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Title: Return to Geneva: The Next Stage of the BTWC Fifth Review Conference

Project: Bradford Project on Strengthening the Biological and Toxin Weapons
Convention (BTWC)

Publication year: 2002

BTWC Review Conference Papers: No. 5

Series Editor(s): Dando, M.R. and Whitby, S.

Publisher: University of Bradford (<http://www.brad.ac.uk>)

Publisher's repository: <http://bradscholars.ac.uk:8080/dspace>

Link to original publication: <http://www.brad.ac.uk/acad/sbtwc/briefing/rcp5.pdf>

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Strengthening the Biological Weapons Convention

Review Conference Paper No 5

Return to Geneva: The Next Stage of the BTWC Fifth Review Conference

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April 2002

RETURN TO GENEVA: THE NEXT STAGE OF THE BTWC FIFTH REVIEW CONFERENCE

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Introduction

1. The Fifth Review Conference of the Biological and Toxin Weapons Convention opened in Geneva on 19 November 2001 and on Friday 7 December it decided to adjourn until November 2002. An Interim Report was issued¹ which records that:

"33. At its 6th plenary meeting on 7 December 2001, the Conference decided by consensus to adjourn its proceedings and reconvene at Geneva from 11 to 22 November 2002."

2. This decision raises many questions. They will be addressed here in three sections, examining successively the **status**, the **procedure** and the **substance** of the forthcoming 11 to 22 November 2002 session, with a view to encouraging a consideration of how best to use the intervening months to prepare the way for a constructive return to Geneva. The **procedure** section is further subdivided into three parts, to look in turn at (1) committee structure and work on the Final Declaration, (2) the conference secretariat and editorial function, and -- in a longer subsection -- (3) the increasingly urgent question of decision-making procedure: to vote or not to vote?

Status

3. What will take place in November will be a resumed session of the Fifth Review Conference. This deceptively simple statement is significant for the implications that flow from it.

4. *First*, the status of the session is not in doubt. It is not a follow-on meeting or an appendix to the Conference but a session of the Conference itself.

5. *Second*, its decisions have the full political authority of the Conference. Its Final Declaration - if it succeeds in adopting one - will stand alongside those of 1980, 1986, 1991 and 1996, with equal authority.

6. *Third*, the recommendations addressed to the Fifth Review Conference (some of which may have appeared too close to 19 November 2001 to be thoroughly absorbed by delegates between then and 7 December 2001) retain their validity and pertinence. Delegates will have no excuse after this 11 months' interval for not having mastered their brief, including the wealth of constructive ideas and textual proposals offered by NGOs and other friends of 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, *Interim Report*, BWC/CONF.V/12, 14 December 2001. Available at <http://www.opbw.org>

Convention. This resumed session **should** be the most thoroughly prepared and the best informed occasion in the whole history of the BTWC review process.

Procedure: (1) Committee Structure and Work on the Final Declaration

7. Many procedural questions, which would otherwise have arisen, have been avoided by the device of adjournment. Adjournment enables the Conference to reconvene with the same President and other elected office-holders, the same funding arrangements and the same rules of procedure.

8. It also retains the same structure of committees. But there is no need for the resumed Conference to repeat the whole pattern of General Debate - Committee of the Whole (CoW) - Drafting Committee from the start.

9. By 7 December 2001 the Conference had moved on from the CoW stage and the Drafting Committee had been at work for a week. It should carry on from that point, **not** go back to the beginning. The resumed session continues the work of the Conference so the emphasis should be on **continuation**.

10. The CoW should not be required, or even expected, to meet; there is no need for it to do so. A single plenary meeting (the seventh) will be necessary on 11 November 2002, not least because it was in plenary when it adjourned; but it should merely take note of the Interim Report, adopt the United Nations' amended cost estimate for the Conference and give the Drafting Committee renewed instructions, urging it to complete its work as expeditiously as possible. It should, above all, resist the temptation to reopen the General Debate of a year before, because that would lead to recrimination and deadlock.

11. Two weeks is not a long time in which to complete the Final Declaration. It will be important to secure informal agreement before 11 November 2002 on whether the Drafting Committee must take as its sole point of departure the documentation² it received from the CoW on 30 November 2001, or whether it can instead build on the work of the next four, or even five, days: in which case its starting point in this resumed session can be the draft Final Declaration as it appeared on the morning of 7 December 2001³ or, better still, as it had developed -- although in a text not yet distributed -- by that afternoon through the further efforts of the Drafting Committee.

12. The latter option is **preferable**. Commentators will have focussed on that (7 December 2001) draft, and textual proposals will have been tied in to it. Whether it was 75%⁴ or 95%⁵

²United 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, *Report of the Committee of the Whole*, BWC/CONF.V/COW/1, 13 December 2001. Available at <http://www.opbw.org>

³See Draft Final Declaration, 7 December 2001. Available at http://www.brad.ac.uk/acad/sbtwc/revconf/draft_FD.pdf Another slightly edited version of this, which unfortunately does not retain the capitalization of the original, is reproduced in *Disarmament Diplomacy*, No. 62, pp. 33 - 45, January-February 2002 and is also available at <http://www.acronym.org.uk/dd/dd62/62bwapp.htm>

⁴As reported in United Nations, Press Release, *Highlights of Press Conference held on Ongoing Developments of the Fifth Review Conference of States Parties to the Biological Weapons Convention on 7 December at the Palais des Nations*, 7 December 2001. Available at <http://www.unog.ch/news2/documents/newsen/pc011207.html> and at <http://www.brad.ac.uk/acad/sbtwc>

⁵As reported in United Nations, Press Release, *Comments made by President of the Fifth Review Conference of States Parties to the Biological Weapons Convention after the Adjournment of the Review Conference until*

agreed in December 2001 (the difference reportedly corresponding to the achievements of the final Friday morning negotiations), it should be possible to stop it unravelling in November 2002 if it is handled with care. One possibility is that the Chairman of the Drafting Committee might bring out the "95%" version, ready for 11 November 2002, to record the extent of agreement on paragraphs for the draft Final Declaration as they stood by the afternoon of 7 December 2001. If that is not done, the Friday morning draft (the "75%" version) will have to suffice.

13. However, whether in its Friday morning or Friday afternoon version, it should be emphasised that the 7 December 2001 draft Final Declaration is only a starting point. Much of it consists of statements reaffirming positions reached at previous Review Conferences. These reaffirmations need to be protected from unravelling; but this does not mean that additional proposals cannot still be brought forward. It is important that new material should be embodied in the Final Declaration of 2002: otherwise this Conference will not advance the recording of extended understandings of the implications of the Convention, which is one of the central functions of the BTWC review process.

14. The Chairman of the Drafting Committee, on this view, should place the burden of proof firmly upon those (in the expectation that they will be few) who wish to alter the previously agreed paragraphs; the Committee should concentrate its efforts on adding new material and on filling the ten or so gaps in the draft Final Declaration where agreement had not been reached in December 2001. Reportedly^{6 7} the most serious gaps were in three areas in particular: non-compliance; follow-up meetings; issues related to the strengthening of the Convention. That is where the diplomatic energies of the Conference will need to be applied with skill and determination, although they are not the only substantive areas in need of attention. The most serious gaps are addressed further in paragraphs 41 to 56 below.

15. Other procedural questions will also need answering. Will the Credentials Committee need to meet, given that some States Parties which were not present at the Review Conference session from 19 November to 7 December 2001 may choose to attend in 2002 and that some new delegates will have been accredited by other States Parties? It seems probable that the Credentials Committee will need to meet in November 2002 even though it thought it had completed its work in 2001.

16. Will the President of the Conference and the Chairmen of the CoW and the Drafting Committee retain the Facilitators for specific issues whom they appointed in 2001, or will a new pattern of consultation and coordination be thought more appropriate in 2002? The designated Facilitators had completed their work in 2001 and there seems to be no compelling reason to reopen that process, though there may be a need to designate "Friends of the President" for specific tasks in 2002. These would be fresh appointments, making use of delegations likely to be most effective in bringing the resumed session to a successful conclusion.

November 2002, 7 December 2001. Available at <http://www.unog.ch/news2/documents/newsen/pc011207b.html> and at <http://www.brad.ac.uk/acad/sbtwc>

⁶Graham S. Pearson, *The Biological and Toxin Weapons Convention*, Report from Geneva, Quarterly Review no 17, The CBW Conventions Bulletin, Issue No 54, pp. 13 - 26, December 2001. Available at <http://www.fas.harvard.edu/~hsp/bulletin/cbwc54.pdf>

⁷Jenni Rissanen, *Left in Limbo: BWC Review Conference Suspended on Edge of Collapse*, Disarmament Diplomacy, No. 62, pp. 18 - 32, January-February 2002. Available at <http://www.acronym.org>

17. Should any plenary meetings be interspersed between the first morning and the last afternoon of the resumed session? This does not need to be decided in advance. Probably, it is best to continue as during the first session of the Review Conference by holding such plenary meetings as and when they are required or requested.

18. How much time should be informally allowed for meetings of the key Groups of States Parties -- EU, Western, Eastern and Non-Aligned? Group meetings are not officially scheduled in the same way as plenary and committee meetings as they do not have the same formal status within the Review Conference. Nevertheless, it would make good practical sense to timetable the formal meetings in such a way as to allow plenty of space for meetings of the Groups since a dissatisfied Group or Groups could easily block progress towards consensus in the Drafting Committee on the content of the Final Declaration.

19. It is not only the established Groups, however, that have a role to play in November 2002. The pattern of negotiation may need changing, precisely so as not to be held hostage to the rigidities of an inflexible Group system. For example, the established Groups might usefully be supplemented -- not superseded -- by a group of like-minded states crossing Group boundaries. Such a "like-minded group" could play a vital part in taking forward proposals for the Final Declaration as a coalition producing acceptable language within the Drafting Committee, and also in negotiating the acceptability of such language with doubters within each of the established Groups, to the extent possible.

20. What is suggested here is not a formal restructuring of the pattern of negotiation so much as a search for a practical way forward which may involve supplementing the established Groups. Time should be allowed for the work of a "like-minded group" even though the emergence of such a group is by its very nature likely to remain uncertain until nearer November 2002, as too is its interaction with "friends of the President" or other informal groups formed to resolve particular problems for the Conference.

Procedure: (2) Conference Secretariat and Editorial Function

21. Procedural questions do not usually include the functioning of the conference secretariat, but for the benefit of the BTWC review process it is arguable that key members of the Secretariat should be encouraged to adopt the "professional assistant" role which those members suitably qualified performed in the Secretariat of the Ad Hoc Group.

22. At the very least, such key members of the Secretariat should be encouraged to work actively with an editorial group of delegates mandated by the Drafting Committee on such tasks as remedying the textual errors in danger of being perpetuated from 1996 (some of them obvious but uncorrected typos) and making the Final Declaration of 2002 internally consistent, free of ambiguity, better ordered and more user-friendly than its predecessors. For whatever emerges on 22 November 2002 is going to be used more than any other document to help steer the BTWC treaty regime over the coming years, at least until it is reinforced by a legally-binding instrument to strengthen the Convention.

23. Such detail does not need to merit the attention of ambassadors engaged in high-level negotiations on key issues and could with advantage be entrusted to "professional assistant" members of the Conference Secretariat, working with an editorial group of the Drafting Committee. The latter should be composed of delegates skilled in BTWC history and terminology and aware of the pitfalls into which some sections of previous Final Declarations have fallen simply for want of attention at the right time.

Procedure: (3) To Vote or Not To Vote?

24. The rules of procedure of BTWC Review Conferences have always included provision for voting, with decisions to be taken by simple majority on procedural issues, by two-thirds majority on others. True, before 2001 consensus had always prevailed in the BTWC review process and the first four Review Conferences managed to agree Final Declarations without voting. Quite rightly, the Rules of Procedure⁸ emphasise the importance of seeking consensus with paragraph 2 of Rule 28 stating that:

"2. The task of the Review Conference being 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, and thus to strengthen its effectiveness, every effort should be made to reach agreement on substantive matters by means of consensus. There should be no voting on such matters until all efforts to achieve consensus have been exhausted."

But this consensus pattern is not invariable. If consensus is being relentlessly blocked there may be a case for voting instead. The ignominious fate of the Ad Hoc Group on 17 August 2001, when its 24th session was unable even to agree a procedural report, and the US shock tactic of 7 December 2001 were unprecedented in the history of the BTWC. The choice of decision-making procedures needs rethinking to take account of them.

25. On the one hand, there is a proper reluctance to resort to voting because it is seen as divisive and an admission of failure to agree; because it might encourage recourse to voting under the equivalent rule in Nuclear Non-Proliferation Treaty (NPT) Review Conferences; and because, if used to overcome a US veto, it risks driving the United States still further into the corner of its self-imposed isolation from the mainstream of BTWC diplomacy. On the other hand, majority voting as a last resort is preferable to serial suspension as the fate of the Review Conference; the interests of the BTWC -- with which the long-term interests of the United States are as inextricably bound up as are those of other States Parties -- should not be subordinated to speculative NPT considerations; and the credibility of the Convention would be damaged by any further adjournment of the Conference without a Final Declaration. Voting is best avoided, in most circumstances: but persistent intransigence in US positions can only bring nearer the prospect of voting on 22 November 2002. Furthermore, the voting instigated by the United States in the OPCW Executive Council, followed by a Special Conference of the States Parties to the Chemical Weapons Convention in April 2002, in regard to a highly political campaign for the resignation of the OPCW Director-General will be a factor in the minds of the BTWC States Parties at the resumption of the Fifth Review Conference.

26. Under Rule 28 of the Fifth Review Conference's Rules of Procedure⁹, a vote on any matter of substance must be deferred for 48 hours. The purpose of this deferment is to ensure

⁸United Nations, Preparatory Committee for the 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, *Report of the Preparatory Committee for the 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*, BWC/CONF.V/PC/1, 1 May 2001, Annex II, Draft Rules of Procedure. Available at <http://www.opbw.org>

⁹United Nations, Preparatory Committee for the Fifth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons

time and space for intensive diplomacy which, if it reconciles opposing viewpoints or works out a compromise between them, renders voting unnecessary.

27. Paragraphs 3 and 4 of Rule 28 read:

"3. If, notwithstanding the best efforts of delegates to achieve consensus, a matter of substance comes up for voting, the President shall defer the vote for 48 hours and during this period of deferment shall make every effort, with the assistance of the General Committee, to facilitate the achievement of general agreement, and shall report to the Conference prior to the end of the period."

"4. If by the end of the period of deferment the Conference has not reached agreement, voting shall take place and decisions shall be taken by a two-thirds majority of the representatives present and voting, providing that such majority shall include at least a majority of the States participating in the Conference."

28. Rule 28 has remained unchanged since the Provisional Rules of Procedure for the Review Conference were recommended to the original Review Conference by its Preparatory Committee.¹⁰ The Rules were adapted by the Preparatory Committee, at its session in Geneva from 9 to 18 July 1979, from the Rules of Procedure which had been used for the First Review Conferences of the Nuclear Non-Proliferation Treaty in 1975 and of the Sea Bed Treaty in 1977. The Preparatory Committee reported¹¹ that it had made five changes, including simply changing the word "Treaty" to "Convention". But none of these changes affected Rule 28, which can therefore be safely regarded as having governed the review process for all three instruments, in respect of their decision-making procedures, as a standard rule. Its origins in United Nations conferences and its wider use outside the field of arms control and disarmament fall outside this paper but suggest an interesting subject for research.

29. There are two particular sets of circumstances in which the Fifth Review Conference might take a decision by a two-thirds majority which are worthy of consideration. First, to arrive at a decision on the language to appear in the Article XII section of the Final Declaration in regard to future activities to strengthen the Convention and, if necessary, in any other sections thereby clearing the way to the adoption of a Final Declaration by consensus or, failing that, by a further vote. Second, to use the Fifth Review Conference to commend a draft Protocol to a Second Special Conference. These two possible circumstances are considered separately below.

Decisions leading to a Final Declaration

and on their Destruction, *Report of the Preparatory Committee for the 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*, BWC/CONF.V/PC/1, 1 May 2001, Annex II, Draft Rules of Procedure. Available at <http://www.opbw.org>

¹⁰United Nations, 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, *Provisional Rules of Procedure for the Review Conference*, BWC/CONF.I/2, 2 January 1980.

¹¹United Nations, 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, *Report of the Preparatory Committee for the 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*, BWC/CONF.I/3, 2 January 1980, paragraph 9.

30. It is evident that the session held on 19 November to 7 December 2001 had made considerable progress towards agreement on the Final Declaration with the principal outstanding issues being reported¹² on the morning of 7 December 2001 as non-compliance with the Convention, follow-up to the Review Conference, and the question of the Ad Hoc Group and whether or not this should resume its work. There are, however, other issues the importance and sensitivity of which should not be underestimated: these include investigations and international cooperative mechanisms.

31. Late in the afternoon of the final day, Friday 7 December 2001, it was understood that agreement was close on the language in the Final Declaration relating to non-compliance with the Convention and to the first eleven Articles of the Convention -- and it was known that consensus language was available for the sections on Articles XIII, XIV and XV -- when the United States tabled new language for the section dealing with Article XII. The draft language being considered for the Article XII section had been as follows:

"1. The Conference decides that a Sixth Review Conference shall be held in Geneva at the request of the majority of States Parties, or in any case, not later than 2006.

2. The Conference decides that the Sixth Review Conference shall consider, inter alia,

- ...

- The impact of scientific and technological developments relating to the Convention;

- The relevance of the provisions of, and the implementation of the Chemical Weapons Convention on the effective implementation of the Biological and Toxin Weapons Convention, duly taking into account the degree of universality attained by such conventions at the time of the Fifth Review Conference;

- The effectiveness of confidence-building measures as agreed at the Second and Third Review Conferences;

- The requirement for, and the operation of, the requested allocation by the United Nations Secretary-General of staff resources and other requirements to assist the effective implementation of the relevant decisions of the Fourth Review Conference;

3. The Review Conference reaffirms that conferences of States Parties to review the operation of the Convention should be held at least every five years."

The President, Ambassador Tibor Tóth, had been engaged in intensive consultations seeking language which would attract consensus to appear at the first tirt which would have addressed the future activities and work of the Ad Hoc Group

¹²United Nations, *Highlights of Press Conference held on Ongoing Developments of the Fifth Review Conference of States Parties to the Biological Weapons Convention on 7 December at the Palais des Nations, 7 December 2001*. Available at <http://www.unog.ch/news2/documents/newsen/pc011207.html> and at <http://www.brad.ac.uk/acad/sbtwc>

32. The new language proposed for the Article XII section by the United States, without prior consultation with any of the other States Parties, was as follows:

"1. The Conference decides, beginning in November 2002, that States Parties will meet annually between the Fifth Review Conference and the Sixth Review Conference to

(a) consider and assess progress by States Parties in implementing the new measures adopted at the Fifth Review Conference; and

(b) consider new measures or mechanisms for effectively strengthening the BWC

2. The Conference decides that an Expert Group may meet, following each annual meeting of the States Parties if agreed at the annual meeting. The Experts Group will examine matters as directed by the States Parties at the preceding annual meeting. The Experts Group will not negotiate measures, but may provide a report, adopted by consensus, to the States Parties on matters examined.

3. The Conference takes note of the work of the Ad Hoc Group, and decides that the Ad Hoc Group and its mandate are hereby terminated and replaced with the process elaborated in paragraphs 1 and 2.

4. The Conference decides that the Sixth Review Conference will be held in November 2006."

This proposal by the United States was received with shock and anger not only because of its proposed termination of the Ad Hoc Group and its mandate but also because of its unexpected introduction less than two hours before the Review Conference was scheduled to end thereby jeopardizing the whole Review Conference and the progress towards agreement on a Final Declaration. It was this proposal that led to the decision to adjourn the Review Conference until 11 November 2002.

33. When the Review Conference resumes on 11 November 2002, it is possible that the United States will withdraw its proposal and accept language proposed by the President which would enable the Ad Hoc Group to continue work on a legally-binding instrument to strengthen the effectiveness and improve the implementation of the Convention. If, however, the United States does not withdraw its proposal then there is much to be said for the Review Conference proceeding to a vote on the content of the Article XII section of the Final Declaration, rather than losing the Final Declaration altogether.

34. It would, however, be desirable to ensure through consultations that there was consensus on all other aspects of the Final Declaration before proceeding to a vote on its Article XII section as the use of the voting procedure should still be regarded as being a last resort in the light of the US shock tactic of 7 December 2001 and if there were to be persistent rejection of consensus thereafter. Although if necessary it could be applied to the Final Declaration as a whole, it would be much preferable to limit its use to just one section.

Decisions relating to the draft Protocol

35. The Ad Hoc Group does not have this possibility open to it, as it decided¹³ at its first session to replace all six paragraphs of Rule 28 of the Rules of Procedure of the Special Conference by the following single provision: "*the Conference shall conduct its work and adopt its decisions by consensus.*" It is therefore not open to the Ad Hoc Group to adopt the Protocol (or any other legally binding instrument to strengthen the Convention) by a two-thirds majority. However, there is nothing to stop the Second Special Conference, to which the Ad Hoc Group would transmit the Protocol, from adopting it by a two-thirds majority vote. The rules of procedure for that Conference have not yet been specified, although it is probable that it would normally adopt the same Rules of Procedure as those adopted¹⁴ by the First Special Conference which decided to adopt *mutatis mutandis* the Rules of Procedure of the Third Review Conference -- and thus have the same rules in respect of voting as does the Fifth Review Conference.

36. A possible way around the blocking of consensus in the Ad Hoc Group, if the United States remains intransigent, would be for the Fifth Review Conference to use its fall-back provision for voting. It could take a decision by two-thirds majority vote to convene the Second Special Conference, define its mandate and authorise it to adopt, also if necessary by a two-thirds majority after a 48-hour deferment of vote, a Protocol or other legally binding instrument to strengthen the Convention.

37. The Second Special Conference could then at last be convened in London (the venue offered by the United Kingdom for this purpose some years ago) but under the authority of the Fifth Review Conference, as the First Special Conference in 1994 derived its authority from the Third Review Conference in 1991.

38. The authority of the Fifth Review Conference in 2002 would supersede that of the First Special Conference, which had mandated a Second Special Conference to take place only upon the conclusion of the work of the Ad Hoc Group, a condition seemingly impossible of fulfilment given the combination of US intransigence and the requirement of Ad Hoc Group consensus.

39. Again, by two-thirds majority vote, the Fifth Review Conference could if it chose commend a draft Protocol to the Second Special Conference for adoption, using a text -- the Chairman's Composite Text¹⁵ -- identical to that for which some 50 States Parties had expressed broad support, with varying degrees of reservation, in July 2001 at the opening of the Ad Hoc Group's 24th session. Or it might, alternatively, take the view that with the Ad Hoc Group no longer available because of US intransigence further work was still needed; and that before the Second Special Conference a Preparatory Committee (Prepcom) ought to work further on that text so as to add value to the draft Protocol before bringing it to the

¹³United Nations, *Ad Hoc Group 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*, Procedural Report, BWC/AD HOC GROUP/3, 6 January 1995, Geneva. Available at <http://www.brad.ac.uk/acad/sbtwc>

¹⁴Appendix III: *Rules of procedure of the Conference* in United Nations, *Special 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 Report, BWC/SPCONF/1, 19 -- 30 September 1994, Geneva.

¹⁵Annex B to United Nations, *Procedural Report of the Ad Hoc Group 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*, BWC/AD HOC GROUP/56-1 and 56-2, 18 May 2001, Geneva. Available at <http://www.opbw.org>

Second Special Conference for adoption. It has always been a planning assumption of the UN Office at Geneva that time will need to be set aside for a Prepcom before the Second Special Conference, so this substantive task might be added to its otherwise procedural mandate. However, if the Fifth Review Conference takes that view and refers final drafting to the Prepcom it will need to define the Prepcom mandate carefully so as to preclude the needless reopening of those issues which had been resolved in the Ad Hoc Group between 1995 and 2001.

40. To sum up, it would still be open to the Fifth Review Conference to adopt a Final Declaration by consensus while using a two-thirds majority vote to take these two decisions to get around the Ad Hoc Group impasse -- on convening the Second Special Conference and on either commending a draft Protocol or mandating the PrepCom to undertake further work on it -- and any others (for example, on follow-up mechanisms or interim supportive institutions) on which consensus cannot be found. The Final Declaration, on this scenario, would as before be an expression of those sentiments on which a negotiated consensus prevailed; but, under the new conditions prevailing since 2001, it would for the first time in the BTWC review process be accompanied by a number of decisions taken by a two-thirds majority under Rule 28.4 following completion of the deferment-of-vote procedure laid down in Rule 28.3. The issues of substance to which that process should be applied would need to have been identified at latest by Wednesday 20 November 2002. This consideration is bound to influence the timetable of the resumed session as well as the calculations and tactics of delegations.

Substance

41. The resumed session will need to focus its energies upon filling the gaps in the Final Declaration, to see in particular whether language can be agreed by consensus on (a) non-compliance; (b) follow-up meetings; (c) issues related to the strengthening of the Convention.

(a) Non-compliance

42. The Drafting Committee had come close to achieving consensus on acceptable language on this issue by 7 December 2001, for inclusion in the Article I section of the Final Declaration on the following lines:

The Conference emphasizes, once more, the vital importance of full implementation by all States Parties of all the provisions of the Convention, especially Article I. The Conference calls upon all States Parties and Signatories to comply fully with their obligations on the basis of the conviction that any non-compliance with its provisions could undermine confidence in, and achieving the basic provisions of, the Convention.

This had clearly been developed from the language in the Article I section of the Final Declaration¹⁶ of the Fourth Review Conference that:

The Conference emphasizes, once more, the vital importance of full implementation by all States Parties of all the provisions of the Convention, especially Articles I, II

¹⁶United Nations, Fourth 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, *Final Document*, Final Declaration, BWC/CONF.IV/9, 1996, Part II, page 16. Available at <http://www.opbw.org>

and III. The Conference agrees that the application by States Parties of positive approaches in accordance with the provisions of the Convention is in the interest of all States Parties and that any non-compliance with its provisions could undermine confidence in the Convention. Non-compliance should be treated with determination in all cases, without selectivity or discrimination.

However, the language of the Drafting Committee on 7 December 2001 was apparently still not strong enough for the United States who are understood to have pressed on 7 December for language expressing "*grave concern that compliance with Articles I, II and III has been subject to doubt in certain cases.*" Such language would be closer to the language in the Article I section of the Final Declaration¹⁷ of the Third Review Conference which said that:

The Conference emphasizes the vital importance of full implementation by all States Parties of all the provisions of the Convention and expresses concern at statements by some States Parties that compliance with Articles I, II and III has been, in their view, subject to grave doubt in certain cases and that efforts since the Second Review Conference to resolve these problems have not been successful. The Conference agrees that the application by States Parties of a positive approach in questions of compliance in accordance with the provisions of the Convention is in the interests of all States Parties and that continued non-compliance with its provisions could undermine confidence in the Convention.

43. At its resumed session the Fifth Review Conference will have to decide whether to express "*grave concern that compliance with Articles I, II and III has been subject to doubt in certain cases*", with the corollary -- also proposed by the United States on 7 December 2001 - - that it is no longer as in 1991 and 1996 a matter of "*the application by States Parties of a positive approach in questions of compliance*" but rather of "*coming into compliance*". Such language differs significantly in its assumptions from the paragraph on which the Drafting Committee, as noted above, had come close to achieving consensus. A further complication may arise from the 'axis of evil' speech¹⁸ in which President George W. Bush named North Korea, Iran, and Iraq. Having in the meantime made that controversial identification and given it such wide publicity, the United States may find it politically difficult in 2002 to revert to its tacit acceptance in December 2001 that the "certain cases" of grave concern over compliance should not be named in the Final Declaration. However, naming of allegedly non-complying States Parties -- whether these three or any others -- would inevitably provoke competitive denunciation.

44. Any attempt to name names in the Final Declaration is to be deprecated as an obvious wrecking device which does nothing to address the serious issue of how best to promote compliance with the BTWC, in all its aspects, as a responsibility shared by all States Parties.

(b) *Follow-up meetings*

¹⁷United Nations, Third 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, *Final Document*, Final Declaration, BWC/CONF.III/23, 1992, Part II, page 11. Available at <http://www.opbw.org>

¹⁸George W. Bush, *State of the Union Address*, 29 January 2002. Available at <http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html>

45. Although language on follow-up meetings had not explicitly found its way into the draft Final Declaration by 7 December 2001, such meetings were implied by various paragraphs which encouraged States Parties to consider issues within the framework of the BTWC. Based on the Friday morning 7 December 2001 draft Final Declaration, these included paragraph 8 of the Article III section, paragraphs 13 and 14 of the Article IV section, paragraph 9 of the Article V section, paragraphs 4 and 5 of the Article VI section and, to a certain degree, paragraph 20 of the Article X section. By 7 December 2001 support was growing for a Meeting of States Parties as an annual event, possibly empowered to establish Expert Groups. However, suspicion remained that the United States, unlike the European Union and like-minded states, might favour the Meeting of States Parties for the purpose of replacing the Ad Hoc Group -- a suspicion borne out by the US proposal for the Article XII section of the Final Declaration -- and it had not yet found its way into the Drafting Committee's text. In any case the US concept of follow-up meetings, which would be no more than reporting sessions for States Parties to report on how they were getting on implementing US proposals for strengthening the Convention, was far removed from the one shared by the EU and other like-minded states.

46. At the resumption of the Fifth Review Conference in 2002 there should be renewed consideration of the desirability of annual meetings of States Parties, but linked to the question of interim supportive institutions. The annual meeting might, for instance, become an open-ended meeting of the Committee of Oversight, open to all States Parties; or the Committee might be required to hold one of its meetings each year immediately before a separate Meeting of States Parties, for the convenience of those many delegations which would take part in both. Which of these alternative forms is preferred for the Meeting of States Parties, an institution in its own right or an open-ended meeting of the Committee of Oversight, may depend in part on how its supporters clarify their thinking on what its functions should be and where it fits in to the overall framework of interim supportive institutions built around a Committee of Oversight.

47. In any case, the pre-existing case¹⁹ for such a Committee understood as a continuing representative body, with a defined, elected membership (based on the General Committee of the Fifth Review Conference), remains a powerful one, as does the case for it to be supported by a Scientific Advisory Panel, a Legal Advisory Panel and a small dedicated Secretariat. The last of these might well be derived from the Secretariat of the Ad Hoc Group as its structure and practice had evolved between 1995 and 2001.

48. The draft mandate for these interim supportive institutions, which was proposed in 2001 for inclusion in the Article XII section of the Final Declaration, would require little modification in order to accommodate the idea of an open-ended session of the Committee of Oversight constituted as an annual gathering of States Parties or even a distinct Meeting of States Parties. The modifications are shown in bold to the language proposed previously²⁰ for the Article XII section of the Final Declaration as paragraphs 4 to 9:

¹⁹Nicholas A. Sims, *The Functions of the BTWC Review Conferences: Maximizing The Benefits From The Fifth Review Conference*, University of Bradford, Department of Peace Studies, Review Conference Paper No. 2, April 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

²⁰Nicholas A. Sims and Graham S. Pearson, *Article XII: Review Conferences*, in Graham S. Pearson, Malcolm R. Dando and Nicholas A. Sims (eds), *Strengthening the Biological Weapons Convention: Key Points for the Fifth Review Conference*, University of Bradford, Department of Peace Studies, November 2001. Available at <http://www.brad.ac.uk/acad/sbtwc> See also Nicholas A. Sims, *The Case for a BWC Committee of Oversight: Mandate and Commentary*, *Disarmament Diplomacy*, no. 60, September 2001, pp.13-19. Available at <http://www.acronym.org.uk/dd/dd60/60op3.htm>

4. *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 confidence-building measures 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 confidence-building measures, 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.

5. *The Committee shall meet no less often than once a year between the Fifth and Sixth Review Conferences. **One meeting each year shall [be an open-ended meeting open to all States Parties] [immediately precede the annual Meeting of States***

Parties. The Committee shall make the services of its secretariat available to the annual Meeting of States Parties and to such Expert Groups as it may establish].

6. *The Committee shall operate by consensus.*

7. *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 United Nations Security Council under Article VI.*

8. *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. **[It shall also report to the annual Meeting of States Parties as required.]***

9. *The Committee shall be financed pro rata as an appendix of this Fifth Review Conference.*

49. How relevant is the NPT Prepcom precedent? The question arises because a Prepcom alternative to a Meeting of States Parties was under consideration in the 2001 committee work of the Fifth Review Conference. In 2002, 2003 and 2004 NPT Prepcom sessions will take place to prepare the way for the NPT's Seventh Review Conference in 2005, as Prepcom sessions in 1997, 1998 and 1999 prepared the way for its Sixth Review Conference in 2000. This intensified review process was part of the deal negotiated in 1995 which enabled the NPT's life to be extended for an unlimited duration after its first, guaranteed, 25 years in force.

50. Whether or not this new pattern of Prepcom sessions spread over the three years preceding each Review Conference year has proved helpful to the NPT, it has a drawback when applied to the BTWC. The drawback is that it focusses attention on the next Review Conference, although less so in 2002 and 2003, which are less sharply focussed on the formulation of recommendations than the 2004 Prepcom is expected to be, when what is needed in the BTWC review process is the more systematic and reliable implementation of the decisions of past Review Conferences. Therein lies the logic of constituting the BTWC Committee of Oversight from the General Committee (or an elected sub-set of its membership) and thereby prolonging the life of an institution of the Fifth Review Conference, explicitly as an appendix of that conference, to see its work through to completion.

51. Regardless of the name and shape of any follow-up Meeting of States Parties, and of its relationship to the Committee of Oversight, there could still be a Prepcom of the traditional kind meeting 6-8 months in advance of each BTWC Review Conference. But that would be a separate body with a narrower mandate geared entirely to the upcoming conference.

(c) *Issues related to the strengthening of the Convention*

52. The resumed session of the Fifth Review Conference will need also to decide (1) what, if anything, it can say in its Final Declaration about the future of the Ad Hoc Group; (2) the

date of the Sixth Review Conference; (3) if not already decided under the rubric of 'follow-up meetings', the mandate for interim supportive institutions to run from the Fifth Review Conference to the Sixth, without prejudice to the respective positions of different States Parties on the future of the Ad Hoc Group or the need for a permanent Organisation for the Prohibition of Bacteriological (Biological) and Toxin Weapons (OPBW).

53. On the future of the Ad Hoc Group, it had been generally accepted -- at least until John Bolton for the United States broke ranks on the afternoon of 7 December 2001 -- that no reference for or against the Group should appear in the Final Declaration. Nor did it need to. The Group derives its mandate, still fully in force, not from any Review Conference decision but directly from the 1994 Special Conference. Its mandate can only be terminated by consensus. It would be perfectly proper for Ambassador Tibor Tóth, in his Ad Hoc Group Chairman capacity, to convene the 25th session (AHG-25) when from his soundings among States Parties he judges the time ripe and that AHG-25 is unlikely to be stalled by the absence of consensus. As Ambassador Toth is also President of the Fifth Review Conference, he is in the best position to ensure that the timing of any AHG-25 he may convene during 2002 will help, not hinder, the work of the resumed session of the Conference. By the same token, he will be in the best position to judge whether any reference to the Group can safely be inserted in the Final Declaration without threatening the breakdown of the Conference: as it certainly was threatened on 7 December 2001. As argued above, in **Procedure (3)**, there are ways in which the Conference could get round the Ad Hoc Group impasse if by November 2002 there is still no prospect of an AHG-25 becoming any more politically feasible than it was in the aftermath of the debacle of 17 August 2001.

54. On the date of the Sixth Review Conference, although there is an argument that the five years should run from 2001 as the year in which the main substantive review of the Convention took place, a requirement to hold it within five years from 22 November 2002 would be preferable, as that looks likely to be the date on which the Fifth Review Conference will have concluded its proceedings. The language proposed by the Drafting Committee that:

3. The Review Conference reaffirms that conferences of States Parties to review the operation of the Convention should be held at least every five years.

might achieve this, but for the avoidance of doubt it would be desirable to add an agreed understanding on the date of the Sixth Review Conference in 2007.

55. On the establishment of a Committee of Oversight, as a continuing representative body of the Fifth Review Conference, and of a Scientific Advisory Panel, a Legal Advisory Panel and their Secretariat as interim supportive institutions, there will still be a need for a 'without prejudice' clause so that they cannot be suspected of constituting a substitute for the Ad Hoc Group or for the OPBW by proponents or opponents of these bodies.

56. It is also much to be hoped in the context of the major issues related to the strengthening of the Convention, that the resumed session will lay the ground for a long overdue *regime of research*, as previously advocated.²¹ However, it would be unrealistic to expect anything

²¹Nicholas A. Sims, *The Evolution of Biological Disarmament*, SIPRI Chemical & Biological Warfare Studies no. 19, Oxford, Oxford University Press, 2001, pp.179-191. Nicholas A. Sims, *The Case for a BWC Committee of Oversight: Mandate and Commentary*, Disarmament Diplomacy, no. 60, September 2001, pp.13-19. Available at <http://www.acronym.org.uk/dd/dd60/60op3.htm>

more than an outline framework for such a regime to be agreed in two weeks when so much else is on the immediate agenda. The framework could then be filled in by the Committee of Oversight on the advice of its Scientific Advisory Panel.

Conclusions

57. When delegates return to Geneva on 11 November 2002, the resumed session of the Fifth Review Conference offers BTWC States Parties a chance to get their review process back on track, after the repeated shocks inflicted by the United States in 2001. Rule 28.2 rightly emphasises the importance of deciding as much as possible by consensus; and certainly that should remain the procedure of choice for the Final Declaration. But, if the United States remains intransigent, serious thought should be given to the use of Rule 28.3 and ultimately Rule 28.4 in the last resort. These procedures would ensure that the Conference is not prevented from taking other decisions, additional to the adoption by consensus of the Final Declaration, which the other States Parties consider necessary - even at the expense of consensus - for strengthening the Convention and steering the constructive evolution of its treaty regime.