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The Review Process of the Biological Weapons Convention

Prospects after the Fifth Review Conference 2001/2002

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Outcome of the Fifth Review Conference 2001/2002

Between January 1995 and July 2001, delegations of states parties negotiated a protocol to the BWC. In March 2001, after lengthy and often fruitless discussions, the chairman of the Ad Hoc Group (AHG), the Hungarian diplomat Tibor Toth, issued a draft protocol which included the following elements:

- An Organization for the Prohibition of BW;
- Declarations;
- Three types of visits: randomly selected transparency visits; clarification visits; and voluntary visits;
- Investigations; and
- Provisions for export controls.

This draft protocol would by no means have been a panacea to cope with the emerging threat of biological weapons, and I believe none of the delegations did perceive it as such. But the protocol would have provided for at least three basic advantages:

- In cases of compliance concern it would have been possible to conduct investigations following these newly agreed procedures;
- Through declarations and randomly selected transparency visits it would have been possible to gain more transparency among states parties;
- The protocol would have delivered a strong political message that the international community took the norm against BW very seriously.

To be sure, the draft protocol presumably was not acceptable for many delegations, but it was welcomed by others, including the delegations from European Union member states, as an important step towards finalizing the protocol. It was the US delegation that took the burden of killing the draft protocol on the grounds

- that the draft protocol would weaken national export controls;
- that through on-site activities such as visits, sensitive information both of private industry and national defence programs would be endangered;
- and that the draft protocol would not improve the verification of the BWC.

In other words, the US had returned to its original position it had been taken at the very beginning of the process of enhancing the BWC in 1991, according to which the BWC in essence is unverifiable.

The Fifth Review Conference to the BWC convened on November 19, 2001 in Geneva. In the meantime, September 11 had shocked the world, and the anthrax letters killing five people in the US had shown that the threat of BW was real. Against this background, the US delegation came to Geneva to insist that compliance to the BWC was the most important item on its agenda and that it would be unwilling to return to any discussions about the protocol itself. Instead, it should be made clear that traditional arms control would not work in the case of BW and therefore alternative approaches would be necessary. Among these were national criminal legislation, improvement of international disease control, a code of conduct for scientists, and procedures for investigating suspicious outbreaks of disease.

EU members agreed that the compliance concerns had to be dealt with seriously and did not intend to provoke the US given the new circumstances that made the danger of international terrorism all too visible. Instead, it was the aim of EU members to keep the multilateral process that would integrate states of concern alive without – at least for the moment - returning to the AHG or the draft protocol. The AHG mandate would be kept untouched, while the states parties should convene annually between the RevConfs, prepared by additional expert meetings. However, other states parties a t the beginning of the RevConf declared that they still were interested in the AHG and the protocol.

In the afternoon of the final day of the RevConf, on December 7, 2001, the US delegation presented a paper that had not been consulted with its allies. It contained a proposal for annual meetings of the states parties and expert group meetings. While this part of the paper seemed to be intended to find common ground with other delegations, the price to pay would have been high, as the paper proceeded:

"The Conference takes note of the work of the AHG, and decides that the AHG and its mandate are herby terminated and replaced with the process elaborated in paragraphs 1, 2 and 3."

This proposal was a shock to everybody in the room. It was widely criticized and opposed. No delegation supported the proposal. It seemed as if the US deliberately had put forward a proposal that torpedoed the RevConf, as it was clear from the outset that a decision to end the mandate of the AHG was unacceptable to almost all delegations. Moreover, this proposal seemed completely unnecessary, because at this point of the RevConf proceedings, discussion had already been focussing on a follow-up process, not on the continuation of the AHG. Since it was impossible to reach compromise on a final document, the RevConf decided by consensus to adjourn and reconvene from November

11, 2002 to November 22, 2002. The draft final declaration was put aside, and only an interim report was finalized.

In spring of 2002, the US government reiterated its position that it would not return to any kind of traditional arms control policies in the field of BW. Now it remained even unclear whether the Bush administration was prepared to accept any follow-up process between RevConfs. The EU on its part did not aim at returning to protocol negotiations in the AHG either, but in order to avoid another confrontation between the US and NAM countries, the EU preferred to retain the dormant status of the AHG and refer to it as a "sleeping beauty". In order to keep the multilateral framework alive, the EU's goal was to establish a follow-up process, consisting of annual meetings. Topics to be discussed included: CBMs; a Scientific Advisory Board; Codes of Conduct; improved surveillance of outbreaks of diseases; assistance in case of outbreaks of diseases and alleged use of BW; national legislation to implement the BWC; legislation on protection of dangerous pathogens; clarification of compliance concerns; investigations in cases of compliance concern.

By September 2002, it was clear that the Bush administration intended to have only a very short RevConf meeting in November 2002, declaring that the next RevConf was to take place no later that 2006. Any kind of follow-up process was opposed – because it was feared that a follow-up process could become a backdoor for other delegations to return to the protocol negotiations. At the same time, John Bolton, undersecretary of state for arms control and international security, stated that the US would be open for an agreement on further proposals to address the BW threat, but that such an approach could only be successful if it was arranged prior to the RevConf meeting.

At the opening of the RevConf on November 11, 2002, chairman Tibor Toth presented a draft decision. His paper proposed three annual meetings of the states parties commencing in 2003 prepared by expert meetings to be held prior to every meeting of states parties. The aim of the meetings was to discuss, and promote common understanding and effective action on:

- The adoption of national measures to implement the prohibitions of the Convention, including penal legislation;
- national measures to establish and maintain the security and oversight of pathogenic micro organisms and toxins;
- enhancing international capabilities for responding to and investigating the effects of cases of alleged use of BW or suspicious outbreaks of disease;
- strengthening and broadening national and international efforts and existing mechanisms for the surveillance, detection, diagnosis and combating of infectious diseases;
- the content, promulgation, and adoption of codes of conduct for scientists.

The 2006 RevConf would consider the work of these meetings and decide on any further action.

Despite the opposition of some delegations, mainly representing NAM countries that did not appreciate the "take-it-or-leave-it" approach on which the Toth proposal was based, the language of Toth's draft proposal was finally adopted. Fortunately, a very small majority of those in Washington who supported the continuation of a multilateral process won the internal dispute against those who preferred no meetings between RevConfs at all. However, the mandate of the meetings is weak and directed only at recommendations on national measures that the states parties should adopt individually. In addition, states parties may provide assistance to other states parties to implement these measures. However, the "new process" does not aim at strengthening the convention itself. Rather, the US was successful in redirecting the BWC discussion process from traditional arms control to measures that would largely be implemented on a national basis with meetings of states parties only concentrating on how efforts in certain fields should be coordinated. This is certainly true for items 1 and 2 that are on the agenda for 2003. Moreover, for the first time a BWC RevConf ended without a final declaration covering the review of the BWC articles. Therefore, the RevConf did not meet its prime function described in Article XII of the BWC, which states that the purpose of RevConfs is to review the operation of the Convention with a view to assuring that its purposes are being realized. At the same time, no decision on the future of the AHG was made.

In any case, the outcome of the RevConf was a compromise between the US, EU and the NAM that kept the multilateral framework alive.

First meeting of Experts, August 2003

Participation in the first meeting of experts that took place from August 18 to August 29, 2003 produced satisfactory results with 83 states parties taking part. Not only did a relatively large number of delegations come to Geneva, but many of them brought with them internationally well respected experts on the items to be discussed. However, other delegations often consisted of diplomats coming from CD embassies based in Geneva and therefore often lacked expertise. The general atmosphere can be described as productive, avoiding any ideological struggle. Even those delegations that openly reiterated their disappointment with the failure of the AHG to finalize a BWC protocol and the outcome of the Fifth RevConf agreed to work constructively within the new process. This was also the case for those delegations that believed that the agenda of the new process was too narrow, in particular in regard to the missing link of the agenda items to Article X of the BWC.

Presentations often were of high quality, but sometimes got too detailed. Participating delegations produced a lot of paper, so that even those states parties that did not come to Geneva now have an opportunity to inform themselves about the results of the conference.

During the first week, delegations discussed the topic "national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation." 37 papers were presented on this item. It became evident that those countries that had already passed national legislation often followed similar approaches with analogue key elements that could be identified in many presentations. The UK delegation presented a working paper, which proposed the following core elements for implementing penal legislation:

- Prohibitions criminalising the development, production, stockpiling, acquisition, retention and transfer of microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification or prophylactic, protective or other peaceful purposes; and weapons, equipment or means of delivery designed to use such agents or toxics for hostile purposes or in armed conflict;
- Extraterritorial application of these prohibitions if undertaken outside the State party, but only if they are done by a State Party person (individual or corporate);
- Specifying penalties on conviction for contraventions of these core prohibitions;
- Provisions for offences by corporate bodies as well as individuals;
- Powers of search and for obtaining evidence in cases of suspected breaches of the legislation;
- Corresponding changes in military law to reflect the introduction of these prohibitions and to govern the conduct of the armed forces;
- Prohibition of assisting others, whether in the State party or overseas, to breach any of the Convention's prohibitions.

During the second week, delegations discussed "national mechanisms to establish and maintain the security and oversight of pathogenic micro organisms and toxins". 26 papers covered this issue. It was made obvious in the discussions that the US followed a "Bio security" approach that mainly aimed at preventing access for terrorists to dangerous pathogens, whereas many other states parties followed a "Bio safety" approach that also contains aspects of protecting humans, animals and plants as well as the environment against dangerous biological material.

Some delegations wanted the expert meeting to end with

- a summary of key elements of national legislation on the prohibition of BW;
- an offer to assist those states parties that did not pass such legislation yet or whose legislation still contains loopholes, for instance by publishing lists of experts who could provide assistance;
- the preparation of recommendations on the possible extension of CBMs that could be agreed upon in November 2003 at the meeting of states parties and transferred to the Sixth RevConf in 2006.

Regrettably, it was not possible to reach consensus on these ideas. The final report of the expert meeting that was adopted only concentrated on procedural aspects. Therefore, it will be the responsibility of the meeting of states parties in November 2003 to agree upon any common language to be transferred to the 2006 RevConf, which - according to the mandate of the new process – has to review the work of the 2003 to 2005 annual meetings and decide on any further action.

Conclusion

Some have argued that the years between 1991 and 2001 can be described as the "lost decade" for the BWC. In fact, for those who aimed at enhancing the BWC, the current situation is more than disappointing as the "new process" does not include any road map of how to return to negotiations that would result in strengthening the BWC itself.

However, the current situation includes a couple of positive elements:

- The "new process" keeps the US, but also critical states in terms of BW proliferation, inside a multilateral framework.
- The series of expert meetings and meetings of states parties that will convene until 2006 offers an opportunity of keeping global attention on the biological weapons problem and for generating greater knowledge of an engagement with this issue.
- The "new process" offers an opportunity to focus in the debate on certain important items. Interestingly, South Africa suggested during the second NPT PrepCom that future NPT PrepComs should be organized in a way the BWC new process was created, i.e. parts of the meetings should be reserved to discuss, and promote common understanding and effective action on a small number of specific issues.
- The items on the agenda are very important, particularly regarding the aim of preventing BW proliferation in general and BW terrorism in particular. Any progress, even if only possible on the national rather than on the international level would be highly appreciated. Therefore, it is worth to support the "new process".

It would be decisive for the future of the "new process" that the first meeting of the states parties in November 2003 agrees on a document, including, *inter alia*,

- core elements of national legislation, prohibiting and penalizing offensive BW activities;
- assistance to states parties to create such legislation;
- connect these efforts with the already agreed upon CBMs.

The new process is an important project to deal with the problem of BW proliferation and BW terrorism. However, until 2006, the enhancement of the BWC itself will not be on the agenda. The burden will be on sixth RevConf 2006 to decide whether the time is ripe for renewing negotiations on strengthening the Convention.