- (c) *plant pathogens; and*
- (d) *pests.*

(3) *The power under this section may be exercised in relation to any chemical only if the Secretary of State is satisfied that the chemical is capable of endangering life or causing serious harm to human health.*

(4) *The power under this section may be exercised in relation to any pathogen or pest only if the Secretary of State is satisfied that there is a risk that the pathogen or pest is of a description that could be used to cause—*

- (a) *widespread damage to property;*
- (b) *significant disruption to the public; or*
- (c) *significant alarm to the public.*

9. This new UK legislation provides a good example of the way in which States Parties can and should review, following the anthrax attacks in the United States, their existing national provisions to implement Article III and Article IV of the Convention.

Issues for the Fifth Review Conference

10. The anthrax attacks in the United States in September and October 2001 has heightened international concern about the possible use of biological agents and toxins by terrorists. Expectation is high that the Fifth Review Conference will build upon and strengthen the language adopted in the third paragraph in the Article III section of the Final Declaration of the Fourth Review Conference which said that:

3. The Conference discussed the question whether multilaterally-agreed guidelines or multilateral guidelines negotiated by all States Parties to the Convention concerning the transfer of biological agents, materials and technology for peaceful purposes to any recipient whatsoever might strengthen the Convention. 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. The Conference notes that these issues are being considered as part of the ongoing process of strengthening the Convention.

11. At the Fifth Review Conference it will be necessary to identify the ways and means to ensure that individuals and subnational groups are effectively prevented from acquiring through transfers, biological agents and toxins for other than peaceful purposes. Language needs to be adopted in both the Article III and Article IV sections of the Final Declaration of the Fifth Review Conference to require the strengthening of national controls of pathogens and toxins both internally and in regard to international transfers.

Suggested Language for the Final Declaration

46. The Fifth Review Conference might adopt language developed and strengthened from that at the Fourth Review Conference along the following lines:

*1. The Conference **emphasizes** the importance of Article III and welcomes the statements which States that have acceded to the Convention have made to the effect that they have not transferred agents, toxins, weapons, equipment or means of delivery as specified in Article I of the Convention, to any recipient whatsoever and have not furnished assistance, encouragement or inducement to any State, group of States or international organizations to manufacture or otherwise acquire them. The Conference **reaffirms** that Article III is sufficiently comprehensive to cover any recipient whatsoever at international, national or subnational levels.*

2. The Conference notes that a number of States Parties stated that they have already taken concrete measures to give effect to their undertakings under this

*Article and in this context also notes statements made by States Parties at the Conference about the legislative or administrative measures they have taken since the Third Review Conference. The Conference calls for all States Parties to **urgently review and strengthen their existing measures and adopt such measures, if such measures do not already exist.** Transfers relevant to the Convention should be authorized only when the intended use is for purposes not prohibited under the Convention.*

*3. The Conference **affirmed that** the States Parties should **urgently** consider ways and means to ensure that individuals or subnational groups are effectively prevented from acquiring, through **national or international** transfers, biological agents and toxins for other than peaceful purposes.*

4. The Conference reiterates that the provisions of this Article should not be used to impose restrictions and/or limitations on the transfers for purposes consistent with the objectives and purposes of the Convention of scientific knowledge, technology, equipment and materials under Article X.

