

Strengthening the Biological Weapons Convention

Briefing Paper No 6 (Second Series)

Maximizing the Benefits of the Inter Review Conference Process: I: National Implementing Legislation

July 2003

Series Editors

Graham S Pearson and Malcolm R Dando

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MAXIMIZING THE BENEFITS OF THE INTER REVIEW CONFERENCE PROCESS:

I: NATIONAL IMPLEMENTING LEGISLATION

by Graham S. Pearson* and Nicholas A Sims†

Introduction

1. At the Fifth Review Conference of the States Parties to the Biological and Toxin Weapons Convention (BTWC) it was agreed¹:

To hold three annual meetings of the States Parties of one week duration each year commencing in 2003 until the Sixth Review Conference, to be held not later than the end of 2006, to discuss, and promote common understanding and effective action on:

- i. The adoption of necessary, national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation;*
- ii. National mechanisms to establish and maintain the security and oversight of pathogenic microorganisms and toxins;*
- iii. Enhancing international capabilities for responding to, investigating and mitigating the effects of cases of alleged use of biological or toxin weapons or suspicious outbreaks of disease;*
- iv. Strengthening and broadening national and international institutional efforts and existing mechanisms for the surveillance, detection, diagnosis and combating of infectious diseases affecting humans, animals, and plants;*
- v. The content, promulgation, and adoption of codes of conduct for scientists.*
[Emphasis added]

and that "Each meeting of the States Parties will be prepared by a two week meeting of experts." The past few months have seen Ambassador Tibor Tóth, the Chairman of the meetings to be held in 2003, carrying out consultations with States Parties in order to develop a schedule of work for the Meeting of Experts on 18 to 29 August 2003. These consultations have led initially to the identification and circulation of subtopics for the two topics to be considered in 2003 and agreement that the first topic "*The adoption of necessary, national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation;*" will be considered during the first week, 18 to 22 August, and that the

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¹United Nations, *Fifth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Geneva, 19 November - 7 December 2001 and 11 - 22 November 2002, Final Document, BWC/CONF.V/17, 2002. Available at <http://www.opbw.org>

second topic "*National mechanisms to establish and maintain the security and oversight of pathogenic microorganisms and toxins;*" will be considered in the second week, 25 to 29 August 2003. More recently, a more detailed structure has been circulated which lists elements for each of the subtopics.

2. These annual meetings of the States Parties preceded by two week Meetings of Experts need to be clearly seen to be what they are -- an inter Review Conference process. Consequently, they need to build upon the extended understandings developed by earlier Review Conferences and in their promotion of *common understandings and effective action* they need to be aimed towards the Sixth Review Conference.

3. The programme of follow-up work in this new format needs to contribute to the recovery of the cumulative Review Conference process, and to strengthen it as the mainstream of BTWC diplomacy. This goal requires constructive use to be made of the agreed language in past Final Declarations, while taking it forward in terms of common understandings and effective action through the addition of shared best practice.

4. The planning for the experts meetings in Geneva in August 2003 has seen the structuring of the limited time available for the two topics into increasingly detailed elements. Although this is helpful to States Parties in preparing for the experts meeting as it enables them to be prepared to address the relevant topics on the assigned day, it is essential that the States Parties do provide material to the Chairman and the Secretariat preferably **prior** to the assigned day and at the very latest **before** the end of the experts meeting as without inputs from the States Parties it will not be possible for the Chairman and Secretariat to develop observations or findings which will effectively promote common understandings and result in effective action.

5. This Briefing Paper addresses the first topic to be addressed in 2003, namely "*The adoption of necessary, national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation;*" by building upon the information provided in the earlier Briefing Papers No. 2² and No. 3³ to provide a background based on the extended understandings agreed at previous Review Conferences and then using the structure developed for the experts meeting setting out our appreciation of the common understandings and possible effective action in the context of the forthcoming Sixth Review Conference.

Preparations for the Meeting of Experts in August 2003

6. Ambassador Tibor Tóth as Chairman of the meetings to be held in Geneva in 2003 has following consultations with the States Parties identified five subtopics for each of the two topics to be considered in 2003. These subtopics have been identified with the aim of focussing the discussions and not of restricting them. They are also intended to help States Parties plan the involvement of their national experts so as to have the right experts there at the right time.

²Nicholas A. Sims, *The New Multilateral Process For The BTWC: Ambiguities And Opportunities*, University of Bradford, Department of Peace Studies, Briefing Paper No.2 (Second Series), January 2003, paragraph 19. Available at <http://www.brad.ac.uk/acad/sbtwc>

³Graham S. Pearson & Nicholas A. Sims, *National Measures to Implement the Prohibitions in the BTWC*, University of Bradford, Department of Peace Studies, Briefing Paper No.3 (Second Series), March 2003. Available at <http://www.brad.ac.uk/acad/sbtwc>

7. The five thematic subtopics for topic *i*. *The adoption of necessary, national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation*; which would be addressed on successive days during the first week, 18 to 22 August, of the Meeting of Experts are:

a. Legal, Regulatory and Administrative

- Various approaches for implementing the prohibitions in the Convention such as legislation, regulation, administrative measures, or a combination of these.

b. Prohibitions

- National measures used to implement the prohibitions in the Convention
- Measures to prevent the development, production, stockpiling, acquisition, retention or use of biological weapons such as anti-terrorism or war crimes legislation, or legislation which directly implements the Convention.

c. Control

- Measures implemented to control the movement of microbial or other biological agents or toxins, or equipment which could be utilized in the production of biological weapons.
- Examples could include import/export control legislation or transport and packaging regulations.

d. Practical Implementation

- The "nuts and bolts" of how to carry out the various measures "on the ground"
- Examples include regulations and procedures followed by customs officials, border control, law enforcement officials, and those responsible for import or export controls as they operationalize the prohibitions in the Convention.

e. Criminalization and Law Enforcement.

- Penal legislation and other measures to criminalize the prohibitions within the Convention.
- Law enforcement given its role in the prevention of and response to crimes.

8. States Parties have been encouraged into providing input papers in **advance** of the meeting which would *either* provide an overview of national approaches to implementing the prohibitions in the Convention *or* papers approaching the issue from a thematic perspective grounded in national experience. In addition, States Parties are being encouraged to make presentations that detail their experience from a thematic perspective, preferably tailored to the subtopics outlined above.

9. More recently, a more detailed structure has been provided for each thematic subtopic dividing it, for four of the five subtopics, into four further subdivisions each containing a number of elements. This detailed structure is as follows:

Day One –18 August	Day Two-19 August	Day Three-20 August	Day Four-21 August	Day Five-22 August
Legal, Regulatory & Administrative	Prohibitions	Restrictions	Practical Implementation & Enforcement	Criminalization & Law Enforcement
A) CIVIL <ul style="list-style-type: none"> Types of Legal Systems: Models & Options Technical Assistance Definitions 	A) DIRECT IMPLEMENTATION <ul style="list-style-type: none"> Definitions in legislation General Purpose Criterion Models & Options 	A) CLASSIFICATION <ul style="list-style-type: none"> Lists Dual-Use Items Models Catch-all Clauses 	A) NATIONAL INFRASTRUCTURE <ul style="list-style-type: none"> Bureaucratic Structures Division of Responsibilities and Authority Domestic Inter-Agency Cooperation 	A) INFORMATION SHARING <ul style="list-style-type: none"> Early Warning Indicators (of hostile intent/illicit activities) Protected disclosure
B) PENAL <ul style="list-style-type: none"> Penal Codes Penal Provisions Penalties Models & Options 	B) WAR MATERIALS <ul style="list-style-type: none"> Classification WMD Legislation Existing Legislation 	B) OPERATIONAL FRAMEWORK <ul style="list-style-type: none"> Permits Licensing Registration Customs Handling 	B) INTERNATIONAL COOPERATION <ul style="list-style-type: none"> Inter-IGO Cooperation Government-IGO Cooperation Regional Arrangements Assistance 	B) ENFORCEMENT <ul style="list-style-type: none"> Inter-Agency Coordination Science and Security Evidence-collection
C) REGULATIONS <ul style="list-style-type: none"> Origins/Sources (National, Regional, IGO) Legal Standing Models & Options 	<u>C) DEVELOPMENT, PRODUCTION, POSSESSION & USE</u> <ul style="list-style-type: none"> Development Production Possession Use 	C) INTANGIBLE TECHNOLOGIES <ul style="list-style-type: none"> Dual-Use Knowledge Technical Assistance Personnel Security Education Trade Issues 	C) EDUCATION & TRAINING <ul style="list-style-type: none"> Awareness raising Norm promotion Training of agency staff Science and Security Military training 	C) INTERNATIONAL ARRANGEMENTS <ul style="list-style-type: none"> Extradition Agreements
D) GUIDELINES <ul style="list-style-type: none"> Origins/Sources Legal Standing Models & Options 	D) COMPLEMENTARY LEGISLATION <ul style="list-style-type: none"> Anti-terrorism legislation Public health security Anti-conspiracy legislation Hazardous materials BW legislation 	D) SANCTIONS <ul style="list-style-type: none"> Bilateral Multilateral Arms Embargoes 	D) EXPERTS <ul style="list-style-type: none"> Identification of national experts Establishment of advisory boards 	

10. This further elaboration into a detailed structure is valuable in that it should help to ensure that all relevant aspects relating to the *necessary, national measures to implement the prohibitions* are addressed by the Meeting of Experts. It has, however, to be recognized that time is very limited and the outcome of the Meeting of Experts needs to be focussed on promoting *common understanding and effective action* as required in the mandate agreed by the Fifth Review Conference⁴. Furthermore, it will be recalled that the mandate states that:

(b) All meetings, both of experts and of States Parties, will reach any conclusions or results by consensus.

and that

(d) The meetings of experts will prepare factual reports describing their work.

11. Consequently, attention needs to be given prior to the Meeting of Experts to how the common understandings will be promoted and effective action taken. It can be expected that the inputs made by States Parties, particularly in the input papers providing an overview of national approaches, will demonstrate that there are common approaches being taken in many States Parties as well as in several regions which could be identified as common understandings in regard to both national measures and their implementation. The presentations of thematic perspectives should enable those approaches which represent best practice to be identified -- and, consequently, for effective action to be identified in which States Parties review their national measures against these common understandings and best practice and thus improve their national measures and national implementation.

12. All of this has to be seen against the background of the Review Conferences as these annual meetings are all part of the Inter Review Conference process agreed at the Fifth Review Conference. After all, the mandate states clearly that:

(e) The Sixth Review Conference will consider the work of these meetings and decide on further work.

It would therefore be prudent to ensure that the outcome of the annual meetings will indeed contribute to the recovery of the cumulative Review Conference process, and strengthen it as the mainstream of BTWC diplomacy. This ultimate goal of strengthening the mainstream of BTWC diplomacy requires constructive use to be made of the agreed language in past Final Declarations, while taking it forward in terms of common understandings and effective action through the addition of shared best practice. It is recognized that the common understandings and effective action emerging from the Meeting of Experts are essentially drafts for the First Meeting of the States Parties to be held in November 2003 and consequently the language proposed in this Briefing Paper for the common understandings and effective action is framed in terms of language that might be adopted by the First Meeting.

⁴United Nations, *Fifth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Geneva, 19 November - 7 December 2001 and 11 - 22 November 2002, Final Document, BWC/CONF.V/17, 2002. Available at <http://www.opbw.org>

The Meeting of Experts in August 2003

13. Consideration can be given to the common understandings that are likely to emerge from the Meeting of Experts and thus to the elements of best practice that might be built upon in identifying effective action. This is done by considering the five thematic subtopics in turn.

A. *Legal, Regulatory and Administrative Systems.*

14. **Legal Systems.** It can be expected that there will be ready recognition of and common understanding that there is a wide diversity in legal systems, and hence of constitutional processes, among States Parties; and that, as required by Article IV of the Convention, it is for each State Party to the Convention *in accordance with its constitutional processes* to take any necessary measures to **prohibit and prevent** the activities involving biological weapons which are defined in Article I. By definition these necessary measures are national measures although international measures may also be needed to complete the criminalization of the forbidden activities, as recommended in a later section of this Briefing Paper. By definition, too, the measures taken must do more than merely prohibit the forbidden activities; they must also prevent them. This **prevention** requirement sets a high standard of effectiveness. It is indeed a very stringent criterion to attach to national implementing measures, but it is explicitly included in Article IV of the Convention and thus constitutes one of the obligations flowing from the Convention. It can usefully be regarded as a test of the effectiveness of legislation and other measures of a prohibitory nature in each State Party. If a State Party's legislative and other prohibitions are not strong enough to **prevent** the activities involving biological weapons which are defined in Article I of the Convention, they do not meet the high standard set by Article IV and that State Party accordingly risks falling short of full compliance with its international obligations under the Convention. It would be desirable for the Meeting of Experts to express this as a common understanding of the significance of the prevention criterion set by Article IV and to recommend that States Parties take effective action by reviewing the effectiveness of their national measures to implement the prohibitions of the Convention in meeting the prevention criterion.

15. Insofar as **technical assistance** is concerned, it can be expected that a common understanding will be developed from the language that was agreed at the Fourth Review Conference⁵:

... some States Parties, as requested by the Second Review Conference, have provided to the United Nations Department for Disarmament Affairs information on the texts of specific legislation enacted or other measures taken to assure domestic compliance with the Convention. These States Parties are invited, and all States Parties are encouraged, to provide such information and texts in the future. In this regard the information provided by States Parties in response to the confidence-building measure agreed to at the Third Review Conference entitled "Declaration of legislation, regulations and other measures" is welcomed. In addition, all States Parties are encouraged to provide any useful information on the implementation of such measures.

⁵United 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*, Final Document, Geneva, 25 November - 6 December 1996, BWC/CONF.IV/9, 1996, Part II. p. 18. Available at <http://www.opbw.org>

16. In addition, it should be recognised that, as agreed at the Third Review Conference, from 15 April 1992 States Parties, under Confidence-Building Measure E,

*shall be prepared to submit copies of the legislation or regulations or written details of other measures on request to the United Nations Department for Disarmament Affairs or to an individual State Party.*⁶ [Emphasis added]

Each State Party can now, therefore, request these details **bilaterally** under the authority of the Third Review Conference, instead of depending solely upon the circulation of texts made available to the United Nations. Although this extension to provide for bilateral requests has not been recorded explicitly in any Final Declaration, it is still one part of the politically binding requirement of CBM 'E'. It therefore represents one of the common understandings which have evolved out of Article IV. This bilateral approach should become more important as States Parties take a greater interest in the status and effectiveness of their own legislation as well as other States Parties' legislation, and whether it is sufficiently strong and comprehensive to contribute to security overall. They can check one another's legislative performance individually, and make their own assessment of its adequacy. The possibility of requesting these details bilaterally could be used to bring diplomatic pressure to bear on any State Party which was thought, by reason of the inadequacy of its national measures, to be leaving open loopholes which bioterrorists or others might exploit to the detriment of everyone's security. To "*be prepared to submit copies of the legislation or regulations or written details of other measures on request*" is to accept that these texts are of legitimate interest to individual States Parties and that their requests are in accord with the common understanding of what Article IV implies for each State Party.

17. It can also be expected that the Meeting of Experts will recognise the importance of cooperation and initiatives which was agreed by the Fourth and earlier Review Conferences in the paragraph⁷ stating that "*The Conference encourages cooperation and initiatives, including regional ones, towards the strengthening and implementation of the Biological and Toxin Weapons Convention regime.*" It can further be expected that the Meeting of Experts will recognise the parallel from the Chemical Weapons Convention⁸ where the second paragraph of Article VII National Implementation Measures states that:

2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations in paragraph 1.

by developing a common understanding along the lines of:

⁶United 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, Final Document, BWC/CONF.III/23/Part II, 1992, pp.12-13. Available at <http://www.opbw.org>

⁷United 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*, Final Document, Geneva, 25 November - 6 December 1996, BWC/CONF.IV/9, 1996, Part II. p. 18. Available at <http://www.opbw.org>

⁸United Nations, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, Corrected version in accordance with Depository Notification C.N.246.1994.Treaties-5 and the corresponding Proces-Verbal of Rectification of the Original of the Convention, issued on 8 April 1994. Available at <http://www.opcw.org/cwc/cwc-eng.htm>

The First Meeting encouraged each State Party that is in a position to do so upon request to afford the appropriate form of legal assistance to other States Parties to facilitate the implementation of the obligations in Article IV of the Convention.

18. **Definitions.** The definitions of what needs to be prohibited and prevented are specified in Article I and Article III of the Convention. The Meeting of Experts in considering common understandings can be expected to start from the language in Article I that:

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

(1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;

(2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

and then to ensure that in any legislation and other national measures States Parties embrace also the extended understandings arrived at by the successive Review Conferences such as that of the Fourth Review Conference⁹ that:

The Conference also reaffirms that the Convention unequivocally covers all microbial or other biological agents or toxins, naturally or artificially created or altered, as well as their components, whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes.

A proposal for effective action would be for States Parties to review their national measures and to confirm that they did indeed prohibit the activities defined in Article I and embraced the extended understandings.

19. Insofar as Article III is concerned, the Meeting of Experts in considering common understandings would start from the language of the Article 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 this Convention.

and again to ensure that national measures include the extended understandings arrived at by the successive Review Conferences such as that of the Fourth Review Conference¹⁰ that:

⁹United 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*, Final Document, Geneva, 25 November - 6 December 1996, BWC/CONF.IV/9, 1996, Part II. p. 15. Available at <http://www.opbw.org>

¹⁰United 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*, Final Document, Geneva, 25 November - 6 December 1996, BWC/CONF.IV/9, 1996, Part II. p. 17. Available at <http://www.opbw.org>

The Conference affirms that Article III is sufficiently comprehensive to cover any recipient whatsoever at international, national or subnational levels.

A proposal for effective action would be for States Parties to review their national measures and to confirm that they did indeed implement the obligations of Article III and embraced the extended understandings.

20. **Penal provisions** are needed to ensure that the legislation and regulatory provisions can be enforced and to make it clear nationally that non-compliance will not be accepted. The Meeting of Experts in considering common understandings can be expected to start from the language agreed by the Fourth Review Conference¹¹ that:

The Conference notes those measures already taken by a number of States Parties in this regard, for example the adoption of penal legislation, and reiterates its call to any State Party that has not yet taken any necessary measures to do so immediately, in accordance with its constitutional processes.

Given the trend towards strengthening references to penal legislation in the Ad Hoc Group negotiations of 1997 -- 2001, and the much greater awareness of the dangers of terrorist attack, including the use of biological agents as in the attacks in the United States in which anthrax has been sent through the postal system, since the events of 11 September 2001, it can be expected that the Meeting of Experts could recognise a stronger common understanding of the necessity for all States Parties to adopt any necessary national measures, **including** penal legislation. It should be possible to agree the inclusion of penal legislation, without seeking to constrain States Parties' discretion in how they choose to enact penal legislation in accordance with their respective legal systems and traditions. Consequently, a stronger common understanding could develop from the language agreed by the Fourth Review Conference if it were adapted to read:

The First Meeting noted that a number of States Parties have already taken measures to implement Article IV of the Convention, **including** the adoption of penal legislation, and any State Party that has not yet taken any necessary measures is urged to do so immediately, in accordance with its constitutional processes.

21. **Regulations** are in many countries complementary to legislation. Principles are frequently set out in legislation and the detailed requirements are set out in regulations. In many national systems, the detailed regulations can be amended so as to keep them up to date by administrative action without the necessity of having to find parliamentary time in order to enact modified legislation. The regulations do, however, carry the full force of law and are enforced through the national authorities bringing cases in the civil and criminal courts. In some regions, such as that of the European Community, legally binding directives are issued which apply throughout the Community and are generally enacted nationally by national regulations.

¹¹United 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*, Final Document, Geneva, 25 November - 6 December 1996, BWC/CONF.IV/9, 1996, Part II. p. 17. Available at <http://www.opbw.org>

22. **Guidelines.** Although these can appear at first sight to be voluntary, and some may state that they are advisory, guidelines are frequently given teeth through it being made clear that the requirements set out in regulations are to be achieved by following the guidelines -- and that if an individual, an institution or a company chooses not to follow the guidelines then they are expected to follow a closely comparable approach that can be demonstrated to be at least as effective as those in the guidelines.

B. Prohibitions

23. **Direct Implementation.** The Meeting of Experts can be expected to identify a common understanding that because Article IV of the Convention requires that:

Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.

this obliges each State Party to ensure national implementation in the broadest possible terms, as the scope clauses at the end of the Article spell out clearly. Although the word *legislation* does not appear in this Article, the commonest response to this obligation among those States Parties which have made known their response has been either to legislate in such a way as to give domestic legal effect to the prohibitions contained in Article I, or to determine on examination of their existing laws that no further specific legislation is necessary. In recent years a growing concern about bioterrorism has reinforced the case for enacting specific legislation, and also for strengthening such legislation as already exists. It has also given governments a greater sense of urgency, as it has come to be recognised that legislation to give domestic legal effect to BTWC prohibitions is a vital element in their efforts to counter terrorist threats. National implementation also embraces government decrees, regulations and administrative memoranda to law enforcement agencies, although relatively little is known as to what action many States Parties have taken in this respect. It is understandable, therefore, that national implementation has come to be identified closely with the adoption of new legislation.

24. Such legislation ties the Convention into national legal systems in the clearest possible way. It contributes to the strengthening of compliance by expanding the constituency with an institutional interest in the success of the Convention. It also builds the treaty regime flowing from the Convention into normative structures at the national level, in the form of rules and expectations and procedures for upholding them. These rules, expectations and procedures in turn uphold their counterparts at the international level. They shore up the international treaty regime and help, even if only marginally, to ensure its survival by constituting one more obstacle which would have to be overcome if the Convention were to come under attack.

25. The language which is used nationally in such direct legislation should follow closely that which is within the Convention in order to ensure that no loopholes are inadvertently created through the language being used nationally in legislation differing from that in obligations undertaken by the State Party under the Convention. The Meeting of Experts could be expected to reach a common understanding in which it is recommended that States Parties in enacting national measures to implement the Convention use the same language as that in Articles I and III of the Convention which set out the prohibitions.

26. This is particularly important in regard to the General Purpose Criterion highlighted in bold below in Article I:

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

*(1) Microbial or other biological agents, or toxins **whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;***

(2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

It is the language of the General Purpose Criterion which ensures that the prohibitions of the Convention are all embracing and include both past and future biological agents. It is consequently vital that implementing legislation in regard to both Article I and to Article III uses comparable language to ensure that the prohibitions implemented nationally are also all embracing.

27. The Meeting of Experts can also be expected to reach a common understanding that the need for national legislation implementing the prohibitions of the Convention may also be covered to a limited extent in some States Parties by national legislation implementing the Chemical Weapons Convention as weapons containing toxin agents are prohibited under both Conventions. An effective action could be to require States Parties to review their national implementing legislation for the Biological and Toxin Weapons Convention **and** for the Chemical Weapons Convention to ensure that the prohibitions in respect of toxins are both all embracing and consistent.

28. **War Materials.** In some States Parties legislation to implement the BTWC may be incorporated in broader war materials legislation. In such cases, it is important to ensure that the prohibitions are applicable at all times and are not limited to war time as the prohibition in Article I relates to the use of biological weapons *for hostile purposes or in armed conflict*. The national legislation needs to implement the General Purpose Criterion effectively at all times as the obligation in Article IV of the Convention is to *prohibit and prevent*.

29. **Development, Production, Possession and Use.** National legislation needs to embrace the prohibition of development, production, stockpiling, acquisition and use of biological weapons. The prohibition needs to apply to both biological agents and toxins and to delivery means and, as already noted, needs to be consistent with the obligations undertaken by States Parties under the Convention. There is much to be said for using identical or closely similar language in the national legislation to that in the Convention -- and for that reason, it is preferable to use the language *develop, produce, stockpile or otherwise acquire or retain* rather than introduce terms such as "possession" which do not appear in Article I or III of the Convention.

30. The Meeting of Experts could be expected to identify a common understanding that:

The First Meeting emphasized that national implementing legislation needs to include prohibition of development, production, stockpiling, retention, acquisition and use of biological weapons with language that applies to both biological and toxin agents and

to the weapons, equipment and means of delivery. Care should be taken to use language in the national legislation that is identical to or closely similar to that in the Convention so as to avoid any loopholes.

31. **Complementary Legislation.** The national legislation implementing the prohibitions of the Convention can also be complemented by other national legislation addressing anti-terrorism, public, animal and plant health, hazardous materials and anti-conspiracy legislation. It is important to review such national legislation and its requirements to ensure that they are indeed complementary and that there are no inconsistencies. Equally important is to ensure that implementation and enforcement is consistent as different agencies and authorities may be responsible for the enforcement of different legislation -- thus anti-terrorism legislation is likely to be implemented and enforced by law enforcement agencies, public, animal or plant health legislation may be enforced by Ministry of Health and Ministry of Agriculture agencies, hazardous material legislation by Health & Safety agencies and so on. There is much to be said for the creation of oversight committees which bring together all the different implementing and enforcement agencies and those who are affected by the legislation in government, industry and academia in order to review the consistency and continuing adequacy of the current legislation and regulations.

32. The Meeting of Experts could be expected to identify the common understanding that national legislation implementing the obligations of the Convention is likely to be complemented by other national legislation addressing topics such as anti-terrorism, public, animal and plant health, and hazardous materials. An effective action could be to encourage States Parties to establish oversight committees involving all the different implementing and enforcement agencies together with those who are affected by the legislation in government, industry and academia in order to review the consistency and continuing adequacy of the current legislation and regulations.

33. **Other Aspects.** There are important elements relating to prohibitions that are not explicitly included in the detailed structure. These relate to the applicability of the prohibitions and whether they are applicable to all natural persons and whether they apply to activities carried out outside the territory of the State Party.

C. Restrictions

34. It is noted that the term "Restrictions" has been used in the latest structure instead of the term "Controls" used in the earlier structure. This change is regretted as "Controls" are more appropriate in dealing with biological and toxin agents which are intrinsically dual use as they occur in nature and yet need to be handled under controlled circumstances in government, industry and academia for human, animal and plant health reasons. It is also evident that countries around the world require controls to be placed on the import of human, animal and plant pathogens and there is a logic in applying similar controls to transfers within countries. The term "restrictions" presents a needlessly negative perception which can alienate at the outset those who are required to implement the national controls. In this Briefing Paper the term "controls" is used as it more accurately reflects the thematic subtopic being considered.

35. **Classification.** In considering the controls on transfers, both nationally and internationally, of biological agents and toxins and of biological equipment, the controls generally reflect the risk classification of the biological agents. However, it needs to be recognised that in many States Parties the national classification systems are different for

human, animal and plant pathogens and can well be tighter for plant pathogens than for human pathogens. Insofar as common understandings are concerned, it is probably enough to recognise that individual States Parties will identify the biological agents and toxins of concern from the point of view of transfers both nationally and internationally -- and may choose to use the same list of agents for control of transfers nationally and internationally. It needs, additionally, to be recalled that the Final Declaration of the Fourth Review Conference in the section on Article III stated that *The Conference affirms that Article III is sufficiently comprehensive to cover any recipient whatsoever at international, national or subnational levels* making it clear that controls are required both internationally and nationally.

36. Insofar as transfers of biological equipment are concerned, there are rarely controls on transfers nationally. Controls are more usually applied to international transfers in order to implement the obligations of Article III of the BTWC. Biological equipment is not usually classified into categories.

37. Catch-all clauses are frequently utilized in export controls so as to avoid the problems associated with lists in that lists are intrinsically finite and can never be fully comprehensive. Typically, such catch-all clauses require an authorisation for the goods to be exported if the exporter has been informed by the national authorities that the items in question are or may be intended in their entirety or in part for use in weapons of mass destruction programmes or if the exporter is aware that the goods that he intends to export are for use in such programmes. The catch-all clause may apply to dual use goods or it may be wider and apply also to goods other than dual use goods.

38. **Operational Framework.** States Parties will appoint national authorities to administer and enforce the national controls relating to transfers nationally and internationally. These may be different authorities for national transfers of human, animal and plant pathogens and toxins and may be different again when it relates to the import or the export of such materials and of biological equipment. As noted earlier, there is benefit in such authorities meeting at intervals to ensure that the regulations are consistent and that there are no loopholes -- or perceived loopholes -- between the different controls. Enforcement also needs to be consistent nationally so that the regulations are upheld and observed. Unenforced regulations are a danger to national security and safety.

39. **Intangible Technologies.** This relates to the national implementation of obligations under Article III of the Convention. As already noted, export controls need to embrace both dual-use equipment and of certain dual-use technology and in particular the technology required for the development, production or use of listed items. A licensing requirement on both physical and electronic transfers of information will frequently be required which should include an "end-use" control which applies to any dual-use items or indeed to any items where the exporter is informed by the government of the State Party that the items are or may be intended for use in connection with a weapons of mass destruction -- from the point of view of the Meeting of Experts this can be limited to a biological and toxin weapons -- or related missile programme. Such an end-use control should apply to both physical and electronic transfers of technology -- ie intangible technologies -- as well as to exports of goods. There should be no exemptions for information in the public domain or for basic scientific research with respect to the end-use control since it should be recognised that deliberately to send to a suspect recipient even a published book or article which might be of use to that biological and toxin weapons programme should require a licence.

40. National regulations also need to embrace the provision of assistance by any nationals of the State Party no matter where such assistance is provided. It needs to be borne in mind throughout that the obligation in Article III is clear 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 this Convention."*

41. **Sanctions.** This would be better replaced by "**Penal Provisions**" as "Controls" apply both to national and international transfers. There need to be penal provisions in national regulations to deal with failure to comply with national controls on the transfer, both nationally and internationally, of human, animal and plant pathogens and toxins. Sanctions are primarily limited to action being taken by one State or a group of States against another State and are thus of less direct relevance to the national implementation of measures to implement the obligations under the Convention.

D. Practical Implementation and Enforcement.

42. **National Infrastructure.** The bureaucratic structures and division of responsibilities will vary from State Party to State Party. There can be no standard model that applies to all States Parties. Rather, it needs to be recognised that the bureaucratic structures and responsibilities may well be different for human, animal and plant pathogens and for toxins. It is therefore important that the national infrastructure is reviewed periodically to ensure that the obligations under the Convention are being both comprehensively and consistently implemented and enforced by the different elements of government responsible for the different categories of biological agents and toxins. There can be merit in holding at least an annual meeting of all the agencies involved to review national regulations and their implementation and enforcement to ensure that there are no loopholes or perceived loopholes.

43. **International Cooperation.** As already noted, the Meeting of Experts could be expected, in the context of legal assistance, to recognise the parallel from the Chemical Weapons Convention¹² where the second paragraph of Article VII National Implementation Measures states that:

2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations in paragraph 1.

by developing a common understanding along the lines of:

The First Meeting urged that each State Party that is in a position to do so should upon request afford the appropriate form of legal assistance to other States Parties to facilitate the implementation of the obligations in Article IV of the Convention.

States Parties should be encouraged to cooperate together in the drawing up, implementation and enforcement of the obligations under the Convention.

¹²United Nations, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, Corrected version in accordance with Depositary Notification C.N.246.1994.Treaties-5 and the corresponding Procès-Verbal of Rectification of the Original of the Convention, issued on 8 April 1994. Available at <http://www.opcw.org/cwc/cwc-eng.htm>

44. The role of Inter-Governmental Organizations (IGO) is less clear. First of all, there are a wide range of IGOs ranging from the WHO, FAO and OIE to other IGOs such as the ICGEB and to regional ones such as those within the European Community. Insofar as some of these IGOs are concerned with human, animal and plant pathogens and with toxins, there is indeed a relevance to the interests of the States Parties to the BTWC. However, it needs to be recognised that the aims and objectives of the IGOs can be quite different from those related to the implementation of the BTWC. Particular care needs to be taken when considering "standards" promulgated by the IGOs as these may actually be "guidelines" to which member States aspire and may or may not be enforceable. It also needs to be recognised that terms such as "biosafety" or "biosecurity" may have quite different meanings when used by an IGO. For effective use of the limited time available for the Meeting of Experts, it will be important to avoid sidetracks and confusion resulting from the different meanings of some of the terms used in the discussions. It is clear that there are different meanings and understandings for the following terms:

a. *Biosafety*. This is frequently used to mean the policies, practices and equipment to prevent biological agents harming humans, animal or plants or the environment. However, with the advent of the Cartagena Protocol on Biosafety, the term biosafety is sometimes used to refer to the procedures relating to living modified organisms.

b. *Biosecurity*. It was pointed out that in some languages, such as French, the same word is used for biosafety and biosecurity. The term biosecurity also has a particularly wide meaning in respect of FAO activities.

c. *Deliberate release*. In the BTWC arena, this term is usually used to relate to a deliberate release by terrorists or by State Action. There is another meaning -- a planned deliberate release -- in the context of the European wide directives relating to the deliberate release of genetically modified organisms or microorganisms.

There could be benefit in a common understanding being agreed prior to the start of the Meeting of Experts in August as to what the terms "biosafety", "biosecurity" and "deliberate release" will mean during the Meeting. Alternatively, each State Party should be asked to make it clear what is meant by the terms in their papers or presentations.

45. Regional arrangements are, however, much more relevant as regional efforts -- such as those of the Andean Federation, ASEAN and the European Union and its associated States -- which address security aspects can contribute an important element to the implementation nationally and regionally of the Convention. There is much to be said for regional comparative tabulations that demonstrate the extent to which the Convention is being implemented in the region -- and peer pressure from fellow States in the region can be a powerful tool in encouraging and assisting laggards to remedy deficiencies.

46. **Education and Training.** There is no doubt that successful implementation nationally of the Convention requires awareness raising in all States Parties of the prohibitions in the Convention and of the national implementation thereof. Although the States Parties at successive Review Conferences have agreed Final Declarations stating that:

3. *The Conference notes the importance of:*

- *Legislative, administrative and other measures designed to enhance domestic compliance with the Convention;*

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

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

there has been little attention given to the extent to which States Parties have actually taken such steps.

47. The Meeting of Experts is encouraged to recognise a common understanding along the lines of:

The First Meeting recognized that effective national implementation of the prohibitions of the Convention requires the mounting of an effective and continuing campaign to ensure that all those working with biological agents and toxins both now and in the future are aware of the prohibitions of the Convention and of the national legislative, administrative and other measures to implement these prohibitions.

48. **Experts.** Effective national implementation requires that the national measures to achieve this are practical and enforceable. A balance needs to be struck to ensure that the burden associated with the implementation of national measures is appropriate. In many States Parties, the effectiveness of national measures is enhanced by carrying out consultation with national experts both at the drafting stage when new legislation or regulations may be opened for consultation and may benefit from the provision of comments and proposals for amendment and during their implementation through advisory committees made up of appropriate national experts who can advise the national implementing authority on solutions to any problems that may arise during implementation or as a result of changing circumstances.

49. The Meeting of Experts is encouraged to recognise a common understanding along the lines of:

The First Meeting noted that the effectiveness of drawing up national measures to implement the prohibitions of the Convention can be enhanced through making draft national measures available for consultation by seeking proposals for amendment from the public in general and the community that will be affected by and implement the measures in particular. Advisory committees including representatives of the community that are affected by the measures can enhance the implementation of the national measures.

E. Criminalization & Law Enforcement

50. **Information Sharing.** It is evident that national implementation can be made more effective if arrangements are made nationally to ensure that any unusual activities or

indications are shared with the appropriate national authorities on a timely basis so that action can be taken. The ability to recognise such unusual activities and indications depends on the success of national programmes to ensure that those involved are aware of the prohibitions under the Convention and of the national measures to implement these prohibitions. In several States Parties, representatives of several government authorities or agencies may visit facilities working with human, animal and plant pathogens and toxins for quite different purposes. They need to be aware of the prohibitions and, should they observe any unusual activities or indications, they need to know to which authority they should report such observations.

51. **Enforcement.** National measures to implement the prohibitions in the Convention need to be enforced and those who are not compliant prosecuted as measures that are not enforced are dangerous. As already noted, as required by Article IV of the Convention, it is up to each State Party to the Convention *in accordance with its constitutional processes* to *take any necessary measures to **prohibit and prevent*** the activities involving biological weapons which are defined in Article I. These necessary measures are national measures and the measures taken must do more than merely prohibit the forbidden activities; they must also prevent them. This **prevention** requirement sets a high standard of effectiveness. It is indeed a very stringent criterion to attach to national implementing measures, but it is explicitly included in Article IV of the Convention and thus constitutes one of the obligations flowing from the Convention. It can usefully be regarded as a test of the effectiveness of legislation and other measures of a prohibitory nature in each State Party. If a State Party's legislative and other prohibitions are not strong enough to **prevent** the activities involving biological weapons which are defined in Article I of the Convention, they do not meet the high standard set by Article IV and that State Party accordingly risks falling short of full compliance with its international obligations under the Convention. The Meeting of Experts can be encouraged to reach a common understanding that the national measures to implement the prohibitions of the Convention need to be enforced and to recommend as effective action that each State Party should review the effectiveness of its enforcement of the prohibitions.

52. **International Arrangements.** In the context of criminalization, there is much to be said for taking forward the ideas developed by the Harvard-Sussex Program who have developed a draft Convention¹³ to prohibit biological and chemical weapons under international criminal law. The proposed Convention would make it an offence for any person, regardless of official position, to order, direct, or knowingly to participate or render substantial assistance in the development, production, acquisition, stockpiling, retention, transfer or use of biological or chemical weapons or to threaten the use of such weapons or to create or retain facilities intended for the production of such weapons. Any person who commits any of the prohibited acts anywhere would face the risk of apprehension, prosecution and punishment, or of extradition should that person be found in a state that supports the proposed Convention. This proposed Convention would provide a valuable complement to the existing BTWC and CWC. It could usefully be negotiated in the Sixth Committee of the United Nations General Assembly.

¹³The CBW Conventions Bulletin, *A Draft Convention to Prohibit Biological and Chemical Weapons Under International Criminal Law*, Issue No 42, December 1998, pp. 1- 5.

53. In addition, there would be benefit in States Parties seeking the explicit addition of biological and toxin weapons to the existing Rome Statute¹⁴ of the International Criminal Court which, currently, under Article 8 War crimes includes:

(xvii) Employing poison or poisoned weapons

and reproduces the language of the first half of the prohibition in the 1925 Geneva Protocol:

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices

but omits the "*bacteriological methods of warfare*" which constitutes the second half of the prohibition in the 1925 Geneva Protocol, or any language drawn from the BTWC. The Rome Statute entered into force on 1 July 2002 and currently has some 91 member States.¹⁵

54. The Meeting of Experts is encouraged to recognise a common understanding along the lines of:

The First Meeting encouraged the States Parties to explore the possibility of negotiating in an appropriate forum, or asking the Sixth Committee of the United Nations General Assembly to negotiate, an international convention on the criminalization of biological and chemical weapon activities which would emphasise individual criminal responsibility for acts stigmatized as international crimes. In addition, the First Meeting encourages States Parties to seek the addition of biological and toxin weapons to the existing Rome Statute references to chemical weapons as falling within the jurisdiction of the International Criminal Court. The First Meeting favours such international legal approaches to the criminalization of all acts prohibited among States Parties as usefully supplementing national implementation measures under Article IV of the BTWC by ensuring that any jurisdictional loopholes are closed, and that immunity from prosecution for criminal acts involving biological and toxin weapons is thereby abolished.

Outcome of the Meeting of Experts

55. The starting point for the *common understandings and effective action* that are to be the outcome of the Meeting of Experts and the subsequent Meeting of the States Parties in November 2003 needs to be the extended understandings that have been developed by the previous Review Conferences as the *common understandings and effective action* need to be aimed towards the Sixth Review Conference. It must be borne in mind throughout that the annual meetings are **an inter Review Conference process**.

56. In this section, a summary is first provided showing the evolution of the extended common understandings regarding Article IV of the Convention, and then the various proposals for common understandings and effective action relating to the first topic "*The adoption of necessary, national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation;*" are drawn together as a consolidated text.

¹⁴Rome Statute of the International Criminal Court, *Article 8 War crimes*. Available at <http://www.un.org/law/icc/>

¹⁵Rome Statute of the International Criminal Court, *Ratification Status*. Available at <http://www.un.org/law/icc/>

57. *Extended Common Understandings*. The evolution of common understandings regarding Article IV of the Convention was examined in Briefing Paper No. 3¹⁶ and summarised there in tabular form. For ease of reference, this tabular summation is reproduced here as it provides the starting point for considering language for the outcome of the Meeting of Experts and the subsequent States Parties meeting in November 2003.

58. In this summary in tabular form of the developments thus far of the regime for Article IV over the first four Review Conferences **bold** text is used to highlight the developments in successive Final Declarations. First in regard to the fundamental requirement in Article IV:

Article IV	<i>Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.</i>
1st Review Conference	<i>The Conference notes the provisions of Article IV, which requires each State Party to take any necessary measure to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within its territory, under its jurisdiction or under its control anywhere, and calls upon all States Parties which have not yet taken any necessary measures in accordance with their constitutional processes to do so immediately.</i>
2nd Review Conference	<i>The Conference notes the importance of Article IV, under which each State Party shall, in accordance with its constitutional processes, take any necessary measures to prohibit or prevent any acts or actions which would contravene the Convention.</i> <i>The Conference calls upon all States Parties which have not yet taken any necessary measures in accordance with their constitutional processes, as required by the Article, to do so immediately.</i>

¹⁶Graham S. Pearson & Nicholas A. Sims, *National Measures to Implement the Prohibitions in the BTWC*, University of Bradford, Department of Peace Studies, Briefing Paper No.3 (Second Series), March 2003, paragraphs 7 to 22. Available at <http://www.brad.ac.uk/acad/sbtwc>

3rd Review Conference	<p><i>The Conference notes the importance of Article IV, under which each State Party shall, in accordance with its constitutional processes, take any necessary measures to prohibit or prevent any acts or actions which would contravene the Convention.</i></p> <p><i>The Conference notes those measures already taken by some States Parties in this regard, for example the adoption of penal legislation, and reiterates its call to any State Party that has not yet taken any necessary measures to do so immediately, in accordance with its constitutional processes. Such measures should apply within the territory of a State Party, under its jurisdiction or under its control anywhere. The Conference invites each State Party to consider, if constitutionally possible and in conformity with international law, the application of such measures to actions taken anywhere by natural persons possessing its nationality.</i></p>
4th Review Conference	<p><i>1. The Conference underlines the importance of Article IV. It reaffirms the commitment of States Parties to take the necessary national measures under this Article, in accordance with their constitutional processes. These measures are to ensure the prohibition and prevention of the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention anywhere within their territory, under their jurisdiction or under their control, in order to prevent their use for purposes contrary to the Convention. The States Parties recognize the need to ensure, through the review and/or adoption of national measures, the effective fulfilment of their obligations under the Convention in order, <u>inter alia</u>, to exclude use of biological and toxin weapons in terrorist or criminal activity.</i></p> <p><i>2. The Conference notes those measures already taken by a number of States Parties in this regard, for example the adoption of penal legislation, and reiterates its call to any State Party that has not yet taken any necessary measures to do so immediately, in accordance with its constitutional processes. Such measures should apply within its territory, under its jurisdiction or under its control anywhere. The Conference invites each State Party to consider, if constitutionally possible and in conformity with international law, the application of such measures also to actions taken anywhere by natural persons possessing its nationality.</i></p>

59. Secondly, in regard to the provision of texts of legislation and other regulatory measures for the purposes of consultation:

1st Review Conference	<p><i>The Conference invites States Parties which have found it necessary to enact specific legislation or take other regulatory measures relevant to this Article to make available the appropriate texts to the United Nations Centre for Disarmament, for the purposes of consultation.</i></p>
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2nd Review Conference	<i>The Conference notes that States Parties, as requested by the First Review Conference, have provided to the United Nations Department for Disarmament Affairs information on and the texts of specific legislation enacted or other regulatory measures taken by them, relevant to this article. The Conference invites States Parties to continue to provide such information and texts to the United Nations Department for Disarmament Affairs for purposes of consultation.</i>
3rd Review Conference	<i>The Conference notes that some States Parties, as requested by the Second Review Conference, have provided to the United Nations Department for Disarmament Affairs information on and texts of specific legislation enacted or other measures taken to assure domestic compliance with the Convention. The Conference invites these States Parties, and encourages all States Parties, to provide such information and texts in the future. In this regard the Conference welcomes agreement by the States Parties participating in the Third Review Conference to implement a new confidence-building measure entitled "Declaration of legislation, regulations and other measures". In addition, the Conference invites all States Parties to provide any useful information on the implementation of such measures.</i>
4th Review Conference	<i>5. The Conference notes that some States Parties, as requested by the Second Review Conference, have provided to the United Nations Department for Disarmament Affairs information on the texts of specific legislation enacted or other measures taken to assure domestic compliance with the Convention. The Conference invites these States Parties, and encourages all States Parties, to provide such information and texts in the future. In this regard the Conference welcomes information provided by States Parties in response to the confidence-building measure agreed to at the Third Review Conference entitled "Declaration of legislation, regulations and other measures". In addition, the Conference encourages all States Parties to provide any useful information on the implementation of such measures.</i>

60. Thirdly, in regard to the wider range of national implementation actions which were given international commendation first at the Second Review Conference:

<p>2nd Conference</p> <p>Review</p>	<p><i>The Conference notes the importance of</i></p> <ul style="list-style-type: none"> - <i>legislative, administrative and other measures designed effectively to guarantee compliance with the with the provisions of the Convention within the territory under the jurisdiction or control of a State Party;</i> - <i>legislation regarding the physical protection of laboratories and facilities to prevent unauthorised access to and removal of pathogenic or toxic material; and</i> - <i>inclusion in textbooks and in medical, scientific and military educational programmes of information dealing with the prohibition of bacteriological (biological) and toxin weapons and the provisions of the Geneva Protocol</i> <p><i>and believes that such measures which States might undertake in accordance with their constitutional process would strengthen the effectiveness of the Convention.</i></p>
<p>3rd Review Conference</p>	<p><i>The Conference notes the importance of:</i></p> <ul style="list-style-type: none"> - <i>Legislative, administrative and other measures designed effectively to enhance domestic compliance with the Convention;</i> - <i>Legislation regarding the physical protection of laboratories and facilities to prevent unauthorized access to and removal of microbial or other biological agents, or toxins;</i> - <i>Inclusion in textbooks and in medical, scientific and military educational programmes of information dealing with the prohibition of microbial or other biological agents or toxins and the provisions of the Geneva Protocol.</i> <p><i>The Conference believes that such measures which States Parties might undertake in accordance with their constitutional processes would strengthen the effectiveness of the Convention.</i></p>

4th Review Conference	<p>3. <i>The Conference notes the importance of:</i></p> <ul style="list-style-type: none"> - <i>Legislative, administrative and other measures designed to enhance domestic compliance with the Convention;</i> - <i>Legislation regarding the physical protection of laboratories and facilities to prevent unauthorized access to and removal of microbial or other biological agents, or toxins:</i> - <i>Inclusion in textbooks and in medical, scientific and military education programmes of information dealing with the prohibitions and provisions contained in the Biological and Toxin Weapons Convention and the Geneva Protocol of 1925.</i> <p>4. <i>The Conference believes that such measures which States Parties might undertake in accordance with their constitutional processes would strengthen the effectiveness of the Convention, as requested by the Second and Third Review Conferences.</i></p>
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61. Finally, on cooperation and initiatives, including regional ones, which appeared first at the Third Review Conference:

3rd Review Conference	<p><i>The Conference welcomes regional measures such as the Mendoza Declaration as well as other initiatives dealing with the renunciation of weapons of mass destruction, including biological weapons, as concrete positive steps towards the strengthening of the Biological and Toxin Weapons Convention regime.</i></p>
4th Review Conference	<p>6. <i>The Conference encourages cooperation and initiatives, including regional ones, towards the strengthening and implementation of the Biological and Toxin Weapons Convention regime.</i></p>

There was also a single paragraph on use which first appeared at the Fourth Review Conference:

4th Review Conference	<p>7. <i>The Conference reaffirms that under all circumstances the use of bacteriological (biological) and toxin weapons is effectively prohibited by the Convention.</i></p>
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62. *Outcome of the Meeting of Experts.* It is recognized that the common understandings and effective action emerging from the Meeting of Experts are essentially drafts for the First Meeting of the States Parties to be held in November 2003 and consequently the language proposed in this Briefing Paper for the common understandings and effective action is framed in terms of language that might be adopted by the First Meeting. In the consolidated text provided below, cross references are provided in parentheses at the end of each paragraph to the relevant paragraph in this Briefing Paper. Insofar as the outcome of the Meeting of Experts in August 2003 and the subsequent Meeting of States Parties in November 2003 is

concerned, the starting point is the language agreed by the Fourth Review Conference¹⁷, modified so as to refer to the First Meeting instead of to the Conference and transposed into the past sentence since the outcome of the First Meeting is to be a *report* not a *Final Declaration*:

OUTCOME OF THE FIRST MEETING: NATIONAL IMPLEMENTING LEGISLATION

1. The First Meeting underlined the importance of Article IV. It reaffirmed the commitment of States Parties to take the necessary national measures under this Article, in accordance with their constitutional processes. These measures are to ensure the prohibition and prevention of the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention anywhere within their territory, under their jurisdiction or under their control, in order to prevent their use for purposes contrary to the Convention. The States Parties recognized the need to ensure, through the review and/or adoption of national measures, the effective fulfilment of their obligations under the Convention in order, *inter alia*, to exclude use of biological and toxin weapons in terrorist or criminal activity. (paras 12 and 58)

2. The First Meeting noted those measures already taken by a number of States Parties in this regard, including the adoption of penal legislation, and urged any State Party that has not yet taken any necessary measures to do so immediately, in accordance with its constitutional processes. Such measures should apply within its territory, under its jurisdiction or under its control anywhere. The Conference invited each State Party to consider, if constitutionally possible and in conformity with international law, the application of such measures also to actions taken anywhere by natural persons possessing its nationality. (paras 20, 33 and 58)

3. The First Meeting recognized that there is a wide diversity in legal systems, and hence of constitutional processes, among States Parties; and that, as required by Article IV of the Convention, it is for each State Party to the Convention *in accordance with its constitutional processes to take any necessary measures to **prohibit and prevent*** the activities involving biological weapons which are defined in Article I. The First Meeting noted that the national measures to be taken by States Parties must do more than merely prohibit the forbidden activities; they must also prevent them. Furthermore, it was noted that if a State Party's legislative and other prohibitions are not strong enough to **prevent** the activities involving biological weapons which are defined in Article I of the Convention, they do not meet the high standard set by Article IV and that State Party accordingly risks falling short of full compliance with its international obligations under the Convention. The First Meeting recommended that States Parties should take effective action by reviewing the effectiveness of their national measures to implement the prohibitions of the Convention in meeting the prevention criterion. (para 14)

4. The First Meeting encouraged each State Party that is in a position to do so upon request to afford the appropriate form of legal assistance to other States Parties to

¹⁷United 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*, Final Document, Geneva, 25 November - 6 December 1996, BWC/CONF.IV/9, 1996, Part II. p. 17-18. Available at <http://www.opbw.org>

facilitate the implementation of the obligations in Article IV of the Convention. (para 17)

5. The First Meeting recognised that national measures to implement the prohibitions in the Convention need to utilize essentially identical language to that of Article I of the Convention and also to embrace the extended understandings that have emerged from the successive Review Conferences. The First Meeting recommended that States Parties should take effective action by reviewing their national measures to ensure that they do indeed prohibit the activities defined in Article I and embrace the extended understandings regarding Article I emerging from successive Review Conferences. (para 18, 25 and 26)

6. The First Meeting recognised that national measures to implement the obligations of Article III of the Convention need to utilize essentially identical language to that of Article III of the Convention and also to embrace the extended understandings that have emerged from the successive Review Conferences. These understandings require measures that are effective internationally, nationally and subnationally. The First Meeting recommended that States Parties should take effective action by reviewing their national measures to ensure that they do indeed implement the obligations of Article III and embrace the extended understandings regarding Article III emerging from successive Review Conferences. (para 19, 25, 26 and 35)

7. The First Meeting noted that some States Parties, as requested by the Second Review Conference, have provided to the United Nations Department for Disarmament Affairs information on the texts of specific legislation enacted or other measures taken to assure domestic compliance with the Convention. The First Meeting invited these States Parties, and encouraged all States Parties, to provide such information and texts in the future both to the United Nations Department for Disarmament Affairs and, upon request, to an individual State Party. In this regard the First Meeting welcomed information provided by States Parties in response to the confidence-building measure agreed to at the Third Review Conference entitled "Declaration of legislation, regulations and other measures". In addition, the First Meeting encouraged all States Parties to provide any useful information on the implementation of such measures. (para 15, 16 and 59)

8. The First Meeting noted that the need for national legislation implementing the prohibitions of the Convention may be covered to a limited extent in some States Parties by national legislation implementing the Chemical Weapons Convention as weapons containing toxins are prohibited under both Conventions. The First Meeting urged States Parties to review their national implementing legislation for the Biological and Toxin Weapons Convention **and** for the Chemical Weapons Convention to ensure that the prohibitions in respect of toxins are both all embracing and consistent. (para 27)

9. The First Meeting emphasized that national implementing legislation needs to include prohibition of development, production, stockpiling, retention, acquisition and use of biological weapons with language that applies to both biological and toxin agents and to the weapons, equipment and means of delivery. It was recommended that language used in the national legislation should be identical to or closely similar to that in the Convention so as to avoid any loopholes. (para 30)

10. The First Meeting noted that national legislation implementing the obligations of the Convention is likely to be complemented by other national legislation addressing topics such as anti-terrorism, public, animal and plant health, and hazardous materials. The First Meeting recommended that States Parties consider establishing oversight committees involving all the different implementing and enforcement agencies together with those who are affected by the legislation in government, industry and academia in order to review the consistency and continuing adequacy of the current legislation and regulations. (para 32)

11. The First Meeting recognized the importance of ensuring that national measures are applicable to all natural persons and furthermore apply to activities carried out not only within but also outside the territory of the State Party. The First Meeting recommended that States Parties review their national measures to ensure that they apply to all natural persons and that there are no exclusions and also to ensure that they are applicable to natural persons anywhere. (para 33 and 58)

12. The First Meeting recognized the benefits arising from cooperation and initiatives, including regional ones, towards the strengthening and implementation of the Biological and Toxin Weapons Convention regime. The First Meeting encouraged regional initiatives to ensure that all States Parties within the region have effectively implemented the prohibitions of the Convention and have adopted measures that are effective in prevention of the activities defined in Article I of the Convention. (para 45 and 61)

13. The First Meeting recognized that effective national implementation of the prohibitions of the Convention requires the mounting of an effective and continuing campaign to ensure that all those working with biological agents and toxins both now and in the future are aware of the prohibitions of the Convention and of the national legislative, administrative and other measures to implement these prohibitions. (para 47 and 60)

14. The First Meeting noted that the effectiveness of drawing up national measures to implement the prohibitions of the Convention can be enhanced through making draft national measures available for consultation by seeking proposals for amendment from the public in general and the community that will be affected by and implement the measures in particular. Advisory committees including representatives of the community that are affected by the measures can enhance the implementation of the national measures. (para 49)

15. The First Meeting recognized that the national measures to implement the prohibitions of the Convention need to be enforced effectively, in order to ensure the prevention of all the prohibited activities, and recommended that each State Party should review the effectiveness of its enforcement of the prohibitions. (para 51)

16. The First Meeting encouraged the States Parties to explore the possibility of negotiating in an appropriate forum, or asking the Sixth Committee of the United Nations General Assembly to negotiate, an international convention on the criminalisation of biological and chemical weapon activities which would emphasise individual criminal responsibility for acts stigmatized as international crimes. In addition, the First Meeting encouraged States Parties to seek the addition of biological and toxin weapons to the existing Rome Statute references to chemical weapons as

falling within the jurisdiction of the International Criminal Court. The First Meeting favoured such international legal approaches to the criminalisation of all acts prohibited among States Parties as usefully supplementing national implementation measures under Article IV of the BTWC by ensuring that any jurisdictional loopholes are closed, and that immunity from prosecution for criminal acts involving biological and toxin weapons is thereby abolished. (para 54)

63. The Meeting of Experts in Geneva on 18 to 29 August 2003 needs to grasp the opportunity that it has to help make the First Meeting of States Parties on 10 to 14 November 2003 a success, by providing the First Meeting with a coherent and comprehensive set of common understandings and effective action which the First Meeting can approve and readily incorporate in its report. Beyond November, the significance of the report of the First Meeting is to add value to the Inter Review Conference process and to set the pattern of the meetings scheduled for 2004 and 2005 on the remaining topics identified by the Fifth Review Conference. The process should therefore contribute, within the limits of the agenda topics and the mandate for the meetings agreed by the Fifth Review Conference, to the recovery and strengthening of the BTWC through a return to the cumulative development of extended understandings leading to effective action at the Sixth Review Conference.