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# **Strengthening the Biological Weapons Convention**

## **Briefing Paper No 2 (Second Series)**

### **The New Multilateral Approach for the BTWC: Ambiguities and Opportunities**

**January 2003**

**Series Editors**

**Graham S Pearson and Malcolm R Dando**

Department of Peace Studies, University of Bradford

# **Strengthening the Biological Weapons Convention**

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# THE NEW MULTILATERAL PROCESS FOR THE BTWC: AMBIGUITIES AND OPPORTUNITIES

by Nicholas A Sims<sup>†</sup>

## Introduction

1. This Briefing Paper examines the new multilateral process agreed at the Fifth Review Conference and identifies some ambiguities and uncertainties within the process in order to bring out the opportunities that these ambiguities provide to the States Parties to make progress in strengthening the BTWC regime. Such a strengthening is all the more urgently required following the failure of the Fifth Review Conference to agree a Final Declaration and thereby carry forward the extended understandings which have played a central part in the construction of the BTWC regime.

2. The new process is to be "*qualitatively different*" from the review process which preceded it. That claim was made repeatedly by Ambassador Tibor Toth, President of the Fifth Review Conference, during the Review Conference and in the Western Group Statement<sup>1</sup> of 14 November 2002 it is spelled out as follows: "*The decision that we have just adopted provides for a **qualitatively different** outcome to that found in the final products of previous Review Conferences.*" [Emphasis added]

3. The new process is detailed in paragraph 18 of the Final Document<sup>2</sup> of the Fifth Review Conference which states that:

*18. At its eighth plenary meeting on 14 November 2002, the Conference decided by consensus, as follows:*

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

*i. The adoption of necessary, national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation;*

*ii. National mechanisms to establish and maintain the security and oversight of pathogenic microorganisms and toxins;*

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<sup>1</sup>Western Group, *Statement on Behalf of the Western Group, Note by the President*, BWC/CONF.V/16, 18 November 2002. Available at <http://www.opbw.org>

<sup>2</sup>United Nations, Fifth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 19 November - 7 December 2001 and 11 - 22 November 2002, *Final Document*, BWC/CONF.V/17, 2002. Available at <http://www.opbw.org>

iii. *Enhancing international capabilities for responding to, investigating and mitigating the effects of cases of alleged use of biological or toxin weapons or suspicious outbreaks of disease;*

iv. *Strengthening and broadening national and international institutional efforts and existing mechanisms for the surveillance, detection, diagnosis and combating of infectious diseases affecting humans, animals, and plants;*

v. *The content, promulgation, and adoption of codes of conduct for scientists.*

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

*(c) Each meeting of the States Parties will be prepared by a two week meeting of experts. The topics for consideration at each annual meeting of the States Parties will be as follows: items i and ii will be considered in 2003, items iii and iv in 2004, item v in 2005. The first meeting will be chaired by a representative of the Eastern Group, the second by a representative of the Group of Non-Aligned and Other States, and the third by a representative of the Western Group.*

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

*(e) The Sixth Review Conference will consider the work of these meetings and decide on further work. [Emphasis added]*

4. A key element in the chapeau to the list of five topics in paragraph 18 (a) of the Final Report is the phrase "*promote common understanding and effective action.*" The hope of the proponents of the new process is that it will generate "*effective action*". If it does so, then it will be "*qualitatively different*" in the sense of better. On the other hand, if the new process leads to fragmentation of the overall treaty regime, it will be "*qualitatively different*" in the sense of worse.

5. However, if it merely promotes "*common understanding*" and nothing more, it will serve much the same function as the Review Conferences in their fundamental role of recording where consensus has been reached on extended understandings of the implications of the BTWC. There is nothing "*qualitatively different*" about that.

6. The new process for the BTWC will stand or fall primarily by:

a. its success in promoting common understanding **AND**

b. its success in promoting effective action;

and also, informally but importantly, by

c. its ability to achieve sharper focus on key BTWC topics whilst maintaining the integrity and cohesion of the overall treaty regime **AND**

d. its cumulative effect in steering the BTWC towards a resumption of the review process proper in 2006.

## 'Reports', 'conclusions' and ' results': "many ambiguities"

7. Paragraph 18 (d) makes it clear that the two-week meetings of experts "*will prepare factual reports*" and paragraph 18 (b) that both the meetings of experts and the meetings of States Parties may produce "*conclusions or results*". The latter, in the case of the annual meetings of States Parties, were interestingly glossed as "*to take decisions*" in the FCO notes appended to the UK Foreign Secretary's statement<sup>3</sup> of 14 November 2002 welcoming the outcome. However, it is not clear precisely what authority the "*conclusions or results*" will possess although it is evident that "*conclusions or results*" agreed by the States Parties will not be without authority.

8. The rule of consensus is to be absolute (as it was in the Ad Hoc Group of 1995-2001 and its VEREX predecessor of 1992-1993). So there is to be no voting on "*conclusions or results*" at either kind of meeting or on the experts' "*factual reports*". Rule 28 apart, the Rules of Procedure of the Fifth Review Conference seem likely to be applied *mutatis mutandis* to the meetings of States Parties and, presumably, to the meetings of experts.

9. The consensus rule still leaves uncertain what is to be the status of consensually-agreed "*conclusions*" issued by a meeting of States Parties in 2003, 2004 or 2005. Although this flexibility could prove to be an advantage, equally care needs to be taken to avoid it leading to disarray. Because of the failure of the Fifth Review Conference to adopt its own Final Declaration or to say anything about the four preceding Final Declarations, the "*conclusions*" of the new process will issue into a vacuum, at least until the Sixth Review Conference incorporates them into its Final Declaration in 2006. Quite how much of a vacuum this is, will depend on the drafting of the conclusions. If they are drafted so as to use language which clearly reaffirms and develops the content of previous Final Declarations, their relevance and value to the cumulative process of regime construction will be evident. If they are regarded as "*decisions*" from the moment they are issued by a meeting of States Parties they may also be regarded as possessing the same status of politically-binding commitments as the Final Declaration of a Review Conference. This, however, seems unlikely given the provision in paragraph 18 (e) that "*The Sixth Review Conference will consider the work of these meetings and decide on further work.*" No wonder the Statement<sup>4</sup> on behalf of the Group of the Non-Aligned Movement and Other States -- the 'NAM Statement' -- noted that "*The language of the decision has many ambiguities,...*". However, as that NAM Statement went on to say "*... but that we believe that as we move away from the climate and pressures of this Conference the need for the States Parties to be practical will ensure that the required work is done and that the ambiguities are clarified.*"

10. It is also left uncertain how the "*factual reports*" from the meetings of experts will relate to the "*conclusions or results*". An obvious -- but imperfect -- model from the history of the BTWC could be the VEREX process, where the Ad Hoc Group of 1992-1993 produced a factual report on potential verification measures from a scientific and technical standpoint, and that report was then transmitted to the States Parties meeting in the Special Conference of 1994 to translate its findings into political terms and to propel its subject-matter higher up the diplomatic agenda.

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<sup>3</sup>Jack Straw, *Straw welcomes outcome of Biological Weapons Convention Review Conference*, 14 November 2002. Available at <http://www.fco.gov.uk>

<sup>4</sup>Non-Aligned Movement and Other States, *Statement on Behalf of the Non-Aligned Movement and Other States, Note by the President*, BWC/CONF.V/15, 18 November 2002. Available at <http://www.opbw.org>

11. This model is imperfect because VEREX and the 1994 Special Conference were explicitly part of a cumulative strengthening process for the BTWC, with no fixed limit in time; whereas the possibility of any multilateral follow-up to the two-week meeting of experts and the one-week meeting of States Parties on each topic (in 2005) or pair of topics (in 2003 and 2004) prior to the Sixth Review Conference in 2006 is unlikely to be accepted by the United States. From the US point of view, it seems clear that the concession of 3 x 3 weeks for multilateral meetings in 2003-2005 is just that: a concession, setting a maximum not a minimum, and a maximum which must not be exceeded for fear of inflaming the anti-multilateralists. Another difference is that the one-week meetings of States Parties were agreed unconditionally by the Fifth Review Conference, unlike the Special Conference of 1994 which the Third Review Conference agreed only conditionally: it was left<sup>5</sup>, in 1991, subject to majority requisition after consideration of the eventual VEREX report. Nevertheless some of the VEREX precedents may be applicable to the new process, in terms of the relationship between the meetings of experts and the meetings of States Parties.

12. The only other possible model from the history of the BTWC is the Ad Hoc Meeting of Scientific and Technical Experts which took place from 31 March to 15 April 1987 as an "appendix" to the Second Review Conference. That meeting was mandated<sup>6</sup> "to finalize the modalities for the exchange of information and data" under the particular set of cooperative measures which soon came to be known as Confidence-Building Measures, and were later to be enhanced and expanded at the Third Review Conference in 1991. But the 1987 meeting was appointed to complete the work of the Second Review Conference. It was largely concerned with working out the detail of the reporting forms to be used by States Parties, and the timing of implementation. It operated within the limits of decisions already taken in 1986 over which CBMs were, and which were not, ready for adoption at that time. The meetings of experts in 2003, 2004 and 2005 on the other hand will be preparing<sup>7</sup> for the meetings of States Parties corresponding to their respective topics or pairs of topics. They will be preparatory; the 1987 meeting was final.

### **The new process: individual components each year**

13. For each of the five topics, ambiguities and opportunities remain over:

- the nature and origin of the texts to be worked on;
- the shape of the drafting process;
- the relationship between the 'experts' and 'States Parties' levels of consideration;

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<sup>5</sup>United 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, Geneva, 9 - 27 September 1991, *Final Declaration*, BWC/CONF.III/23, 1992, Part II, p.18, Article V section. Available at <http://www.opbw.org>

<sup>6</sup>United Nations, Second Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, *Final Declaration*, BWC/CONF.II/13/II, 1986, p.6, Article V section. Available at <http://www.opbw.org>

<sup>7</sup>United Nations, Fifth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 19 November - 7 December 2001 and 11 - 22 November 2002, *Final Report*, BWC/CONF.V/17, 2002, paragraph 18c. Available at <http://www.opbw.org>

- how the pairings of topics (i) and (ii) in 2003, and of topics (iii) and (iv) in 2004, work out in terms of hours allocated to each, and whether they are addressed concurrently or consecutively, at the two-week meetings of experts and at the one-week meetings of States Parties;
- the authority of any 'conclusions or results' and whether they constitute decisions or not, and if so whether they are to be regarded as comparable in status to the politically-binding commitments agreed in Final Declarations of Review Conferences;
- how they fit into the cumulative process of regime construction, by using language which clearly reaffirms and develops the content of previous Final Declarations.
- the possibility of any collective follow-up on any topic before 2006: this appears unlikely to be accepted by the United States as it may be viewed as exceeding the maximum 3 x 3 weeks' allocation of time to the BTWC multilateral process between 2003 and 2005.

14. It is apparent that much will depend on the preparations made by the States Parties for each of the annual meetings. As Ambassador Tóth has stressed, the process could become an empty shell if States Parties do not engage and prepare **in advance** of first the expert meeting and then the meeting of States Parties. Each State Party needs to consider the benefits that the individual topic can bring to the security, health, environment and prosperity of that State Party as well as to the international community and thus to work out how best to maximise and achieve those benefits. There is little doubt about the **need** for each of the topics to be considered but it is far from clear as to how this can best be achieved -- and this may vary from State Party to State Party. It is equally clear that the consideration of each topic can bring **benefits** to each State Party -- and that these can be maximised through prior preparation and analysis.

15. A possible model, at least for the 2003 topics, might look like this. The meeting of experts could be essentially a pooling of experience and a comparison of best practice. The texts to be worked on would be States Parties' legislation, regulations and other measures of BTWC national implementation, for topic (i), and the equivalent in respect of national mechanisms to establish and maintain the security and oversight of pathogenic microorganisms and toxins, for topic (ii). However, for this to be possible, it is clear that States Parties need to provide their legislation, regulations and other measures of BTWC national implementation **prior** to the experts meeting.

16. The secretariat can do much **prior** to the experts meeting to facilitate the best use of this material by arranging it in the most convenient format, with summaries and tabulations as appropriate, for ease of comparison as well as arranging for the necessary translation into the official UN languages. Being a secretariat, however, it will quite properly refrain from making any judgements.

17. It would be for the meeting of experts to bring its collective judgement to bear on the material. Its factual report would aim to add value by deriving recommendations for best practice from this pooling of experience.



18. The meeting of States Parties would receive this factual report, including these recommendations, a few months later. (5 September to 10 November 2003 appears to be the most likely interval, although at the time of writing only 10-14 November for the meeting of States Parties has been agreed.) Governments of States Parties would accordingly have had time to consider the experts' report and recommendations beforehand and to identify the key issues which remained to be considered.

19. Carefully avoiding any suggestion of negotiation -- for the United States' insistence on keeping negotiation out of the new multilateral process is itself non-negotiable -- the meeting of States Parties could work on a different kind of text from the meeting of experts for the purpose of recording its "*conclusions or results*". Such a text would ideally integrate

a. the States Parties' verdict on the experts' recommendations, commending those it felt able to approve as promoting best practice,

**and**

b. the relevant language in Final Declarations, arranged and tabulated by the secretariat for the meetings of experts and of States Parties.

20. An integration exercise along these lines will be essential for making sure that the new multilateral process carries forward the stalled review process, admittedly in a different form and with a restricted agenda, but in a way which makes it easier rather than harder for the Sixth Review Conference to relaunch the review process proper in 2006.

21. The "*conclusions or results*" would possess at least a provisional authority, pending their full integration into the Final Declaration of the Sixth Review Conference. At that point they would take their place within the overall framework of the review process, and its cumulative expression of common understandings, applied to the BTWC treaty regime in its entirety.

22. The new multilateral process could come to be seen in retrospect, on this scenario, as a well-focussed and intensive preparatory stage for the Sixth Review Conference, within the five-topics limit and bearing in mind that the five topics do not represent the full scope of the 2006 agenda.

### **The new process: interactions over the three years**

23. Ambassador Tóth at the resumed Fifth Review Conference in 2002 placed great emphasis on the care he had taken to balance 'compliance' and 'cooperation' elements in formulating the five topics to be addressed in the new process. It is vital to confidence in the process that most States Parties should share this perception of balance at the outset, and should remain convinced of it at the end. Likewise, in considering the topics first in expert and then at the States Parties meetings, it will be important to recognise and address **both** 'compliance' and 'cooperation' aspects of each topic. Ambassador Tóth may well need to reiterate at intervals how carefully he selected the five topics in 2002, on criteria which included that of striking a balance between the 'compliance' and 'cooperation' emphases of the different Groups.

24. The scope for interaction between one year and the next appears to be very restricted as each year's 2 + 1 weeks of meetings are seen as independent of each other year's. They stand alone. That is the formal position and it is likely to be championed vigorously by those who

fear any erosion of the formal position may give the United States an excuse for abandoning the whole process.

25. Yet, informally, it is going to be difficult to prevent tensions and confrontations -- for example, between the United States and the more anti-US members of the NAM -- spilling over from 2003 to 2004, and from 2004 to 2005. Conversely, if the 2003 meetings go well there may be lessons to be applied, and precedents to be repeated, in 2004 and 2005. At the very least, an outcome deemed reasonably successful in November 2003, when work on topics (i) and (ii) is concluded, will generate confidence in the process and States Parties will approach the 2004 meetings with less uncertainty and trepidation than if the 2003 meetings go badly.

26. By 2005 a certain amount of informal momentum may have built up, even though the process is emphatically not designed to be a cumulative one from year to year (unlike the review process proper). It may be significant that 2005 has just one topic, not two, for attention; and it may be that a little time will be found and allocated to a more general stocktaking as the process nears its conclusion. Another feature of the single 2005 topic, "*the content, promulgation and adoption of codes of conduct for scientists*", is that it is evidently the most distinctively 'non-governmental' in character of all five topics. It is likely to require rather different treatment, at any rate in the two-week meeting of experts, from the more conventionally 'governmental' topics (i) to (iv) of 2003 and 2004.

27. Interaction between the meetings of 2003, 2004 and 2005 in a constructive sense would be made easier if a 'troika' of Chairmen were to coordinate the process. Yet this currently seems a faint prospect. At present, in addition to the likely US suspicion of anything which might mitigate the stand-alone character of each year's meetings, there appears to be some NAM opposition to any 'troika' arrangement. However, in practice it is difficult to imagine that the NAM representative chairing the 2004 meetings will not have informal contact with Ambassador Toth who is chairing the 2003 meetings (having been appointed<sup>8</sup> by the Fifth Review Conference on 14 November 2002 on the nomination of the Eastern Group) and with the eventual Western Group nominee to chair the 2005 meetings. This still falls far short of a specially designed coordinating mechanism.

28. In the absence of a 'troika', formal or informal, let alone a Committee of Oversight for the duration of the process, much of the residual responsibility for coordination will rest with the Depositary Governments -- who are already wrestling with the dates of the 2003 meetings -- with the assistance of the secretariat provided by the UN Department for Disarmament Affairs through its Geneva Branch.

29. The Depositary Governments' mandate from the Fifth Review Conference<sup>9</sup> is very limited: "*The Conference requested the Depositaries of the Convention to consult with a view to establishing suitable dates for the 2003 meetings, and to notify States Parties accordingly.*" Anything further that they are able to agree on among themselves to guide the

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<sup>8</sup>United Nations, Fifth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 19 November - 7 December 2001 and 11 - 22 November 2002, *Final Report*, BWC/CONF.V/17, 2002, paragraph 19. Available at <http://www.opbw.org>

<sup>9</sup>United Nations, Fifth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 19 November - 7 December 2001 and 11 - 22 November 2002, *Final Report*, BWC/CONF.V/17, 2002, paragraph 19. Available at <http://www.opbw.org>

process will be derived instead from a broad understanding of the responsibilities conferred on them by Article XIV of the Convention in the light of the law of treaties, and subject always to what the States Parties generally will accept. It cannot be taken for granted that the Depositary Governments will steer the process in substance as well as in timetabling the meetings.

30. On the other hand, the secretariat provided by the United Nations is required<sup>10</sup> *"to continue to assist the Depositary governments to provide such services as may be required for the implementation of the decisions and recommendations of the Review Conferences."* This could imply the beginnings of a bureau for the new multilateral process. In any case the secretariat is likely to perform a vital role throughout and in particular **prior** to the annual meetings of experts, both in continuity over the successive years of the process as a whole, and during the individual meetings. For these it should be reinforced as necessary by professional assistants recruited on short-term contracts, as has been the practice at both 2001 and 2002 sessions of the Fifth Review Conference and earlier in the Ad Hoc Group secretariat.

### **The new process and the Sixth Review Conference**

31. The NAM Statement<sup>11</sup> of 14 November 2002 included as its fourth 'understanding' that:

*"The BWC forms a composite whole and that while it is possible to address related issues separately, it will be necessary for all of the inter-linked elements of the Convention -- whether they relate to regulation, compliance or promotion -- to be dealt with."*

This strong affirmation of the need to address the Convention in the round reflects NAM disappointment at the selectivity of the 2003-2005 agenda. It may also reflect a fear of fragmentation: a sharper focus on individual topics may be achieved only at the cost of neglecting the unity of the treaty regime as "a composite whole". However, the decision to confine the new process to just five topics has been taken and the agenda cannot now be widened until 2006, although constructive use of the ambiguities in the language describing the five topics can potentially widen the bounds of discussion.

32. Accordingly, the relationship between the new process and the Sixth Review Conference raises further questions. It will be essential to restore in 2006 the review process proper. This includes, in accordance with Article XII, an obligation to review the operation of the Convention in relation to the purposes of the Convention, and to review it in the round. Many important aspects of the Convention will have been excluded from systematic multilateral consideration ever since 2001 because of the self-imposed constraints of the Fifth

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<sup>10</sup>United 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, *Estimated Costs of Meetings in 2003, 2004 and 2005 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: Note by the Secretariat*, BWC/CONF.V/14, 13 November 2002, paragraph 1, citing decision 56/414 adopted by the UN General Assembly on 29 November 2001. The plural Conferences is justified by the continuing requirement to implement unfulfilled or only partially fulfilled decisions and recommendations of the Second, Third and Fourth Review Conferences, in addition to the single decision of the Fifth Review Conference.

<sup>11</sup>Non-Aligned Movement and Other States, *Statement on Behalf of the Non-Aligned Movement and Other States*, Note by the President, BWC/CONF.V/15, 18 November 2002. Available at <http://www.opbw.org>

Review Conference at its resumed session and because of the limitations it imposed on the new process. It will be vital in the preparations for 2006 to ensure that the agenda of the Sixth Review Conference is not skewed by the input it receives from the 2003-2005 meetings of experts and meetings of States Parties. The Conference in 2006 is indeed meant to "*consider the work of these meetings and decide on any further action*"<sup>12</sup> but care needs to be taken to ensure that its agenda must not be narrowed down to that input alone.

33. Deliberate efforts will have to be made to ensure attention in 2006 to all the other aspects of the Convention as well. This will require intensive rounds of consultation in 2005-06, especially if the United States does not allow any part of the 2005 meeting of States Parties to be used for broadening out the discussion beyond topic (v), codes of conduct for scientists, to a wider stocktaking. Consultations may well need to take place in the margins of the First Committee in New York during October and November 2005 although this may be difficult as the Presidency of the Sixth Review Conference is unlikely to have been agreed until the Preparatory Committee usually held in April prior to the Review Conference. There is much to be said for the Preparatory Committee for the Sixth Review Conference taking place immediately after the meeting of the States Parties in 2005, rather than being left until April 2006. Then the President-designate could undertake successive rounds of consultations with individual States Parties and the Eastern, NAM and Western Groups -- as the President of the Fifth Review Conference did in April, July and September 2002 -- as well as using the First Committee opportunities in the autumn of 2005.

34. Otherwise, there is a danger that the Sixth Review Conference will open in 2006 with unresolved disagreement over whether -- to put it at its simplest -- it is aiming to build on the review process of 1980-86-91-96, or on the new process of 2003-05, or on a mixture of the two processes. (For this purpose, the Fifth Review Conference of 2001-02 is regarded as a hiatus, having failed to consolidate let alone carry forward the review process.)

### **Contextual influences on the new process**

35. The new process will be influenced by other things happening in the world with regard to the threat of biological and toxin weapons. These may conveniently be divided into two sets of contextual influences.

#### *Contextual influences endogenous to the BTWC.*

36. The ongoing operation of the Convention continues, formally independent of the new process. Systematic programmes of meetings beyond the 3 x 3 weeks' limit have been ruled out until 2006, but not other kinds of meeting for which the Convention, explicitly or as interpreted by earlier Review Conferences, already makes provision. For example, further Consultative Meetings might be convened under the contingency mechanism of Article V, as invoked by Cuba in 1997. Less likely, but also possible, is the bringing of a request for investigation to the Security Council under the complaint procedure of Article VI.

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<sup>12</sup>United Nations, Fifth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 19 November - 7 December 2001 and 11 - 22 November 2002, *Final Report*, BWC/CONF.V/17, 2002, paragraph 18 (e). Available at <http://www.opbw.org>

37. Article V and Article VI procedures remain unaffected by the decision of 14 November 2002. But the use made of them, if any, will undoubtedly influence the implementation of the 14 November 2002 decision through the new process.

*Contextual influences exogenous to the BTWC.*

38. Under this heading it may be noted that developments in the Australia Group and other plurilateral channels favoured by the United States (G-8, G-7 + Mexico, NATO) for coordinating export controls and countering bio-terrorist threats will influence the new process from outside the BTWC. So, too, will the lessons learned from UNMOVIC activities in Iraq, from any other BW-related developments in the Middle East -- or North Korea -- and, though unfortunately less likely, from any resumption, or replacement, of the long-stalled Trilateral Process for establishing the magnitude and ensuring the complete abandonment of the former Soviet BW programme in the post-Soviet Russian Federation. A future investigation by the United Nations Secretary-General of alleged BW use, under the long-established procedures for handling CBW allegations mandated by UN resolutions of 1982 and 1988, would also impinge significantly on the way in which BTWC States Parties came to regard the threat posed by those weapons. As would any use of BW whether by a State or by sub-State actors. Any of these events could prove to be a more powerful contextual influence on the new process than any developments within the BTWC itself.

## **Conclusions**

39. Other contextual influences may help prevent the fragmentation of the BTWC treaty regime. For example, academic and NGO consortia could do much to keep a more synoptic, 'whole-Convention' perspective in view by running parallel events around the time of the meetings of States Parties in each year from 2003 to 2005. This would complement their activity in feeding in specialist contributions to the meetings of experts, topic by topic, to the extent that their own expertise and the rules of procedure laid down by governments allow. Delegations confined strictly to the limited agenda of the new process in the meetings of States Parties for 2003, 2004 and 2005 respectively would then have a wider forum in which to transcend the limitations imposed by the new process, and would be encouraged to take a wider view by meeting under academic-NGO auspices, possibly in conjunction with UNIDIR. Their handling of the factual report from the corresponding meeting of experts could well benefit from viewing it within the wider context of the BTWC treaty regime as a whole, and from the evidence of sustained interest on the part of academic and NGO specialists as representatives of 'civil society' concerned to uphold the Convention and strengthen its treaty regime alongside governments.

40. Furthermore, the kind of input made by academic specialists as in Key Points for the Fourth Review Conference (1996)<sup>13</sup> and Key Points for the Fifth Review Conference (2001)<sup>14</sup> will be even more essential in the run-up to 2006, although it will need to take a different form in the light of (a) the hiatus in the cumulative review process represented by the Fifth Review Conference, and (b) the new process of 2003-2005.

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<sup>13</sup>Graham S. Pearson & Malcolm R. Dando (eds), *Strengthening the Biological Weapons Convention: Key Points for the Fourth Review Conference*, University of Bradford, Department of Peace Studies and QUNO Geneva, November 1996. Available at <http://www.brad.ac.uk/acad/sbtwc>

<sup>14</sup>Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims (eds), *Strengthening the Biological Weapons Convention: Key Points for the Fifth Review Conference*, University of Bradford, Department of Peace Studies and QUNO Geneva, November 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

41. But just as the International Committee of the Red Cross should not be expected to stand alone in reasserting the global norm against the deliberate spreading of disease, so non-governmental 'friends of the Convention' should not be expected to carry the weight of sustaining the BTWC on their shoulders alone. They can advise, encourage and warn. They can continue to feed in a steady stream of policy proposals, research findings and original ideas to strengthen the treaty regime. They can draw attention to its chronic institutional deficit, to the urgency for collective scrutiny of new developments in science and technology, to the desirability of agreed constraints on norm-threatening lines of research, to the need to enhance the transparency of biodefence programmes, and to the importance of States Parties doing all in their power to demonstrate compliance with all obligations flowing from the Convention -- and this list is by no means exhaustive. They can help the States Parties to embark, once again, on an agenda for recovery. However, the Convention belongs to the States Parties and it is first and last their responsibility to uphold and strengthen it so that it works to the benefit of all.

42. In 2001 they failed to strengthen it by the Protocol route, and in 2002 they ducked out of their responsibility to review the operation of the Convention in relation to its purposes, or even explicitly to reaffirm the positions agreed at previous Review Conferences. Most of them have a less than perfect record of submitting CBM returns in accordance with their politically-binding commitments of 1986 and 1991, reaffirmed in 1996. A few -- and this is much more serious -- have allowed doubts to persist regarding their compliance with their fundamental obligations under Article I of the Convention. Although it is one thing -- and it is useful, as the NAM did in their Ministerial Statement<sup>15</sup> of 29 April 2002 -- to call upon States Parties to utilise the Article V procedures to address compliance concerns, States Parties should not neglect the benefits that would arise from their submitting a more comprehensive declaration under the CBMs which are, after all, specifically intended to "*prevent or reduce the occurrence of ambiguities, doubts and suspicions*".<sup>16</sup>

43. Collectively they have a lot of ground to make up. The 2002 outcome was undistinguished. It was only a (modest) success when compared with the even bleaker alternative: the prospect of complete failure which might have occurred upon the resumption of the Fifth Review Conference. Now States Parties must exert every effort to get the evolution of the BTWC regime back on track. The Sixth Review Conference must do more than mark a return to the review process proper: it must be enabled to examine the operation of the Convention in all its aspects, in relation to all its purposes, and to steer its constructive evolution onwards from 2006. This requires much more information to be made available by States Parties between now and 2006, and properly collated and circulated: a kind of 'CBM-plus' programme but extending much further into the realities of compliance assurance, the realities of disease prevention and the realities of international cooperation in the peaceful applications of microbiology for the general good.

44. Some ad hoc meetings will be needed in order to maximise the chance of achieving these aims for 2006. These meetings would be over and above the 3x3 weeks maximum

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<sup>15</sup>Non-Aligned Movement, Ministerial Meeting of the Co-ordinating Bureau of the Non-Aligned Movement, *Final Document*, Durban, 29 April 2002, page 19, paragraph 77. Available at <http://www>.

<sup>16</sup>United 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, Geneva, 9 - 27 September 1991, *Final Declaration*, BWC/CONF.III/23, 1992, p.14, Article V section. Available at <http://www.opbw.org>

allowed within the new multilateral process for meetings which are authorised by the Fifth Review Conference and will be serviced by the United Nations within the budgetary limits approved in 2002.<sup>17</sup> Any ad hoc meetings will therefore require ad hoc financing and servicing, probably by a host government, which might receive financial contributions from like-minded governments to defray its costs.

45. For example, NAM states might organise ad hoc meetings to which all other States Parties might be invited in the light of the second 'understanding' in the NAM Statement<sup>18</sup> of 14 November 2002, namely that *"The States Parties are sovereign and that as masters of their own fate they can together and at any time decide on further work that may be required."*

46. Furthermore, there is nothing to prevent, and much to be said for, any State Party or group of like-minded States Parties organising an ad hoc meeting to which all other States Parties could be invited.

47. The emergence of a new 'like-minded group' spanning the NAM, Eastern and Western Groups will be particularly helpful in maximizing the benefits obtainable from the new multilateral process and in using it to promote a successful relaunch of the cumulative review process for the whole BTWC in 2006. The European Union -- Latin America and Caribbean forum<sup>19</sup> could well provide a nucleus for such a like-minded group especially if other States Parties such as Australia, New Zealand, Norway, Canada, South Africa, the Republic of Korea and Japan were invited to participate in such a group. Several Eastern Group members have associated themselves with European Union positions. In addition, the Russian Federation made it clear in their statement<sup>20</sup> following the resumed Fifth Review Conference that they intended to "actively participate" in the work of these fora together with "like-minded partners." Coordination of policy as well as procedure should be the aim, building on shared perceptions of the common interest while respecting the sovereignty of each State Party.

48. The new process of 2003-2005, if well handled, could well have a significant contribution to make to the strengthening of some parts of the BTWC, within the limits of its five-topics agenda and provided that the ambiguities in that agenda are turned into opportunities. If not well handled, by States Parties' governments making good use of it, the new process will remain an empty shell or fig leaf, as Ambassador Toth warned repeatedly on

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<sup>17</sup>United 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, *Estimated Costs of Meetings in 2003, 2004 and 2005 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: Note by the Secretariat*, BWC/CONF.V/14, 13 November 2002, approved by the Fifth Review Conference at its ninth plenary session, 15 November 2002, BWC/CONF.V/17, paragraph 19.

<sup>18</sup>Non-Aligned Movement and Other States, *Statement on Behalf of the Non-Aligned Movement and Other States*, Note by the President, BWC/CONF.V/15, 18 November 2002. Available at <http://www.opbw.org>

<sup>19</sup>See for example, European Union, *EU - Latin America & the Caribbean Summit: Conclusions, EU - LAC Common values and Positions*, 17 May 2002. Available at [http://europa.eu.int/comm/world/lac/conc\\_en/val\\_pos.htm](http://europa.eu.int/comm/world/lac/conc_en/val_pos.htm)

<sup>20</sup>Russian Federation, *On the Completion of the Second Part of the Fifth Review Conference of the Biological Weapons Convention*, 2371-18-11-2002, Daily New Bulletin, 19 November 2002, Ministry of Foreign Affairs of the Russian Federation, Information and Press Department. Available at <http://www.in.mid.ru/bl.nsf/eng>

11 November 2002 when making his proposal public as a Draft Decision<sup>21</sup> of the Fifth Review Conference.

49. NGOs, academic and other representatives of 'civil society' can properly supplement the work of the States Parties, not replace it. They can provide a complement, not a substitute. That remains as true in the context of this new multilateral process for the BTWC in 2003-2005 as in the better known context of its cumulative review process, which must be restored and taken forward in 2006.

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<sup>21</sup>United Nations, *Draft Decision of 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/CRP.3, 6 November 2002. Available at <http://www.opbw.org>