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STRENGTHENING THE BIOLOGICAL WEAPONS CONVENTION

What next for the Ad Hoc Group?

After seven years of negotiation in the Ad Hoc Group of the States Parties to the Biological Weapons Convention, the United States has withdrawn support for the creation of an international system of declarations, on-site visits and challenge investigations that is the central element in the current approach of the AHG to strengthening the Convention. Despite this setback, the AHG should certainly not abandon the pursuit of its mandate from the 1994 Special Conference of States Parties. That mandate, which is in full effect and is without limit of time, calls upon the Group to

consider appropriate measures, including possible verification measures, and draft proposals to strengthen the Convention, to be included, as appropriate, in a legally binding instrument, to be submitted for the consideration of the States Parties.

The deliberations of the Ad Hoc Group and the preceding study of potential verification measures by the VEREX group of governmental experts have significantly advanced international understanding of the possibilities, and their challenges, for strengthening the BWC with a legally binding instrument, or protocol. For the AHG to abandon its task would be to dissipate this collective fund of experience and knowledge and to forfeit a unique opportunity to strengthen the BWC. Quitting would further risk sending a signal that the international community has given up on creating a united front to suppress biological weapons and that hostile exploitation of biotechnology is now inevitable. Such a signal would lend support to arguments within governments for initiating or intensifying activities inimical to the objectives of the BWC — the very opposite of what the Special Conference intended.

So what is it that the Ad Hoc Group should now undertake to do? The answer must come from national capitals, discussions within regional groupings and informal consultations within the Group itself, initiated by its Chairman, Ambassador Tibor Tóth of Hungary. As these deliberations go forward, suggestions from outside government may be of use. We offer three, each intended to further the work of the AHG in the development of effective and acceptable international measures to be incorporated into a legally binding instrument:

(1) Promote the conduct of voluntary bilateral and multilateral field trials of transparency and compliance measures at biodefence and industrial facilities, both within

and between the three regional groups of nations. The provisions of the AHG Chairman's composite draft protocol (posted on www.opbw.org) could be used as a baseline in joint practice trials not only of declarations, transparency visits and clarification procedures but, in due course, of facility and field investigations. The objective would be to develop a common base of experience on which to evaluate the utility and acceptability of various modalities and procedures for declarations and on-site measures.

(2) Develop standards for the design and harmonization of national measures, including domestic criminal legislation, pursuant to the obligation of each state party under BWC Article IV to prevent violations of the Convention anywhere on its territory.

(3) Formulate options for aid and assistance to countries threatened or attacked with biological weapons, as required under BWC Article VII, and for facilitating the acquisition and use of equipment and materials for the diagnosis and treatment of prevalent infectious diseases, an activity in support of BWC Article X.

Meanwhile, in deciding what compliance measures it can accept, the United States needs to ask itself more carefully than it previously has just what biodefence activities make sense and are compatible with the spirit and the letter of the Biological Weapons Convention, and what information about them needs to be kept secret. The location and general nature of legitimate biodefence work, if routinely declared under the provisions of a protocol, would generally be considered by other states as confidence building. But the same information, coming to light only as a leak to the media, risks eroding the constraints on borderline activities and fueling arguments for provocative or prohibited BW activities within governments elsewhere.

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The deterrent core of the current protocol approach is a mutually reinforcing system of declarations, on-site visits and challenge investigations. The objective, while acceptably safeguarding legitimate biodefence and industrial secrets, is to increase uncertainty within any government weighing the pros and cons of conducting activities prohibited by the BWC that such activities could be kept hidden. A fuller explanation of this approach is set out in the March 1998 issue of this *Bulletin*, pages 1-3. A majority of states in the Ad Hoc Group appear to believe that the Chairman's composite draft protocol adequately accomplishes these objectives. The United States does not. We submit that a solution-orientated attack on the problem has yet to attract the talent and effort it merits.

Finally, one must wonder if the United States has adequately appreciated the downside of its recent action. Having rejected the current protocol approach after participating in it for seven years, how will the United States regain sufficient political credibility to win support for any new proposals it may advance? Without a mutually agreed verification arrangement, how will the United States resolve questions about the military biological facilities at Ekaterinburg, Kirov and Sergiyev Posad that were engaged in offensive work under the Soviet Union? More generally, without a protocol, how will the United States find an international forum to undertake action to clarify other present and future ambiguities? Without an internationally supported protocol, and short of peremptory acts of war, how will the United States deal with facilities it believes to be engaged in prohibited activities? Without having to contend with declarations, on-site visits and investigations, will not a government contemplating a biological-weapons programme be more confident of being able to keep it hidden and therefore be more likely to embark upon it? And, without the provisions of a protocol that build confidence between states parties, how will the United States persuade others of the fact that it is not itself developing biological weapons, a perception that would be directly contrary to the US interest in preventing the spread of biological weapons? The existence of US criminal law against BW activities, applicable to individual persons but of dubious applicability to acts of state, is not a sufficient answer.

This is not to say that partial answers to some of these questions cannot be devised. But as time passes, the drawbacks of having renounced the current approach to a protocol and the opportunity it offers for enhancing international unity in the effective prohibition of biological weapons will come to be more keenly felt. That will be the time the United States takes another look at ways to minimize the cost and maximize the utility of the triad of declarations, visits and investigations around which the current protocol approach is built. Meanwhile, the Ad Hoc Group, including the United States, has much to do.

And for the impending Review Conference?

The mandate of the Ad Hoc Group does not include review of the operation of the BWC. That is the responsibility of conferences of the states parties, a responsibility that derives from the requirement in Article XII of the Convention for an initial review conference and from the decisions of each

successive review conference to authorize another. The Fifth Review will open in Geneva on 19 November.

The Convention's review conferences serve the essential purposes of reaffirming the international norm against biological weapons; of keeping the consensus understanding of its terms and provisions abreast of any relevant new scientific and technological developments; and of authorizing continuation of the review process itself. Review conferences help keep the BWC alive and responsive to changes in its context. But they are not enough.

What is needed in addition is an international entity representing all the states parties to give practical implementation to the provisions of the Convention. The 1994 Special Conference mandated the drafting of a legally binding instrument, including possible verification measures, which would accomplish precisely that. It must remain the ultimate goal. Meanwhile, anguish over the July setback, after a decade of work in Geneva, first in VEREX and then in the Ad Hoc Group, must not be allowed to deflect the states parties from tending to the basic needs of the Convention. The upcoming review conference could be the last opportunity for a whole five-year cycle for the states parties acting together to take new practical steps.

One modest but important step forward would be for the Fifth Review Conference to create a Committee of Oversight to serve the agreed interim needs of the Convention until an Organization for the Prohibition of Biological Weapons can be put into operation. The Committee's tasks would include following up the decisions of the Fifth Review Conference; promoting universal adherence to the Convention; and managing the orderly operation of the confidence-building measures agreed at the Second and Third Review Conferences and any other such measures that may be decided by the states parties. The case for such an interim supportive institution, an outline of the general functions it might serve, and a draft mandate that would bring it into existence, are put forward by Nicholas Sims in this issue of the *Bulletin*.

Whether through this, or some other scheme or schemes, what is essential is that the Fifth Review Conference reaffirms the norm and the understandings achieved by the states parties thus far and that it sets out a practical way forward, even if modest. The world needs to see that governments can act together to combat the menace of biological weapons; now more than ever.

Forthcoming events

24–28 September, The Hague
— Twenty-sixth session,
OPCW Executive Council

11–16 November, Agra, India
— 51st Pugwash Conference
*Challenges for Peace in the
New Millennium*

19 Nov–7 Dec, Geneva — Fifth
BWC Review Conference

24–25 November, Geneva —
Pugwash Workshop
*Strengthening the Biological
Weapons Convention*

10–13 December, Wiston
House, Sussex — Wilton Park
conference *Non-Proliferation:
Meeting the Challenges*, details
on www.wiltonpark.org.uk

NURTURING THE BWC: AGENDA FOR THE FIFTH REVIEW CONFERENCE AND BEYOND

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Article XII provided only for one Review Conference, five years after the BWC's entry into force. In 1980 it was touch and go whether the First Review Conference would reach agreement on convening another; its timing remained contentious until late 1984. The review conferences of 1986, 1991 and 1996 generated expectations of a continuing series at 5-year intervals. This is the pattern into which the Fifth Review Conference fits. The Conference will take place in Geneva during 19 November–7 December 2001.

Formal functions

All five conferences are primarily governed by the Article XII mandate “to review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention...are being realized.” This includes taking into account the impact of “any new scientific and technological developments relevant to the Convention.” That is their common agenda.

Each conference's final declaration has supplemented the common agenda with specific tasks laid upon the next conference. The Fourth Review Conference asked the Fifth also to consider the relevance of the provisions and implementation of the Chemical Weapons Convention (CWC) on the effective implementation of the BWC (updating the original Article XII provision that “negotiations on chemical weapons” be given particular attention); the effectiveness of confidence-building measures agreed at the Second and Third Review Conferences; the conclusions of the expected (post-Ad Hoc Group) Special Conference “and further action as appropriate”; and the UN Secretary-General's provision of staff and other resources required to assist the effective implementation of Fourth Review Conference decisions.

Informal functions

In practice, the review conferences have acquired additional, informal functions. These are performed imperfectly and unevenly (as indeed are the formally stated functions). However, they are essential for the nurturing of the BWC treaty regime. In the absence of other institutions, the evolution of that regime has depended heavily upon the review conferences and their final declarations performing four, inter-connected, functions in particular:

- Registering consensus on definitions and extended understandings of specific terms used in the Convention, especially those which reinforce the general purpose criterion and comprehensive coverage of Article I.
- Identifying and elaborating procedures within the framework of the Convention, notably Article V, using the latent potential of the text as it stands together with

the definitions and extended understandings it has accumulated through this review process.

- Reaffirming the positions established at earlier review conferences (the *acquis*) and moving beyond them to the extent consensus allows.
- Steering the evolution of the BWC treaty regime through the next five years.

In 2001 the third of these functions is vitally important. The Fifth Review Conference will need to hold the line and stop the BWC's *acquis* unravelling, even if not much forward movement is possible on this occasion. There is value in the cumulative drafting process, in which the last review's final declaration is the starting point and new language is added. Such cumulation deepens and extends the common positions, agreed procedures and politically-binding commitments which the BWC states parties are willing to endow with their collective authority. This time, cumulation may be relatively slight, because of the effort required to stop the BWC going backwards. But every little helps, especially in a pervasive climate of demoralisation and distrust following the US statement of 25 July and the resulting failure of the Ad Hoc Group on 17 August even to agree a procedural report, let alone conclude a Protocol.

The Ad Hoc Group and its Mandate

With regard to the Ad Hoc Group, the 1994 Special Conference mandate remains intact and suffices to authorise the convening of a 25th session and, if need be, subsequent sessions of the Group when circumstances allow the ‘strengthening’ process to be resumed. It must be hoped that the US will eventually be persuaded, if not to join in a consensus in favour of a Protocol along the lines of the 30 March composite text, then at any rate not to block consensus. If the US were to stand aside, the Group could proceed to record consensus (with the US position footnoted as necessary, on the analogy of those NATO decisions of the early 1980s in respect of which Greece and Denmark were frequently ‘footnote states’), conclude the Protocol and transmit it to a second special conference for adoption and opening for signature. Better late than never.

The Fifth Review Conference does not need to renew the Group's 1994 mandate, and the US may not allow it to. But by the same token, any attempt to discontinue or even amend it is likely to be opposed by pro-Protocol states. The result may well be silence on the subject of the mandate, in the final declaration of 7 December, together with a liberal sprinkling elsewhere of clauses along the lines of “without prejudice to the positions of States Parties on matters under negotiation in the Ad Hoc Group” to enable a final declaration to be agreed at all.

The worst outcome would be deadlock: a conference swamped by the backwash from the Ad Hoc Group. It is

vital to protect it from being so entirely overshadowed by the events of 25 July–17 August, and by recriminations over who was to blame, that it fails to agree even a modest set of advances on the *acquis* of 1980–1996. There is no shortage of suggestions for what might usefully be agreed under most of the substantive Articles of the Convention, to take forward the review process. The need now is for political leadership and diplomatic skill to ensure that the conference does something like justice to its formal agenda (minus, perforce, consideration of the non-existent conclusions of a Special

Conference yet to take place) and its additional, informal functions.

Steering the treaty regime

There is a strong case for paying particular attention in 2001 to the fourth of the informal functions listed above: steering the evolution of the BWC treaty regime through the next five years. This is not something at which previous review conferences have excelled. They have left the BWC to

DRAFT MANDATE FOR INTERIM SUPPORTIVE INSTITUTIONS

Proposed for inclusion in the Final Declaration of the BWC Fifth Review Conference, in the Article XII section after the standard paragraphs on future review conferences.

1. The Conference, conscious of the need for interim institutions in support of the Convention to bridge the five years' interval between the Fifth and Sixth Review Conferences, and without prejudice to the positions of States Parties on the strengthening of the Convention through a legally-binding instrument, requests its General Committee [to constitute itself as a continuing body until the Sixth Review Conference] [to elect x of its members to constitute a continuing body until the Sixth Review Conference] under the name [Committee of Oversight] [Continuing Committee] [Interim Committee] [Representative Committee] and in that capacity, under the authority of this Conference and without detracting from the functions of the Depositary Governments designated under Article XIV:
 - (a) to follow up the Final Declaration and decisions of this Conference;
 - (b) to exercise a general oversight over the effective application of the provisions of, and the balanced operation of, the Convention, including its programme of CBMs established by the Second and Third Review Conferences, in the interests of the States Parties as a collectivity;
 - (c) to assist States Parties in fulfilling their obligations under the Convention and their politically binding commitments, including the programme of CBMs, under the final declarations of successive review conferences;
 - (d) to promote universal adherence to the Convention, including the organisation of demarches on its behalf to States Signatories which have yet to ratify their signatures, to encourage their ratification, and to non-signatories, to encourage their accession to the Convention;
 - (e) to represent the States Parties to the Convention as a collectivity in relations with the United Nations, and with other organizations as appropriate;
 - (f) to establish, as it finds necessary for the exercise of its functions, subsidiary organs such as a Legal Advisory Panel and a Scientific Advisory Panel with appropriate terms of reference;
 - (g) to establish, in consultation with the Secretary-General of the United Nations, a small secretariat dedicated exclusively to the service of the Convention including this Committee and its Panels;
 - (h) to report to the Sixth Review Conference, including a recommendation on whether this mandate should be extended, with or without amendment, under the authority of the Sixth Review Conference to bridge the interval between the Sixth and Seventh Review Conferences.
2. The Committee shall meet no less often than once a year between the Fifth and Sixth Review Conferences.
3. The Committee shall operate by consensus.
4. The Committee may be invited by any State Party to assist in undertaking consultation and cooperation pursuant to Article V, and may accede to such an invitation provided no State Party objects, without detracting from the right of any State Party to request that a Formal Consultative Meeting be convened in accordance with the decisions of successive review conferences and the procedures agreed by them, under Article V, or to lodge a complaint with the UN Security Council under Article VI.
5. The Committee shall issue interim reports on its work, in addition to the report to the Sixth Review Conference required under paragraph 1(h) above. Such reports shall be addressed to all States Parties and shall also be made available to States Signatories, the United Nations, and other organizations as appropriate.
6. The Committee shall be financed *pro rata* as an appendix of this Fifth Review Conference.

evolve in an uncoordinated fashion, divergent and unbalanced as between the different sectors into which its treaty regime can be divided for purposes of analysis. To achieve convergence and equilibrium in its constructive evolution will require deliberate steering. But in the absence of any other treaty institutions it is up to the review conference to undertake such steering or create the means by which a representative body may act on its behalf; or it will not be done at all.

The treaty regime does need steering: it will not flourish through neglect. And it must be steered by its states parties collectively. The BWC is a fully multilateral treaty, binding 143 sovereign states, and it needs institutions to match.

Interim supportive institutions

What should these institutions be? In the long run, no doubt, the Organization for the Prohibition of Bacteriological (Biological) and Toxin Weapons planned in the Protocol will suffice. But until there is an OPBW with the experience and capacity to serve the needs of the Convention as well as the Protocol, the Convention requires a modest set of interim supportive institutions to nurture its treaty regime and help it to flourish as, with careful steering, it starts to overcome its long-recognised fragility.

In 1990–91 several such initiatives were proposed, and the Third Review Conference gave serious consideration to setting up an inter-sessional body or at least a secretariat unit to help states maximise the value of their newly enhanced programme of confidence-building measures.

A representative Committee of Oversight would do much to remedy the BWC's chronic institutional deficit. It should be served by a small dedicated secretariat.

That opportunity was narrowly missed in 1991. Now the case has re-emerged with new urgency. If the Fifth Review Conference cannot expect in three weeks to register much more than a lowest common denominator of agreement, it can at least make possible some progress after 7 December, by addressing the problem of the continuing dearth of institutional capacity.

Almost every useful advance one could imagine coming out of the Fifth Review Conference, and the taking forward of the *acquis* from the earlier Review Conferences, would benefit from continuing institutional capacity. The simplest way to create this capacity is to give the General Committee of the conference (its office-holders and regional group coordinators, plus regionally representative vice-presidents) a continuing identity and a mandate, to act on the conference's behalf until the Sixth Review Conference. Then its mandate might be extended, with or without amendment, to cover the interval between the Sixth and Seventh Review Conferences. (The Seventh Review Conference, in 2011, is the earliest date at which even on the most optimistic assumptions a permanent OPBW might be ready to permit integration of the Convention and Protocol institutions.)

Advantages of simplicity argue in favour of extending the life of the General Committee through 2001-2006 in the first instance. Its chairmanship would be straightforward (the presidency of the conference) and its funding, as an

appendix of the conference, would be *pro rata* as for the conference itself, thereby avoiding argument over two issues which vitiated the institutional proposals at the Third Review Conference.

The alternative of a smaller *bureau*, elected by the General Committee from among its membership (for example, retaining the conference office-holders and regional coordinators but not the vice-presidents), has also had its advocates. In the draft mandate set out in the box on the page opposite, which proposes functions and methods of working for the representative body, both variants are offered and a range of possible titles suggested.

Conclusion

Two things must be re-emphasised. First, the case for a modest set of BWC institutions is a long-established one, developed and articulated since the 1980s: it is not to be misperceived as an alternative to the Protocol or as insurance against the eventuality of definitive failure in the quest for a Protocol. Second, they must be seen as interim institutions, pending eventual integration of Convention and Protocol institutions in a permanent OPBW. They are not a substitute for an OPBW, and their creation would not be an alternative to continued pursuit of a legally-binding Protocol, open to all to join.

Deliberately, this text has been developed for the Article XII section of the final declaration, and not under the rubric of "further action as appropriate" which would relate it to the 'strengthening' process identified with the Ad Hoc Group and might cause it to be misinterpreted as a substitute for the conclusion of a Protocol.

The Fifth Review Conference can put in place the institutional means to steer the BWC treaty regime into constructive channels and nurture its evolution, pending the arrival of a Protocol and an Organization (the OPBW) which remain vital to its strengthening.

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This article was adapted in part from 'Interim supportive institutions for the Biological Weapons Convention: the case for a representative body and advisory panels, pending institutional integration with the eventual Protocol Organisation (OPBW)', paper presented to the 14th Workshop of the Pugwash Study Group on the Implementation of the Chemical and Biological Weapons Conventions, Geneva, 18–19 November 2000; and from a presentation to the Harvard Sussex Program Seminar at the Foreign and Commonwealth Office, London, 30 March 2001, published as 'The functions of the BTWC review conferences: maximising the benefits from the Fifth Review Conference', in Graham S Pearson & Malcolm R Dando (eds), Strengthening the Biological Weapons Convention: Review Conference Paper [University of Bradford, Department of Peace Studies] no 2, April 2001.