

# **ROUTE-MAPS TO OPBW: USING THE RESUMED BWC FIFTH REVIEW CONFERENCE**

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Why is there no Organization for the Prohibition of Biological Weapons (OPBW)? The world has had its OPCW for 5 years. No one would want to suggest that biological weapons constitute a lesser threat than chemical weapons, or that biological disarmament is less in need of strengthening than chemical. Yet that is the signal which governments and their disarmament diplomats risk sending out, if they abandon their efforts of 1995–2001 to create an OPBW. Even putting those plans on indefinite hold

suggests a complacency strangely out of kilter with the times we live in.

OPBW is a casualty of the stalling of the BWC Protocol, blocked by deadlock in the Ad Hoc Group at its 24th session (July–August 2001). This occurred after the United States announced that it could not accept the current Chairman's Composite Draft for the Protocol or any amended version of it, when in the recriminations which followed the Group was unable even to agree a procedural report.

Without the Protocol, there will be no OPBW. It is therefore an urgent task for the projected Second Special Conference to be convened, to adopt the Protocol and open it for signature. This conference, for which London remains on offer as a venue, has long been key to the majority view among states parties of how the BWC is best strengthened: by a legally binding instrument, including possible verification measures and other strengthening measures, which would be additional and supplementary to the Convention itself.

The procedure for concluding such an instrument, now known as the Protocol, was laid down at the First Special Conference in 1994, which took the scientific experts' findings of the VEREX exercise (1992–93), converted them into political proposals and propelled them on to the diplomatic agenda by formulating the mandate for a new Ad Hoc Group of BWC States Parties.<sup>1</sup> Under the 1994 mandate it was to a Second Special Conference that this new Ad Hoc Group was to report when it had successfully concluded its labours. But the Group can only proceed by consensus. And after six and a half years' work, from 1995 to 2001, it found its route to consensus blocked. Hence the current impasse.

This article offers two route-maps towards OPBW. One route-map passes through a 25th session of the Ad Hoc Group. The other assumes the Group to be wrecked beyond repair and, by substituting the authority of the Fifth Review Conference for that of the First Special Conference, transmits the draft Protocol direct to a Second Special Conference. Either way, the routes converge on London where a Second Special Conference is overdue to adopt the Protocol, open it for signature and launch a Preparatory Commission for an OPBW composed of the signatory states.

Both routes require creative use to be made of the forthcoming session of the BWC Fifth Review Conference, to be resumed in Geneva 11–22 November 2002. Even if it cannot be expected to register immediate, substantive advances in the BWC treaty regime, the November session can at least take decisions which will enable subsequent gatherings to steer that regime towards recovery after the shocks to which it was repeatedly subjected in the second half of 2001.

### ***Decisions and majorities: the November options***

One decision could be to encourage the Chairman of the Ad Hoc Group to convene its 25th session, at the same time giving a strong steer to the Group to use that session to conclude the Protocol on the basis of the Chairman's Composite Draft and to forward it to a Second Special Conference for adoption. Such a decision might include firm dates for both gatherings, or time limits within which they must take place.

The other decision, which would be all the more necessary if it appeared likely that the consensus rule in the Ad Hoc Group would continue to be used to block further negotiation of the Protocol, or even to obstruct the Chairman in his efforts to convene a 25th session, would be to convene the Second Special Conference in London in 2003, directly under the authority of the Fifth Review Conference. The Second Special Conference would then be mandated by the Fifth Review Conference, as the First Special Conference had been mandated by the Third Review Conference. By having the original 1994 mandate for the conference replaced

with a 2002 one, the Second Special Conference would be freed from the obligation to receive the draft of a legally binding instrument, for adoption as the Protocol, from the Ad Hoc Group and that Group alone. Instead, under its new mandate it would be free to receive the text forwarded to it by the Fifth Review Conference. The latter could also include in this new mandate a decision-making procedure for the Second Special Conference which would stop it being blocked by the same inflexible application of the consensus rule which had paralysed the Ad Hoc Group in 2001 and rendered its revival doubtful in 2002.

At first sight the two decisions may appear to be alternatives. However, there might be value in taking both decisions, with the second to be applied only if the first is not implemented by the dates specified. The effect of this would be to give the Ad Hoc Group one last chance, thereby respecting the procedure envisaged in 1994, but if it turned out that the Ad Hoc Group route to a Second Special Conference remained blocked then the second decision would come into play. The 1994 procedure would then be superseded by a mandate for the Second Special Conference to be convened under the direct authority of the Fifth Review Conference.

It should be helpful that the President of the Fifth Review Conference is concurrently the Chairman of the Ad Hoc Group, and was also in 1994 the President of the First Special Conference following his 1992–93 chairmanship of the VEREX Group. Clashes of personalities involved in the replacement of mandates are thereby averted: which is not to deny that Ambassador Tibor Tóth has a delicate task ahead of him in presiding over the resumed session of the Fifth Review Conference in November, especially if it comes to the mandatory 48-hour deferment of vote required under Rule 28.3 before, if necessary, a two-thirds majority vote is taken under Rule 28.4.

For these decisions may have to be taken by two-thirds majorities. Consensus is not sacrosanct, and all BWC review conferences have possessed the fall-back provision for voting in Rule 28 ever since the rules were first devised in 1979 [see Annex Box]. Until 2001 voting was seldom, if ever, considered; but the precarious state of the BWC now requires fresh thinking about its decision-making procedures, and this November a rule left unused for 23 years may come into play for the first time. A temporary abandonment of the consensus tradition may be a necessary price to pay for relaunching the stalled diplomatic process of strengthening the BWC, if that is the only way to get the Protocol negotiations unblocked — with the goal, among many other benefits, of creating an OPBW.

If consensus is being relentlessly blocked, voting may be the only way around the blockage. It should not be applied to more decisions than absolutely necessary: in particular, as much as possible of the Final Declaration should continue to be adopted by consensus. The arguments for resorting to a vote at all are finely balanced. On the one hand, there is a proper reluctance to resort to voting because it is seen as divisive; 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 US government even further into the corner of its self-imposed isolation from the mainstream of BWC diplomacy. On the other hand, majority

voting is preferable to serial suspension as the fate of the Review Conference; the interests of the BWC should not be subordinated to speculative NPT considerations; and the credibility of the Convention could be damaged by any further adjournment or indecision on the part of the Conference. Voting is best avoided, under most circumstances; but persistent intransigence in US positions can only bring nearer the prospect of voting on 22 November 2002.<sup>2</sup>

### ***Towards OPBW: without the US at first?***

One common objection to bringing the Protocol into force, even without the United States, is that it would leave the rest of the world bearing the burden of compliance costs which industry located within the United States and US biodefence programmes would entirely escape; and for that reason alone EU and other pro-Protocol governments may come under pressure from relevant industrial and biodefence interests to save them from such an inequitable fate. However, it is not necessary to bring the Protocol into force to begin to reap the fruits of the OPBW harvest.

Consider the stages which would follow completion of the Protocol. Opening it for signature would enable signatory states to constitute themselves as a Preparatory Commission for the OPBW. The Preparatory Commission could appoint an Executive Secretary and the Executive Secretary could recruit staff to a Provisional Technical Secretariat. Between them, the PrepCom and the PTS could start shaping the embryonic OPBW.

This is what happened before the Chemical Weapons Convention entered into force, and what has been happening since the opening for signature of the Comprehensive Test Ban Treaty. The PrepCom/PTS phase for OPCW in The Hague lasted from 1993 to 1997. For the CTBTO in Vienna it has lasted since 1997.

Experience from both shows that the PrepCom/PTS phase is an active one, which the governments of signatory states — and NGOs — take seriously. It is, after all, their best chance to shape the future Organization and through it the application of the Protocol. Especially where the negotiators (whether the Conference on Disarmament for the CWC and CTBT or the Ad Hoc Group for the BWC Protocol) have left gaps or ambiguities, the scope for active diplomacy in the PrepCom is considerable. So too is the scope for their nationals to seek employment in the PTS and mould the definitive Technical Secretariat of the eventual Organization.

Institutional capacity would grow during the years following the Protocol's opening for signature. The OPBW would become ever more concrete a project. BWC states parties would come under some pressure to define their stance towards the Protocol, some standing aloof, some signing but not ratifying, and the keenest ratifying. This definition of attitudes itself would create a dynamic process within the BWC. There follows the likelihood of diplomatic alignments emerging around the prospect of an earlier or a later date for entry into force, and interacting with domestic debates within the United States with the possibility of new policy reviews eventually replacing the hostile stance of 2001 with a more positive US attitude towards the Protocol.

So enabling the Protocol to be opened for signature would not commit governments to an early entry into force, yet OPBW benefits could begin to flow during this interim period, to the advantage of a recovering BWC regime.

### ***US policy not the only obstacle***

The discussion in this article so far may have implied that only the United States stands between the BWC and its Protocol, and hence current US policy is the only obstacle on the road to an OPBW. However, an important corrective to this over-simplified view has recently been offered by Daniel Feakes and Jez Littlewood. They make the point, from close observation of the negotiations, that

In terms of the AHG [Ad Hoc Group], the perception that the Protocol was agreed until the US rejected it has to be replaced by a recognition that other countries besides the US had put significant obstacles before the AHG which still had to be overcome.<sup>3</sup>

They cite as a significant obstacle the tension of April–July 2001 over whether the Chairman's Composite Draft should supersede the Rolling Text: "a small, but politically powerful, group of states" wanted negotiations to continue on the Rolling Text. Had they been willing instead to welcome the Chairman's Composite Draft as a necessary compromise, the 23rd session and the intervening weeks could have been used to get closer to agreement at the opening of the 24th. In the event, however, US intransigence at the 24th session fortuitously obscured their reservations and they acquired an undeserved credit by default. The significance of continuing to focus exclusively on the Rolling Text was that it denied an early conclusion to the negotiation of the Protocol. "Reaching agreement in 2001 was not important to these states."

Feakes and Littlewood cite, as a key document in this resistance to the Chairman's Composite Draft taking centre-stage, a working paper of 4 May 2001, the *Joint Statement on the Process of the BTWC Ad Hoc Group Negotiations*<sup>4</sup> submitted by China, Cuba, Islamic Republic of Iran, Indonesia, Libyan Arab Jamahiriya, Pakistan and Sri Lanka. This small group, a minority among the 56 states participating in the 23rd session:

maintained that the rolling text was the sole basis of the negotiations and issued an explicit call for a return to negotiations based on this.<sup>5</sup>

Since the US rejection, however, some movement in favour of the Protocol has been noted, and it may be that a move to reinvigorate the Protocol would gather support among this group of states. The new situation may have superseded the Joint Statement: this remains to be seen.

### ***Implications for the November options***

Would those states be ready now to promote the Chairman's Composite Draft as the definitive text of the Protocol, without need of much further negotiation? If the answer is yes, the Fifth Review Conference could expect to vote by a larger than two-thirds majority for going down the route outlined above, of (a) setting dates or time-limits for a 25th session of the Ad Hoc Group to conclude the Protocol on the basis of the Chairman's Composite Draft and for the Second Special Conference to adopt it, and (b) in case of continued

failure of the Ad Hoc Group to reach consensus, conferring a direct mandate on the Second Special Conference, to be convened under the authority of the Review Conference, and commending the Draft directly to that body for adoption under its new 2002 mandate.

If however the answer is no, the Review Conference might still be able to get the negotiations reopened. This would require a decision, probably again by a two-thirds majority, to refer further negotiation to a 25th session of the Ad Hoc Group and, if US refusal of consensus continued to block that route, to a substantive session, in addition to the usual procedural session, of the Preparatory Committee for the Second Special Conference (not to be confused with the subsequent OPBW Preparatory Commission of states signatories to the Protocol). That would be an unusual use of a PrepCom, but a necessary one, if on the one hand the US continues to block the Ad Hoc Group route and on the other the states responsible for the Joint Statement of 4 May 2001 are not yet ready to commend the Chairman's Composite Draft as superseding the Rolling Text. It would be necessary in order to get the Protocol negotiations back on the road.

Those governments which have "talked up" the Protocol despite the US rejection will have a special responsibility in November to give effect to their words. If they really believe that the Protocol is the key to strengthening the BWC, the resumed session is their opportunity to improve its chances of survival, with or without the United States, and with or without the Joint Statement group.

### ***The Madrid Commitment and the BWC Protocol***

European and Latin American states can be seen as the core of a two-thirds majority to rescue the Protocol in November, especially after the Madrid summit of 17 May 2002. This European Union meeting with the states of Latin America and the Caribbean issued a 33-page political declaration, the *Madrid Commitment*.<sup>6</sup> Significantly they declare, after reaffirming the struggle against proliferation of CBW, an equal commitment to "the reinforcement of disarmament instruments in this field." [Emphases added.]

The *Madrid Commitment* continues: "We will continue to work together for the complete eradication of chemical and biological weapons." The BWC and CWC are the

## **RULES OF PROCEDURE FOR THE BWC REVIEW CONFERENCES**

### **SECTION IV: VOTING AND ELECTIONS**

#### ***Rule 28***

#### ***Adoption of decisions***

1. Decisions on matters of procedure and in elections shall be taken by a majority of representatives present and voting.
  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.
  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.
- [paragraphs 5 and 6 are not reproduced here]

*Source:* United Nations, *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, Annex II, *Draft Rules of Procedure* (1 May 2001). Available at <http://www.opbw.org>

***Historical note:*** Rule 28 of the BWC Review Conferences has remained unchanged since the Provisional Rules of Procedure were recommended to the original (1980) Review Conference by its Preparatory Committee. Those Rules were adapted by the Preparatory Committee, at its session in Geneva, 9–18 July 1979, from the Rules of Procedure which had governed the First Review Conferences of the Nuclear Non-Proliferation Treaty in 1975 and of the Sea Bed Treaty in 1977. The Preparatory Committee reported that it had made five changes, including simply changing the word 'Treaty' to 'Convention'. But no other of these changes affected Rule 28, which can therefore safely be 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 the scope of this article but suggest an interesting subject for research.

*Sources:* United 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); *Report of the Preparatory Committee*, BWC/CONF.I/3 (2 January 1980) paragraph 9.

“disarmament instruments” in need of reinforcement; and in the case of the BWC:

We underline that it is our conviction that the latter Convention is best enhanced by the adoption of a legally binding instrument to oversee the prohibition of the development, production and stockpiling of biological and toxin weapons and their destruction. We continue to support the objective of attaining a regime that would enhance trust in compliance with the Biological Weapons Convention in accordance with the mandate of the Ad Hoc Group set up under the said Convention.

The language is sufficiently specific to commit both Europe and Latin America to something closely resembling the Protocol. If they are genuine in this commitment — and there is no reason to doubt it — we have here the nucleus for a two-thirds majority in November and for the original signatories to the Protocol and hence members of the OPBW PrepCom. Significant levels of additional support from outside those two regions could be expected, based on their statements in 2001, from such States Parties as Australia, Canada, Japan, New Zealand and South Africa.

Since the European Union first started taking “common positions” in the Ad Hoc Group — positions with which almost all non-EU members in the region, whether candidates for EU membership or not, were happy to associate themselves — it has raised its profile and intensified its political activity around the quest for the Protocol.<sup>7</sup> These trends continued under the recent Belgian and Spanish presidencies and seem likely to be maintained when Denmark assumes the EU presidency for the second half of 2002.

In the *Madrid Commitment* the Europeans and Latin Americans gave equal value to disarmament with non-proliferation. This is a timely reminder that the disarmament obligation is central to the BWC and will be central to its Protocol and OPBW.

### ***Treaty relationships and reciprocity***

At this point it may be worth restating some basic propositions about disarmament treaties, which may have been in danger of being overlooked. They underscore the case for the Protocol and for beginning to build an OPBW.

Treaty relationships are about reciprocity. We (in AnyState) want to make sure that no one attacks us with certain weapons so we want to make sure that no one has any. By the same token we want to reassure everyone else that we do not have any. They must be open with us and we must be open with them.

This reciprocity is the logic of verified disarmament; but in the absence of full verification it can also be the logic of a strengthened regime for the demonstration of compliance, which is essentially the regime embodied in the Protocol with its three pillars of declarations, visits and investigations, underpinned by purpose-built institutions.

Treaties are not just about constraining or deterring the enemy (whether ‘rogue states’ or ‘terrorists’). They have other functions too. The Protocol, through its interlocking machinery of OPBW and National Authorities, will embody and promote reciprocity among its states parties. They will be able to reassure one another, more reliably and systematically than hitherto, that they are fully committed to

biological disarmament and that all their industrial activities and biodefence programmes are demonstrably consistent with this commitment.

As important as reassuring one another (as government to government) is reassuring the attentive public. This may well require better solutions to the problem of confidentiality between OPBW and governments than OPCW has come up with in the first five years since the CWC’s entry into force. Governments in the 21st century are not accountable exclusively to one another. Greater openness about permitted activities, combined with legislative scrutiny and National Authority advisory committees, should serve to reassure healthily sceptical citizens that their government is fully in compliance with its international obligations.

Treaty relationships solidify an agreed norm of behaviour and make it harder to overturn. Each state party stands guard over the others, and the watchfulness of treaty partners discourages backsliding. The relevance of this to the Protocol is that the latter would have value even if initially confined to a core group of states most strongly committed to the BWC and least likely to be suspected of undermining it. They would be mutually supportive in reinforcing, and giving organised expression to, their shared commitment.

They would bear the costs, of the Organization and of compliance more generally; but they would also be in charge. Governments want to be where key decisions are being taken. They would be in a strong position from the start to shape an OPBW which both served their own interests as a core group and turned an open face to the rest of the world so as to attract steadily widening participation. Moreover, as noted already, they could hold back from entry into force and keep the OPBW in its PrepCom/PTS phase if they judged it prudent to await particular ratifications. Formal numerical conditions for the entry into force of a treaty do not eliminate the network of informal understandings whereby some unofficial preconditions are judged more essential than others: it is in this light that the tolerability of an OPBW without US participation will eventually have to be judged.

### ***Conclusion***

Institutions are never a panacea for international problems. But without appropriate institutions problems can just get worse. To get the Protocol back on track and thereby relaunch the agenda of building the National Authorities and OPBW should be the aim of the Fifth Review Conference in its resumed session. Institution-building could give a psychological boost to the BWC. It is high time that a sense of purposeful forward movement replaced the current sense of drift, awaiting the next shock, which has nearly paralysed the diplomacy of biological disarmament.

### ***References and Notes***

1. Nicholas A. Sims, *The Evolution of Biological Disarmament* (Oxford: OUP for SIPRI, 2001) p 104.
2. Nicholas A. Sims, ‘Return to Geneva: The Next Stage of the BTWC Fifth Review Conference’, Review Conference Paper No. 5 (April 2002) in Graham S. Pearson and Malcolm R. Dando (eds.), *Strengthening the Biological Weapons Convention: Review Conference Papers* (Bradford: University of Bradford, Department of Peace Studies, 2002) p 5.

3. Daniel Feakes and Jez Littlewood, 'Hope and Ambition turn to Dismay and Neglect: The Biological and Toxin Weapons Convention in 2001', *Medicine, Conflict and Survival*, vol. 18 (2002) p 170.

4. BWC/AD HOC GROUP/WP.451 (4 May 2001)

5. Feakes and Littlewood (2002), p 163.

6. European Union, Latin American and Caribbean Summit, *Political Declaration: The Madrid Commitment*, 8802/02 (Presse 133), Madrid, 17 May 2002.

7. On this see Daniel Feakes, 'The Emerging European Disarmament and Non-Proliferation Agenda on Chemical and Biological Weapons', *Disarmament Diplomacy*, no. 65 (July/August 2002)

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