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## The U.S. Government's Interpretation of The Biological and Toxin Weapons Convention

### A Report of the Working Group on Biological Weapons

**Ambassador James F. Leonard, Marie Isabelle Chevrier, and Rajendra Aldis  
contributors**

**November 2002**

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# **The U.S. Government's Interpretation of The Biological and Toxin Weapons Convention<sup>1</sup>**

## **A Report of The Federation of American Scientists Working Group on Biological Weapons**

**November 2002**

A substantial body of evidence dating back to the Nixon administration demonstrates that the United States Government has consistently maintained that all types of biological and toxin weapons, including those described as non-lethal weapons, are prohibited by the US unilateral renunciation of biological weapons, the Biological and Toxin Weapons Convention (BTWC) and more recent domestic legislation implementing the BTWC and outlawing the possession of all biological weapons in the United States.

### **Nixon's 1969 Policy Review of Chemical and Biological Weapons**

Policies for "lethal" biological weapons and "incapacitating" biological weapons were considered separately during President Nixon's 1969 policy review of chemical and biological weapons. The Interdepartmental Political-Military Group that reported to the National Security Council on biological weapons developed different pro and con arguments for "maintain[ing] a lethal biological capability beyond RDT&E" and "maintain[ing] a capability for use of incapacitating biologicals."<sup>2</sup> The review ultimately recommended to the President that the US renounce all forms of biological weapons. Following this recommendation, President Nixon issued National Security Decision Memorandum 35, November 25, 1969, which declared that:

- a) The United States shall renounce the use of lethal methods of bacteriological/biological warfare.**
- b) The US will similarly renounce the use of all other methods of bacteriological/biological warfare (for example incapacitating agents.)**

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<sup>1</sup> Marie Isabelle Chevrier is the principal author of this report. Ambassador James F. Leonard and Rajendra Aldis made major contributions to the report.

<sup>2</sup> Memorandum, Richard F. Pedersen and William I. Cargo to the Under Secretary of State, Subject: NSC Review Group Meeting, Thursday, October 30, on Chemical and Biological Warfare (NSSM -59), October 31, 1969; Top Secret, 3 pages p 1. Source: Document declassified under a freedom of Information Act request by the National Security Archive, George Washington University, Washington D.C. (Hereafter cited as National Security Archive) whose website is website: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB58/>. Report to the National Security Council, "US Policy on Chemical and Biological Warfare and Agents," submitted by the Interdepartmental Political-Military Group in response to NSSM 59, November 10, 1969. Top Secret, 52 pp. 24-27. National Security Archive.

**c) The United States bacteriological/biological programs will be confined to research and development for defensive purposes (immunization, safety measures, et cetera).<sup>3</sup>**

In his statement announcing the new policy, President Nixon reiterated the renunciation of both lethal and other biological agents. Nixon said:

**--The United States shall renounce the use of lethal biological agents and weapons, and all other methods of biological warfare.  
--The United States will confine its biological research to defensive measures such as immunization and safety measures.<sup>4</sup>**

At a press conference following President Nixon's announcement, Dr. Henry Kissinger, the National Security Advisor, clarified US policy in response to questions from the audience. He stated:

**We do plan to destroy all existing stocks of bacteriological weapons....We concluded that bacteriological weapons, if used, might well produce global epidemics...For this reason, we have concluded that the use of bacteriological weapons, either lethal or incapacitating bacteriological agents, will not be American policy and we are renouncing their use, either in a first use capacity or in retaliation. We will not use bacteriological weapons even if they are used against us...We are giving up a means of retaliation. But when we considered the long-term effect of bacteriological warfare...we concluded that only the bacteriological weapons were really primarily useful for first use; that the effect in retaliation would be long delayed, the consequences would be too uncontrollable, and we have deliberately decided to renounce bacteriological warfare, either for first use or for retaliation. We have simply not concluded that this is an effective or proper instrument of warfare.<sup>5</sup>**

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<sup>3</sup> National Security Decision Memorandum (NSDM) 35, Subject: United States Policy on Chemical Warfare Program and Bacteriological/Biological Research Program, from National Security Adviser Henry A. Kissinger to the Vice President, Secretary of State, Secretary of Defense, etc. November 25, 1969; Top Secret/Nodis, 3 pages; pp 2-3. National Security Council Files, Subject Files – Chemical, Biological Warfare (Toxins, etc.) Vol. II – Box 311; Richard M. Nixon Presidential Materials Staff, US National Archives and Records Administration (NARA) College Park, Maryland; declassified under executive order 12958. An earlier declassified copy of the memorandum, with excisions can be found at the National Security Archive website: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB58/>

<sup>4</sup> Richard M. Nixon, "Statement on Chemical and Biological Defense Policies and Programs" *Public Papers of the Presidents: Richard Nixon, 1969*. (Washington, DC: U.S. Government Printing Office, 1971). The public papers of President Nixon can be found on the website of The President Richard Nixon Library & Birthplace; [www.nixonfoundation.org](http://www.nixonfoundation.org).

<sup>5</sup> Press conference with Dr. Henry A. Kissinger, Assistant to the President for National Security Affairs; and Ron Ziegler, Press Secretary to the President. 10:38 A.M. EST, November 25, 1969.

In February 1970 Nixon extended the renunciation to all toxins as well.<sup>6</sup>

## **US Ratification of the Geneva Protocol**

President Nixon sent the Geneva Protocol to the US Senate for advice and consent for ratification on August 19, 1970. At that time a number of noteworthy issues regarding the Protocol were raised, most of them dealing with chemical weapons policy, not biological weapons policy. In discussions with Congressional leaders the Nixon administration insisted that the Geneva Protocol covered all kinds of biological agents. A document listing the talking points for Nixon in a meeting with the Senate Majority Leader<sup>7</sup> notes,

- First, we will not recommend that the U.S. reserve the right of retaliation for biological weapons.**
- rn This goes a step further than all but one of the 39 reserving Parties. 38 have reserved a right of retaliation with both chemical and bacteriological weapons...**
  - rn We see no reason to reserve a right to retaliate with weapons which we have renounced altogether.**
  - rn Moreover, we will make clear our understanding that the term “bacteriological” in the Protocol includes all biological methods of warfare and toxins.<sup>8</sup>**

These points were reiterated in numerous documents in the discussion of the biological component of the Geneva Protocol.<sup>9</sup>

## **Negotiation of the Biological and Toxin Weapons Convention**

The US policy on biological weapons, announced on November 25, 1969, included a decision that the US would associate itself with the principles and objectives of the UK draft Convention prohibiting the development, production and stockpiling of biological weapons.<sup>10</sup> When the Soviet Union tabled an alternative draft Convention on March 30, 1970, the US quickly took up the task of negotiating a widely acceptable Convention. In doing so it sought to broaden the prohibitions of the draft Conventions. Then-Secretary

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<sup>6</sup> For a detailed analysis of the biological and toxin weapons policy see Jonathan B. Tucker, “A Farewell to Germs: The U.S. Renunciation of Biological and Toxin Warfare, 1969-1970” *International Security*, Vol. 27, No. 1 (Summer 2002), pp.107-148.

<sup>7</sup> Senator Mike Mansfield was Senate Majority Leader from 1961-1976.

<sup>8</sup> “The President, Talking Points, Meeting with Senator Mansfield – Geneva Protocol August 13, 1970, 5 pages, p 2. National Security Council Files, Subject Files – Chemical, Biological Warfare (Toxins, etc.) Vol. II – Box 311; Richard M. Nixon Presidential Materials Staff, US National Archives and Records Administration (NARA) College Park, Maryland; declassified under executive order 12958. Emphasis in the original.

<sup>9</sup> The Geneva Protocol refers to “bacteriological” methods of warfare. The US interpretation of this clause is that the Protocol bans the use of all biological methods of warfare. See preceding text and footnote 8.

<sup>10</sup> NSDM 35 op.cit.

of State William P. Rogers described to President Nixon the strategy of the United States in the negotiations:

**Our response is designed ...to encourage achievement of our basic objective, negotiation of a ban on production or possession of biological weapons and toxins. ...We will seek to include a preambular clause reflecting the parties' intention that the convention should have the effect of precluding the use of these weapons in any circumstances.<sup>11</sup>**

Throughout the State Department's negotiating instructions to Ambassador James F. Leonard it is clear that the thrust of the US position was consistently to outlaw the possession and use of all types of biological and toxin weapons. In agreeing to language in the Soviet draft that did not contain an explicit ban on use, the US stated,

**We believe it very important, however, that the Convention contain a clear expression of the desire of the parties that elimination of these weapons preclude their use under any circumstances.<sup>12</sup>**

Elsewhere, the instructions note:

**We are proposing a number of drafting changes designed mainly to strengthen the Convention.**

**In Article I we [the United States] have added the words "or retain" after the word "acquire" in order to strengthen the undertaking...<sup>13</sup>**

In his statement at the Biological Weapons Convention Signing Ceremony on April 10, 1972, President Nixon stressed the importance of the Convention in this way:

**In terms of the agreement that is being signed today, it has very great significance. It means that all the scientists of the world, certainly a universal community, whatever their language, whatever their race, whatever their background, instead of working to develop biological weapons which one nation might use against another nation, now may devote their entire energy toward working against the enemy of all mankind—disease.<sup>14</sup>**

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<sup>11</sup> Memorandum for the President, from Secretary of State William P. Rogers, April 23, 1971; Confidential, 2 pages. Source: Vol. IV – part 1 folder: NSC Files: Subject Files, Chemical, Biological Warfare (Toxins, etc.); Box 312; Richard M. Nixon Presidential Materials Staff, U.S. National Archives and Records Administration (NARA), College Park, Maryland; declassified under Executive Order 12958.

<sup>12</sup> Department of State Telegram to US Mission in Geneva, SUBJECT: CCD: Negotiation of Biological Weapons Convention, page 03, paragraph 6. National Security Council Files, Subject Files – Chemical, Biological Warfare (Toxins, etc.) Vol. IV part. 1 – Box 312; Richard M. Nixon Presidential Materials Staff, US National Archives and Records Administration (NARA) College Park, Maryland; declassified under executive order 12958. Emphasis added.

<sup>13</sup> Ibid. page 07 paragraph 21.

<sup>14</sup> Richard M. Nixon, Remarks at the Signing Ceremony of the Biological Weapons Convention, April 10, 1972. *Public Papers of President Richard M. Nixon, 1972*. Available on line from The Richard Nixon Library and Birthplace at [www.nixonfoundation.org](http://www.nixonfoundation.org).

## **Biological Weapons Anti-Terrorism Act of 1989**

The first stated purpose of the Biological Weapons Anti-Terrorism Act of 1989, passed by the US Congress and signed by President George H.W. Bush in 1990, was to “implement the Biological Weapons Convention.” The Act inserted into the US Criminal Code language paralleling the language of the Convention, making anyone subject to criminal penalties who:

**knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin, or delivery system for use as a weapon, or knowingly assists a foreign state or any organization to do so.**

The Act contained the following definitions:

- (1) the term ‘biological agent’ means any micro-organism, virus, or infectious substance, capable of causing--**
  - (A) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;**
  - (B) deterioration of food, water, equipment, supplies, or material of any kind; or**
  - (C) deleterious alteration of the environment;**
- (2) the term ‘toxin’ means, whatever its origin or method of production--**
  - (A) any poisonous substance produced by a living organism; or**
  - (B) any poisonous isomer, homolog, or derivative of such a substance;**
- (3) the term ‘delivery system’ means--**
  - (A) any apparatus, equipment, device, or means of delivery specifically designed to deliver or disseminate a biological agent, toxin, or vector; or**
  - (B) any vector; and**
- (4) the term ‘vector’ means a living organism capable of carrying a biological agent or toxin to a host.<sup>15</sup>**

The above definition of biological agent, together with the stated purpose of the legislation to implement the Biological Weapons Convention, makes it absolutely clear that the US interprets the prohibitions of the Convention to include all biological agents: non-lethal as well as lethal agents; agents causing disease in plants, animals or any organism, not just those affecting humans; and anti-materiel or environment-altering agents that affect non-living substances as well as those affecting living organisms.

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<sup>15</sup> [Pub. L. 101-298](http://www4.law.cornell.edu/uscode/18/175.notes.html), Sec. 3 (a), May 22, 1990, 104 Stat. 201. Biological Weapons Anti-Terrorism Act of 1989. Full text of the Act can be found at the Legal Information Institute website for the US Code, Title 18, Part I, Chapter 10, Section 175. <http://www4.law.cornell.edu/uscode/18/175.notes.html>

## **Anti-Terrorism and Effective Death Penalty Act of 1996**

This Act of Congress signed by President Clinton further elaborated the above definitions in the US Criminal Code, specifically expanding it to include bioengineered products. The Act went on to amend the parts of the US Code enacted as a consequence of the Biological Anti-Terrorism Act of 1989 to make sure that the Code contains a comprehensive ban on biological agents and toxins that will apply to any new scientific discoveries.<sup>16</sup> The new definitions now read:

**(1) the term ‘biological agent’ means any micro-organism, virus, infectious substance, or biological product that may be engineered as a result of biotechnology, or any naturally occurring or bioengineered component of any such microorganism, virus, infectious substance, or biological product, capable of causing -**

**(A) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;**

**(B) deterioration of food, water, equipment, supplies, or material of any kind; or**

**(C) deleterious alteration of the environment;**

**(2) the term ‘toxin’ means the toxic material of plants, animals, microorganisms, viruses, fungi, or infectious substances, or a recombinant molecule, whatever its origin or method of production, including -**

**(A) any poisonous substance or biological product that may be engineered as a result of biotechnology produced by a living organism; or**

**(B) any poisonous isomer or biological product, homolog, or derivative of such a substance;**

**(3) the term ‘delivery system’ means -**

**(A) any apparatus, equipment, device, or means of delivery specifically designed to deliver or disseminate a biological agent, toxin, or vector; or**

**(B) any vector;**

**(4) the term ‘vector’ means a living organism, or molecule, including a recombinant molecule, or biological product that may be engineered as a result of biotechnology, capable of carrying a biological agent or toxin to a host;<sup>17</sup>**

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<sup>16</sup> Public Law 104-132, April 24, 1996. Anti-Terrorism and Effective Death Penalty Act of 1996.

<sup>17</sup> 18 USC 178. Found on the web at <http://www4.law.cornell.edu/uscode/>

## **NATO Policy on Non-lethal Weapons**

US policy and understanding of its obligations under the Geneva Protocol and the BTWC also are applicable to the NATO alliance. A NATO Press statement entitled “NATO policy on non-lethal weapons” of 13 October 1999 does not specifically mention biological weapons, nevertheless, the policy states:

**The research and development, procurement and employment of Non-Lethal Weapons shall always remain consistent with applicable treaties, conventions and international law, particularly the Law of Armed Conflict as well as national law and approved Rules of Engagement.<sup>18</sup>**

Thus, research or development of non-lethal weapons in any NATO country would be subject to the BTWC. Research and development in the United States must be consistent as well with the US Criminal Code quoted above.

## **Conclusion**

Under the US Constitution, international treaties are the “highest law of the land.” Obligations accepted at the time the Geneva Protocol and the Biological and Toxin Weapons Convention were signed and ratified remain binding in the form in which they were understood at that time. The US is permanently bound by the Geneva Protocol, which has no provisions for withdrawal, and remains bound by the BTWC’s ban on all biological weapons unless and until the US government decides to withdraw from the Convention.

From 1969 through the present, US policy has repeatedly and unambiguously renounced all biological and toxin weapons. It has faithfully implemented its obligations under Article IV of the BTWC with the passage domestic legislation. In doing so it has defined biological agent and toxin in a very broad fashion. There should be no doubt that declaratory US policy and US criminal law forbid the possession and use of any and all biological and toxin weapons.

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<sup>18</sup> “NATO policy on non-lethal weapons” NATO Press Statements, 13 October 1999. Available on the NATO website at: <http://www.nato.int/docu/pr/1999/p991013e.htm>.