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# Light at the End of the Tunnel?

The Sixth Review Conference of the  
Biological Weapons Convention

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## Summary

The Sixth Review Conference of the Biological Weapons Convention (BWC) ended on December 8<sup>th</sup>, 2006 with a consensual agreement on a Final Declaration, something the BWC regime had not seen since 1996. This document represents a comprehensive and thorough review of the BWC. It reaffirms some important understandings, most notably the prohibition of biological weapons use and the comprehensive scope of the BWC; it also contains an updated reflection on the role of the BWC regarding non-state actors and bioterrorism, an increased emphasis on national implementation, and a recognition of synergies with international organisations and civil society.

States parties agreed on several additional measures: they decided on a new intersessional process with annual meetings and a work programme for 2007-2010; they established a small Implementation Support Unit (ISU) in Geneva that will provide administrative support, facilitate communication among states parties and manage the confidence-building measures (CBMs); and they decided to promote universality of the BWC. The working atmosphere had improved significantly since the previous review conference, and there was a willingness to work constructively and pragmatically throughout much of the negotiations. Of the two basic conflicts in the regime, the one concerning cooperation, technological exchange and export controls permeated the negotiations again but did not block consensus in the end. The other one around verification and a legally binding document to strengthen the BWC did not come to bear directly, as there was a tacit agreement not to include these issues in the negotiations, but it was nevertheless palpable in the background. Likewise, general political tensions, especially between Iran and the USA, impacted on the deliberations but did not prevent a substantive consensual outcome.

What does this outcome mean for the BWC regime? Is there light at the end of the tunnel? Considering the difficult political situation in the regime since 2001, when the efforts to strengthen the BWC through a legally binding compliance protocol failed, and applying a pragmatic viewpoint, the answer is yes. Viewing the results from a more conceptual arms control perspective, however, the assessment must be somewhat more sober.

In the political situation prior to the review conference, the conditions for success were far from ideal: Given the desolate state of the regime after 2001, it was no matter of course that a meaningful outcome could be achieved at all. But the full review and the new understandings contributed to solidifying the regime, and the conference results provide a good starting point for pragmatic steps to tackle issues such as national implementation, prevention of bioterrorism and misuse of biological agents, awareness-raising, domestic preparedness and surveillance of infectious diseases. There was also a sense of activism, ownership of the BWC and a convergence of views on some problems that bodes well for the new intersessional process and the future work in the regime. However, the focus is currently only on one dimension of the BWC regime, namely on problems that affect all states parties but that are exogenous to state-to-state relationships.

If, in a conceptual view, the function of arms control is seen in stabilising inter-state relations, preventing armaments, and building confidence between states, the review conference was much less successful in these respects. To fulfil this function, there needs to be a stable, reliable framework for state interaction with a certain degree of predictability and trust in the other parties' compliant behaviour. But the Final Document remains weak on procedural issues, and there could be no agreement on any new binding obligations, not even in connection with the intersessional topics. Transparency measures like the CBMs could not be significantly improved, and compliance and verification were left aside completely. The latter strategy was essential to avoiding exacerbation of the tensions and to achieving the above-mentioned successes. Nevertheless it means that a whole dimension of the BWC as an arms control instrument is being neglected.

The assessment of the conference from these two perspectives leads to recommendations that reflect the same two-pronged approach. In the current situation, the primary focus will be on the work in the new intersessional process. Most of the topics of 2007 and 2008 – national implementation, biosafety, biosecurity, codes of conduct – were already discussed in the last process, so that there is ample material available for substantive discussions. All these topics could be translated into action more effectively if states parties could agree on a systematic reflection and on introducing binding recommendations. If effective follow-up action can be induced, this could address important problems and mitigate some of the deficits of the regime as regards implementation, preparedness against bioterrorism and prevention of the misuse of biotechnology.

The topics for 2009 – international cooperation, technological exchange and capacity-building to counter infectious diseases – and 2010 – assistance and preparedness in the case of biological weapons use – are new in the intersessional discourse and will require thorough preparation. Both contain areas that have long been of concern to developing countries in the Non-Aligned Movement. The intersessional meetings will provide an important opportunity to discuss the perceived problems and different views around technological cooperation and development. Contrary to some concerns expressed during the review conference, such a discussion could actually contribute to de-politicising and de-ideologising this issue, as it forces states to reflect on and express their expectations, define their needs, and recognise what is already being done. If the discussions can be conducted as factually and pragmatically as in the last intersessional process, they could not only tackle problems of development, public health and disease surveillance, but might even contribute to objectifying a long-standing conflict in the regime.

With a longer-term view to the arms control dimension of inter-state relations, several ideas could be considered that go beyond the topics of the intersessionals but are based on existing measures and thus do not require new negotiations. States parties could review and make use of the consultation procedures under Article V to address not only grave compliance concerns, but also other problems. This would provide for an additional framework with regular procedures in which states parties can discuss specific problems, e.g. issues related to development and technological cooperation, or the CBMs. Collective action on CBMs might not be possible until the next review conference, at the earliest, but

states parties could individually explore the scope for improvements and increased transparency. Moreover, states parties could support the UN's efforts to strengthen the Secretary General's mechanism to investigate alleged biological or chemical weapons use, for example through training sessions for the experts. Especially if combined with procedures for assistance, this would enhance the ability of states parties to respond to the gravest compliance concerns possible. Finally, making the BWC norms universally binding through international customary law could be considered as a parallel strategy to universalising treaty membership. This would provide for a more solid normative basis for action against proliferators and would enhance the role of the UN Security Council and Secretary General in connection with biological weapons proliferation.

The first set of recommendations could bring real progress in the current situation and to the dimension of practical and shared "biological problems". The second set could pave the way for some modest improvements to the arms control dimension of state-to-state relations and compliance. While the constant interaction in the regime may contribute to improving state relations, this cannot be taken for granted, especially should more confrontational situations arise. In the long term, it would therefore be necessary that states initiate a new discourse on compliance and verification and consider new approaches to these issues, as a return to the protocol approach would be neither feasible nor desirable. Until political circumstances allow for this, strengthening the procedures available in the BWC right now could mitigate some deficits in the regime. Only if both dimensions are addressed – not necessarily in a one-in-all approach, but in the same framework of action – will the regime be truly strengthened and the potential of the BWC as an arms control instrument and core of the regime be fully exploited.



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## 1. Introduction<sup>1</sup>

The fear of sickness and death is as old as humankind, and the deliberate use of disease as weapon has been morally condemned and outlawed for over a century. With the Biological Weapons Convention (BWC), which was concluded in 1972 and entered into force in 1975, biological weapons became the first category of weapons to be prohibited completely and comprehensively by international law.<sup>2</sup> The BWC has 157 member states. Every five years, these states hold review conferences that offer the opportunity to review the operation of the treaty, to assess its effectiveness, and to agree on additional measures to improve biological weapons control.

In the BWC regime, such improvements are urgently needed. Although biological weapons have seldom been used by states or by non-state actors (Wheelis et al. 2006; Tucker 2000), several developments and characteristics specific to the biological field require close attention and effective control mechanisms.<sup>3</sup> There is rapid progress in biotechnology and the life sciences, including in genetics, synthetic biology, nanotechnology, and other areas.<sup>4</sup> Although these developments are primarily intended for benign applications in medicine and pharmacology, many of them could be misused for malign (weapons) purposes. This reveals a fundamental problem of biological weapons control: the dual-use character of many scientific techniques, agents and equipment. The same activities or substances can often have (legitimate) civil or defensive and (illegitimate) offensive applications, which makes it difficult to distinguish between legal and illegal activities and impossible to simply ban certain activities or materials.<sup>5</sup>

The dual-use problem is especially grave given that the scientific and technological developments could theoretically lead to an increased interest in biological weapons by states and non-state actors, as these developments might enhance the weapons' effectiveness and military utility (which to date has been considered low). As for state programmes, the BWC permits research and development as long as it serves purely defensive purposes. However, due to the dual-use nature of much of this research, its purpose can be determined from the outside only under very transparent conditions. In the absence of such transparency, especially if others distrust the defensive nature of a

1 I would like to thank Giorgio Franceschini, Alexander Kelle, Jez Littlewood, Harald Müller, Tabea Seidler and Jonas Wolff for their very helpful comments and the Deutsche Forschungsgemeinschaft (DFG) for financial support. Moreover, I am grateful to those who provided important advice and information but prefer to remain anonymous. The views expressed in this paper are solely my own views.

2 The text of the BWC can be found at <http://disarmament.un.org/TreatyStatus.nsf>; 20.06.2007.

3 For the following cf. Wenger/Wollenmann (2007).

4 For an overview of relevant developments cf. e.g. Kelle et al. (2006); Wheelis (2002).

5 The negotiators of the BWC tried to address this problem by inserting the so-called "general purpose criterion" in Article I of the treaty: It prohibits any biological agents and toxins "of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes" and any equipment "designed to use such agents or toxins for hostile purposes or in armed conflict".

programme or use this as an excuse for their own activities, the risk of biological armaments could be growing in the future. Moreover, if non-state actors with an interest in biological weapons gained access to new discoveries, they could abuse them e.g. to carry out bioterrorist attacks. Large-scale and mass casualty attacks with biological weapons are technologically demanding and require resources that are hardly available outside state-run programmes; they may hence not be very likely.<sup>6</sup> But even small-scale attacks like the Anthrax letters in the USA in autumn 2001 could have enormous psychological and economic effects. The BWC is binding only upon states and not upon non-state actors, but if implemented fully, it can provide useful tools for countering bioterrorism. A strong BWC regime can thus more effectively prevent state and non-state actors from acquiring biological weapons.

However, the existing deficits of the BWC regime – including in the areas of compliance, verification, transparency, and national implementation – render the control of biological weapons less effective than it could and should be (chapter 2). Review conferences provide opportunities to initiate steps to strengthen the regime, but any attempts to mitigate the current deficits have to take place in a difficult political context, as they have to cope with general political tensions and with long-standing conflicts in the regime (chapters 2.2.2 and 3).

Despite these political difficulties, the 6<sup>th</sup> review conference of the BWC ended on December 8<sup>th</sup>, 2006 with agreement on a Final Declaration, something the BWC regime had not seen since 1996. The Final Document contained not only a full article-by-article review of the convention, but also several additional agreements and understandings intended to strengthen the convention (chapter 4). The full review is generally deemed a success, but while some consider the outcome an important step forward and out of a “metaphorical valley” (Littlewood 2007: 15), others stress its limited nature and the fact that crucial problems of the regime such as verification, transparency in biodefence, and scientific and technological developments remain untackled (CNS 2007).<sup>7</sup> Assessing the outcome from two angles, this PRIF Report argues that both judgements are justified: Considering the difficult political context of the “post-protocol” regime since 2001 (chapter 3.1), the conference was certainly successful, as it paved the way for further steps towards better implementation and a more stable regime. However, viewing the regime from a conceptual arms control point of view, the assessment must be more sober, as the crucial deficits could not be addressed. Following the same two-pronged perspective, recommendations are made in chapter 5 with regard to the immediate outcome of the review conference, but also – based on the arms control concept as discussed in chapter 2 – with a look beyond it.

6 For an assessment of biological weapons and bioterrorism threats cf. e.g. Leitenberg (2005).

7 Cf. for conference analyses CNS (2007); Fox (2006); Guthrie (2007); Meier (2007); Khan (2007); Littlewood (2007); Pearson (2006b, 2007); Sims (2007).

## 2. Biological Arms Control

### 2.1 Arms Control as a Concept

Arms control theory as conceptualised after the end of World War II has three main objectives: reducing the risk of (nuclear) war by increasing stability and preventing arms races, reducing the costs of armaments, and limiting the damage in the case of war (Bull 1961; Schelling/Halperin 1985). Initially aimed at stabilising the relations between the USA and the Soviet Union, the concept has come to be understood as encompassing various measures aimed at limiting or reducing levels of armaments, restricting or preventing proliferation, building confidence, and increasing transparency.<sup>8</sup> Arms control hence includes measures designed to control the means of warfare and increase stability.

Past experience and conceptual considerations suggests that to reach this objective, arms control measures should ideally

- be reciprocal and non-discriminatory,
- include legally and/or politically binding measures and treaties in which agreed norms and principles are codified and which allow to distinguish between legitimate and illegitimate behaviour,
- be in accordance with international law,
- provide ways to determine (non-)compliance with the agreed measures,
- create a framework of rules and procedures which provide a certain degree of predictability.

Confidence-building plays a central role in this, as it is both a precondition and an objective of arms control.<sup>9</sup> Other preconditions, which are interlinked with confidence-building and mutually reinforcing, are transparency, verification, regular and regulated dialogue as well as stable communication channels between states. Measures that meet the above criteria form a complex web of political and diplomatic means to create and maintain stability. Moreover, continuous cooperation in international institutions and regimes can contribute to transforming state relations – to the positive, if confidence-building works and transparency helps create trust; to the negative, if distrust remains and if rules are perceived to be broken or applied in a discriminatory way. Viewing arms control from this angle illustrates that these measures are not an end in itself, but that they serve a certain purpose. Stable inter-state relations can be created in various ways, but a certain degree of reliability and predictability is necessary in any international environment that has no overarching authority and in which the perception of other states' actions often influences a state's own reactions.

8 Croft (1996); Goldblat (2002); cf. Burns (1993: 1ff.) for the relation between arms control and disarmament.

9 For a critical view on this "paradox of arms control" cf. Gray (1992) (later qualified in Gray (2003)).

Arms control has its merits in any multilateral context and with regard to any category of weapons that is perceived as a (potential) threat. The connection between transparency, confidence-building, predictability and stability is well established, and there is no reason to assume that this has changed after the end of the Cold War. It is hence argued that international arms control regimes, if effective, serve an important purpose in fostering international peace and security regardless of their systemic context.

Of course, (perceived) changes in the security environment and in the international system may require adaptations of arms control measures to specific regional contexts, to non-state threats and/or to technological developments. However, the underlying objectives remain relevant, as relative stability, even if it existed today, cannot be taken for granted but needs to be continually maintained and reconstructed. An ideal-type model of arms control would thus encompass agreements that are legally binding, codify principles and norms, and allow to distinguish legitimate from illegitimate behaviour. They would also contain measures to verify compliance and sanction non-compliance, and to enhance transparency and confidence among states parties. In sum, they would provide a certain degree of predictability for those involved, which excludes measures perceived as arbitrary or discriminatory.

## 2.2 Biological Arms Control and the BWC Regime

### 2.2.1 *Strengths and Deficits of the Regime*

An analysis of the current biological weapons regime on the basis of these conceptual considerations would have to conclude that, while possessing some strengths, it is far from meeting this ideal (cf. Kelle 2003). Together with the 1925 Geneva Protocol, which prohibits the (first) use of biological, chemical and toxin weapons in warfare, the BWC forms the core of the biological weapons regime; in combination, the treaties provide a comprehensive legal framework and strong norms against these weapons.<sup>10</sup> States parties have repeatedly attempted to develop the regime further, and it has proved sufficiently dynamic to incorporate new measures and approaches, as is visible for instance from recent initiatives to prevent illegitimate access to pathogens and to improve public health and international cooperation. Yet, the regime also suffers from several shortcomings.

The BWC lacks measures to check and monitor compliance with the treaty. Efforts to remedy this deficit through a legally binding compliance protocol to the BWC failed in 2001 (see chapter 3.1). The BWC's existing compliance mechanisms are weak and only include consultations among states parties on problems arising in connection with the convention (Article V) as well as the possibility to request the UN Security Council to deal with suspected treaty violations (Article VI). Even though Russia/the Soviet Union, South Africa and Iraq (then a BWC signatory) are known to have violated the BWC (Wheelis et al. 2006), and even though the USA has repeatedly accused other treaty members of

10 For a critical view cf. Smithson (2004).

breaching the convention<sup>11</sup>, Article VI has never been invoked. One reason may be that involving the Security Council represents a grave step with potentially severe consequences, and states might be wary of such a strong action or fearful of reciprocal accusations. However, with suspected or alleged cases of non-compliance pronounced but not effectively addressed, confidence in the convention could be eroding.

One mechanism available to states parties and to the Security Council in this context is the UN Secretary General's mechanism, initiated in 1982 and elaborated in 1987, to investigate the alleged use of biological, chemical and toxin weapons.<sup>12</sup> The Secretary General could carry out such investigations if requested by UN members, the General Assembly, the Security Council, or on his/her own account. Several alleged chemical weapons and toxin uses were investigated between 1982 and 1992, but the mechanism was never applied to biological weapons. It is not institutionalised but relies on experts and equipment provided *ad hoc* by UN members. Until recently, the lists of experts and laboratories to be used in an investigation were outdated, but attempts to update them were initiated in 2002 by the UN Department for Disarmament Affairs (DDA, since March 2007 UN Office for Disarmament Affairs, ODA) and again through the UN General Assembly's Counterterrorism Strategy in 2006.<sup>13</sup> Probably owing to the new terrorism connection and maybe also due to a stronger awareness among BWC members, there seems to be a greater interest and willingness now to provide information, and the update process is apparently making good progress. In addition, UN ODA is reviewing the investigation guidelines and procedures. Nevertheless, the mechanism is but a virtual one, and its links with the BWC regime remain weak, as it is primarily related to the 1925 Geneva Protocol and several BWC members oppose tying it more strongly to the BWC.

In order to mitigate the compliance and transparency deficit, a system of confidence-building measures (CBMs) was set up in 1986 and elaborated in 1991 (cf. e.g. Chevrier/Hunger 2000; Isla 2007). These politically binding measures require states to annually submit information to DDA/ODA on research facilities of very high biosafety standards and on biodefence research, on outbreaks of infectious diseases, on relevant scientific publications, on the promotion of scientific contacts, on legislation and regulations related to the BWC, on former offensive programmes, and on vaccine production facilities.<sup>14</sup> The CBMs currently represent the only means available to states parties to enhance transparency and confidence in each others' compliance. However, participation has been poor – with an all-time high of 56 submissions in 2006<sup>15</sup> – and has

11 E.g. in US Department of State: Adherence to and Compliance With Arms Control, Disarmament and Non-Proliferation Agreements and Commitments, August 2005: 17ff. (<http://www.state.gov/t/vci/rls/rpt/51977.htm>; 20.06.2007).

12 UNGA Resolutions A/37/98 D (1982); A/42/37 C (1987); cf. Littlewood (2006); Tucker/Zilinskas (2002); Woodward (2004).

13 A/RES/60/288 (2006) (<http://www.un.org/terrorism/strategy-counter-terrorism.html>; 20.06.2007).

14 BWC/CONF.III/23 Part II (Annex).

15 An overview over CBM participation since 1988 is available at <http://www.unog.ch>; 20.06.2007.

therefore not yielded the expected results. Rather, CBMs remain another area in which action is urgently needed.

The BWC also suffers from a lack of organisational support (Sims 2006a; Sims/Pearson 2005; Findlay/Woodward 2004). International treaty organisations can provide logistic support to meetings, serve as communication channels and clearinghouses for information exchange, and allow for more regular and regularised interaction. The BWC has no such organisation and, until recently, even lacked any permanent institutional support. An organisational structure would also be important to monitor and effectively deal with the scientific and technological developments in fields related to the BWC, which are currently not being addressed adequately.

Up until recently, the obligation to nationally implement the BWC was neglected by a number of states parties (Woodward 2003), and there is still not enough pressure or incentive for states to fully implement the BWC.<sup>16</sup> This means that in many states there were (or still are) no – or no systematic and effective – national legislation and regulations to criminalise biological weapons-related activities and to prevent illegitimate access to dangerous materials, nor for procedures regarding CBM submission, cooperation under Article V and VI, or assistance under Article VII in case of biological weapons use.

Judged by the criteria of effective arms control listed above, the regime lacks several of the crucial elements, namely trust in other states' compliance (due to deficient implementation, a lack of verification, and a lack of transparency), and effective ways to deal with cases of suspected treaty violations. While there are still no institutionalised communication channels, either, the constant interaction in the intersessional process 2003-2005 has facilitated better communication among states parties. Nevertheless, for BWC members the lack of binding and well-developed procedures means a lack of predictability and potentially a perceived risk of falling victim to arbitrary action and accusations. Hence, the potential of the BWC to counter state and non-state threats and to deal with scientific developments is not fully exploited. Despite the strong norms, there is thus urgent need for action, but any attempts to mitigate the deficits and to strengthen the regime face a difficult political context.

### *2.2.2 Political Conflicts in the BWC Regime*

The members of the BWC regime are organised in three regional groups: The Group of Western and Other States (Western Group/WEOG), the Group of Non-Aligned and Other States (NAM), and the Group of Eastern European States (Eastern Group). This structure is based on political and socio-economic as well as geographic dimensions: it dates back to the Cold War with its two blocs and the non-aligned movement, and the WEOG and NAM largely consist of industrialised and developing countries, respectively.

<sup>16</sup> Information on national legislation related to the BWC is available at <http://www.vertic.org/datasets/bwlegislation.html> and <http://disarmament.un.org/Committee1540/list-legdb.html>; 20.06.2007.

In addition to general political differences, two BWC-specific conflicts permeate the negotiations even in seemingly unrelated areas and impact on the dynamics in the regime: the conflict between technological cooperation/development and export controls as well as around a compliance protocol to the BWC and, more broadly, verification. As regards the former, Article X of the BWC provides for cooperation and technological exchange in the peaceful use of the biosciences. It potentially conflicts with Article III that requires the prevention of biological weapons proliferation, which may include export controls and restrictions on transfers. NAM states have repeatedly complained that export controls are being applied by industrialised states in a way that inhibits technological exchange and development, while WEOG members have emphasised that export controls are part of Article III implementation. This creates constant (latent or open) tensions in the regime. Whereas NAM states often stress that the BWC contains “regulatory” (security) as well as “promotional” (cooperation/development) aspects, Western delegations hold the security aspects far more important and often reject proposals aimed at strengthening the “promotional” side. Interestingly, both sides have now adopted a similar rhetoric calling for a “balanced approach” and for viewing the BWC as a “composite whole” without singling out certain articles, with the NAM pressing for more attention to Article X and the Western states trying to prevent exactly that.

The second major conflict developed around the issue of verification and a legally binding document to strengthen the BWC. In 1994, BWC members mandated the Ad Hoc Group (AHG), a negotiation forum open to all interested parties, to negotiate a compliance protocol to the BWC, but the approach foundered on US opposition in 2001.<sup>17</sup> In keeping with its current attitude towards arms control, the USA still rejects any kind of binding measures or institutionalisation as well as anything else that could possibly lead to a BWC protocol. Verification had initially been a Western (though not US) preoccupation, and NAM states like China, India, Iran and Pakistan, as well as Russia, were reluctant to accept intrusive verification and inspection measures (Littlewood 2005: 98f, 227). Since 2001, however, the rhetoric, though probably not the basic attitude, has changed considerably. In the wake of continuing US opposition, verification has become a (rhetorical) priority for the NAM and Russia. The uncompromising US position allowed these states to hide behind it and safely and vigorously call for the protocol’s conclusion and implementation. At the same time, many Western states that remain committed to verification in the long term have rhetorically all but abandoned the subject to avoid alienating the USA. Instead, they have settled for a more limited and pragmatic approach that accommodates US interests and focuses on other aspects of the BWC.

17 The US argued that the BWC was not verifiable, that a protocol would lull states parties into a false sense of security while providing cover for treaty violators, that the provisions would jeopardise commercial interests and compromise US national security by yielding too much information about biodefence activities. Cf. e.g. Bailey (2002); Roberts (2003); Rosenberg (2001); cf. also Ward (2004); cf. more generally e.g. Chevrier (2001); Dando (2002); Kervers (2002, 2003); Littlewood (2005); Rissanen (2001).

### 3. The Biological Weapons Regime Prior to the 6<sup>th</sup> Review Conference

#### 3.1 The 5<sup>th</sup> Review Conference in 2001 and 2002

The failure of the protocol negotiations in July 2001 and the way it came about left the BWC and the regime in a deep crisis (Brugger 2002; Lennane 2006). At the 5<sup>th</sup> review conference in 2001, disagreement could be expected along the “traditional” conflict lines – compliance, export controls, and scientific and technological exchange and cooperation – anyway.<sup>18</sup> In addition, the USA dealt a near-fatal blow to the conference with a proposal to terminate the AHG mandate. This surprised even the US’s closest allies and provoked strong reactions from most delegations, including Western states. In order to avoid a complete failure of the conference, the president suspended it for one year to allow for a cool-off period and to gain time to explore possible alternative approaches.

After the events of 2001, relations between the WEOG and the NAM remained antagonistic and had soured even within the WEOG (Brugger 2002) when the 5<sup>th</sup> review conference resumed work in November 2002.<sup>19</sup> In order to maintain some kind of multilateral discussion in this very tense situation, a proposal for annual meetings had been worked out and consulted on and was presented by the conference president as a “take it or leave it”-package on the first day. This proposal, apparently tailored to win US tolerance, provided for annual meetings of experts and states parties between 2003 and 2005 on five narrowly defined topics. They resembled topics proposed by the USA in 2001 as an alternative to the compliance protocol.<sup>20</sup> States parties were to “*discuss, and promote common understanding and effective action*” on national implementation of the BWC, national mechanisms to ensure security and oversight of pathogens and toxins, international capabilities to deal with cases of alleged biological weapons use, national and international mechanisms to combat infectious diseases, and codes of conducts for scientists. There was no negotiation or decision-making mandate.<sup>21</sup>

Consultations during the conference were held informally, behind closed doors or in the regional groups only. For the WEOG and Eastern European states, the proposal presented an acceptable, though not necessarily for all desirable, interim solution, given that complete failure seemed to be the only alternative. Within the NAM, however, there was a strong reluctance to accept it as it was, as the work programme was perceived to follow US priorities and ignore crucial NAM interests, and there was a high degree of

18 For accounts of the conference proceedings cf. e.g. Brugger (2002); Rissanen (2002); Zanders et al. (2002).

19 For accounts of the resumed session cf. e.g. Chevrier (2002/2003); Hart et al. (2003); Meier (2002); Pearson (2002); cf. also Sims (2003).

20 White House, ‘Strengthening the international regime against biological weapons’, Statement by President George Bush, 01.11.2001 (<http://www.state.gov/t/ac/rls/rm/2001/7907.htm>; 20.06.2007).

21 BWC/CONF.V/17: 3-4.

frustration at the way it was imposed upon the states parties. Consensus could be secured in the end despite the very tense atmosphere, but it took a lot of diplomatic effort to persuade key NAM states to agree to the chair's proposal and at the same time keep the US on board.

### 3.2 The Intersessional Process 2003 – 2005<sup>22</sup>

Initial assessments of the new process varied between scepticism because the topics did not address the fundamental problems of the regime (e.g. Meier 2002), and cautious optimism that there might be "*much more to the new process than might first appear*" (Littlewood 2003: 63). Western states mostly defended the outcome as "the best we could get", but some also expressed dissatisfaction at the format of the process. The like-minded, more radical NAM members remained sceptical of its utility.

Contrary to the rather low expectations, the expert meetings were conducted in a constructive and productive way. Participants appreciated the opportunity to exchange views and information, to clarify concepts such as biosafety and biosecurity<sup>23</sup> (Guthrie et al. 2004) and to bring in stakeholders who had previously not been adequately involved (e.g. from academia, industry and international organisations). As these meetings served the sole purpose of facilitating such exchanges and compile factual reports, and as many delegations brought in technical experts with no "diplomatic baggage", there were no tensions comparable to those at the 5<sup>th</sup> review conference.

However, the meetings of states parties with their more political (and politicised) atmosphere revealed that these old tensions still lingered. Despite the constructive expert discussions, states parties could not produce tangible results or distil any "best practices" or recommendations out of the plethora of information gathered, but in each final report could merely "agree on the value of" certain measures and principles discussed during the sessions.<sup>24</sup> The lines of argumentation exposed the degree to which the protocol still divided states parties and remained the focal point of the BWC regime, and more than once, behind-the-scenes diplomatic interaction was necessary to secure consensus. At the same time, the process "gradually cooled the political temperature" (Khan 2007: 13), and it seems plausible to assume that the mere exchange of views and continuous interaction contributed much to the changed atmosphere that struck many observers as a surprise in 2006 and that was far from obvious only months before the conference started.

22 For descriptions and assessments of the whole process and the individual meetings cf. e.g. Guthrie et al. (2004; 2006); Littlewood (2003); Meier (2002); Pearson (2003a, b, 2004a, b, 2005a, b); Tucker (2004).

23 Biosafety means protecting against the accidental release of pathogens or other laboratory accidents, whereas biosecurity refers to protection against theft or illegitimate access. These concepts initially caused tensions for political reasons, since some perceived a new bias towards security measures, but also for linguistic reasons, since many languages simply do not distinguish between safety and security.

24 BWC/MSP/2003/4; BWC/MSP/2004/3; BWC/MSP/2005/3 (<http://www.opbw.org>; 20.06.2007).

### 3.3 Preparations for the Conference: Developments in 2006

#### 3.3.1 Early Preparations

Whereas the 6<sup>th</sup> review conference hovered in the background of all BWC meetings since 2001, the 2005 meeting of states parties marked the onset of more concrete proposals and ideas. Officially, the topic was codes of conduct, but several states seized the opportunity to present their views and priorities for the 2006 conference.<sup>25</sup> At the same time, it was uncertain whether the Preparatory Committee in April 2006 would even be able to agree on the duration of the conference – 2 or 3 weeks – and on an agenda.

Over the course of 2006, several track-two meetings were held to facilitate dialogue among states parties and to sound where there might be room for agreement and progress. Some meetings apparently facilitated identification of those issues that were likely to figure prominently in the review conference discussions: universality, the outcome of the first intersessional process, a new intersessional process, implementation support for the BWC, the CBMs, ways to deal with scientific and technological developments, verification, and the relationship between bioterrorism and the BWC (Geneva Forum 2006; Tokyo Seminar 2006). However, it seems there were still diverging views on the relevance, prioritisation and acceptability of some of these measures.

#### 3.3.2 EU Joint Action, Action Plan and Common Position

In February 2006, the European Union (EU) agreed on a Joint Action and an Action Plan.<sup>26</sup> The Joint Action aims at encouraging ratification of or accession to the BWC to promote its universality, and at supporting its national implementation in EU countries. Implementation of the Joint Action was commissioned to the BioWeapons Prevention Project (BWPP), an international network of NGOs committed to strengthening the BWC. The Action Plan obligates EU members to annually submit their CBM declarations and, by the end of 2006, provide the UN Secretary General with updated lists of experts and laboratories to be used in an investigation of alleged biological weapons use; this information is to be updated every two years. For 2006, both objectives were achieved.

25 Cf. the statements of Canada, Germany, India, New Zealand, Sweden, and the United Kingdom (on behalf of the EU); all available at <http://www.opbw.org>; 20.06.2007.

26 “Council Joint Action 2006/184/CFSP of 27 February 2006 in support of the Biological and Toxin Weapons Convention, in the framework of the EU Strategy against the Proliferation of Weapons of Mass Destruction”, Official Journal of the European Union, 7.3.2006, L 65/51-55; “EU Action Plan on biological and toxin weapons, complementary to EU Joint Action in support of the BWC”, Official Journal of the European Union, 9.3.2006, C 57/1-2 (<http://www.sussex.ac.uk/Units/spru/hsp/Harvard-Sussex-Program-The-EU-and-WMD.htm>; 20.06.2007).

In March 2006, the EU agreed its Common Position for the review conference.<sup>27</sup> It reveals that the EU remains committed, at least nominally, to achieving verification measures for the BWC “in the longer term”. Concrete objectives of the EU as listed in the document include promotion of, *inter alia*, a further intersessional process for 2007-2010 with specific work areas, universality of the BWC, full compliance with and effective implementation of the BWC, improvements to the CBM process, and further action on the work of the 2003-2005 meetings.

### 3.3.3 The Preparatory Committee (PrepCom)<sup>28</sup>

In April 2006, BWC states parties convened for the PrepCom to agree on an agenda and elect the officials for the conference. While some suggested that the PrepCom also discuss substantive issues<sup>29</sup>, there was a general realisation that it should restrict itself to procedural discussions lest agreement on the agenda would be jeopardised.

Most agenda items could be taken from previous agendas and were agreed easily, but one problem remained: The USA was adamantly opposed to any reference to the AHG, to the 2001 review conference or to any mention of verification or a BWC protocol (Ruppe 2006), but the NAM, and most prominently Iran, insisted on an agenda that at least kept the possibility open to include these topics in the deliberations (cf. Borrie 2006: 20; Nguyen 2006). Agreement was finally possible on a compromise formula that accommodated both positions.<sup>30</sup>

Ambassador Masood Khan of Pakistan, who chaired the PrepCom, held most negotiations in the plenary and not in the regional groups as was done during the 2002 session of the 5<sup>th</sup> review conference (Borrie 2006: 20; Pearson 2006a), thereby creating a much more transparent setting. The PrepCom showed that apparently all states, including Iran and the USA, were unwilling to block the proceedings at this early stage (Nguyen 2006). However, once the discussion turned to substantive issues, there was clearly still much scope for disagreement and conflict.

Non-governmental experts described the PrepCom as successful mainly because states agreed on an agenda, but expectations for the review conference remained mixed (CNS 2007; Schneidmiller 2006). Over the summer of 2006, however, there were indications for progress and converging positions, which later that year gave rise to more (yet cautiously) optimistic outlooks (Borrie 2006; Lennane 2006; Meier 2006).

27 “Council Common Position 2006/242/CFSP of 20 March 2006 relating to the 2006 Review Conference of the Biological and Toxin Weapons Convention (BWC)”, Official Journal of the European Union, 25.3.2006, L 88/65-67 (<http://www.sussex.ac.uk/Units/spru/hsp/Harvard-Sussex-Program-The-EU-and-WMD.htm>; 20.06.2007).

28 For reports of the PrepCom cf. Nguyen (2006); Pearson (2006a).

29 Canada introduced a paper entitled “Towards the Sixth BTWC Review Conference: An Accountability Framework”, which was based on a non-paper circulated in 2005 and contained proposals for national implementation, CBMs, implementation support and annual meetings (BWC/CONF.VI/PC/INF.1).

30 Agenda item 11, BWC/CONF.VI/PC.2: 7.

### 3.3.4 Setting the Stage for the 6<sup>th</sup> Review Conference

The EU, a group of 12 Latin American states<sup>31</sup>, and the JACKSNNZ group<sup>32</sup> published working papers well before the conference began, and Canada re-submitted its “Accountability Framework” as a working paper also in advance.<sup>33</sup> All these working papers touched upon issues that had been discussed prior to the conference.

Canada	EU	JACKSNNZ	Latin American States
	Biosafety & biosecurity (Germany)		
National implementation	Assessment of nat. implementation (Germany)	Review of national implementation (Japan)	
CBMs	CBMs (France)	CBMs (Switzerland)	CBMs
	Article X (Finland)		Article X
	Universality (Italy)	Universalisation (Australia) Universality (South Korea)	Universalisation
Implementation support	Implementation support (Netherlands)	Implementation Support Unit (Norway)	Implementation Support Unit
Annual meetings	Intersessional process I & II (France, UK)	Intersessional process (New Zealand)	Follow-up mechanism

Table 1: Topics of working papers published prior to the review conference

The single group papers built upon and referred to one another, which demonstrated their interconnectedness – e.g. as regards an Implementation Support Unit (ISU), universalisation, CBMs and national implementation – and reinforced the claims for the single proposals. Moreover, they showed that sub-groupings existed in the NAM and in the WEOG that were willing to put forward pragmatic proposals and to engage constructively. This raised hopes that the more radical positions within these groups would be more easily exposed and would have greater difficulties rallying group support and solidarity than had been the case at previous conferences (Meier 2006). Finally, the papers revealed a broad middle ground across all regional groups; after all, 55 states aligned themselves with the working papers.<sup>34</sup> However, some of the key players, namely the USA, Russia and China and several other NAM states, did not make their positions known in advance, and since all decisions at review conferences are made by consensus, there was still uncertainty as to what exactly the conference would be able to achieve.

31 Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Mexico, Peru and Uruguay.

32 This is an acronym for a group of seven “non-nuclear, non-EU” Western states, namely Japan, Australia, Canada, South Korea, Switzerland, Norway, New Zealand.

33 BWC/CONF.VI/WP.1- 19. All working papers are available at <http://www.opbw.org> and <http://www.bwpp.org> (20.06.2007).

34 In addition to the (then) 25 EU members, 8 (then) acceding, candidate and potential candidate countries plus Ukraine and Moldova aligned themselves with the EU statements and working papers.

## 4. The 6<sup>th</sup> BWC Review Conference in 2006<sup>35</sup>

### 4.1 Organisation of the Conference

Similar to previous BWC review conferences, the 6<sup>th</sup> review conference was organised in different formats: Only the formal plenaries are open to NGO observers; they are mostly used for the opening and closing of the conference and for the General Debate. The actual negotiations are held in the Committee of the Whole, in informal plenaries and in the Drafting Committee (which did not meet in 2006). All formats except for the Credentials Committee are open to all states parties and are usually attended by the same delegates. While the president chairs the plenaries, representatives of the other two regional groups preside over the Committees. Chairs traditionally rotate among the regional groups.

The issues mentioned most frequently in the General Debate were those already discussed at earlier meetings, namely (in the order of frequency) universalisation, a new intersessional process, CBMs, verification, national implementation, the intersessional process 2003-2005, cooperation and development, and bioterrorism and biological threats.<sup>36</sup> NGOs, international organisations, academic institutions and scientific associations also made statements to the plenary and organised a number of lunchtime seminars for conference participants. These seminars provided additional room for information exchange and discussion.<sup>37</sup>

Ambassador Khan received much credit for the success of the conference (CNS 2007; Guthrie 2007: 23; Meier 2007: 29; Pearson 2006b: 35). Throughout the meetings, he maintained a very transparent approach and forced states to openly and publicly voice their objections in the plenary. He pushed for a high negotiation speed, managed to largely avoid a “*split along regional group lines*” (Khan 2007: 14), and his style of chairmanship was generally praised as highly efficient and effective.

### 4.2 The Regional Groups: Eastern Group, WEOG and NAM

Even though the traditional group structure was maintained and remained palpable in the discussions, it seemed less vital than before. The **Eastern Group** was hardly visible as an actor at all. The **WEOG** also met less frequently than during previous sessions and did not

35 For analyses of and comments on the review conference, cf. also e.g. Fidler (2007); Guthrie (2007); Littlewood (2007); Meier (2007); Pearson (2006b, 2007); Sims (2007).

36 Verification and Article X were mentioned most frequently by NAM states, whereas support for a new intersessional process and a CBM review was highest in the WEOG. Most statements are available at <http://www.bwpp.org>; 20.06.2007; for summaries cf. Pearson (2006b).

37 For a summary of all statements by NGOs and international organisations, cf. Pearson (2006b). All statements are available at [www.bwpp.org](http://www.bwpp.org). For a list of the side events cf. Guthrie (2007: 28).

issue any joint statements or papers. Rather, three distinct actors – the EU, the JACKSNNZ, and the USA – were discernible within the group (Meier 2006: 36).

The increasingly intensive EU coordination leaves little leeway to deviate from previously agreed EU positions in favour of common Western positions (unless agreed in a separate EU coordination, which always precedes WEOG consultations). Since the EU enlargement in 2004, there has been a significant overlap in membership between the Western and Eastern groups through the EU, which also impacts on group coordination. For the EU, the interest in pushing through its priorities as stated in the Common Position at times clashed with the principled aim of facilitating (or at least not blocking) consensus. Despite its very thorough and useful preparations, and although individual members made important contributions throughout the conference, the EU's role during the conference was not as significant as it could have been, as the high negotiations speed made effective coordination difficult.

With the JACKSNNZ, a new grouping appeared in the BWC context, though it had operated in the nuclear non-proliferation regime before. The group informally consulted on a number of working papers prior to the review conference, and members loosely coordinated their work also during the conference. The proposals themselves were proactive and not radically different from some of the EU ideas, albeit more progressive and further reaching in some respects.

Since the EU and the JACKSNNZ aimed to actively support the BWC and facilitate consensus, the USA, which since 2001 has maintained by far the most restrictive positions with the WEOG, was left more isolated within the group at this conference than before. Its “red lines” appeared to have changed marginally (e.g. as regards the ISU) in line with the US's recent slightly more favourable attitude towards multilateralism (Sims 2007: 367; Findlay 2006: 14), but still seemed stricter and narrower than most others'. However, within these red lines, there was a greater willingness to be flexible, engaged and constructive (cf. CNS 2007; Guthrie 2007: 23). Part of the reason may have been that after the review conferences of the nuclear Non-Proliferation Treaty (NPT) in 2005 and the UN Programme of Action on small arms and light weapons in 2006, the USA did not wish to take the blame for wrecking yet another arms control conference. Moreover, the US assessment of the BWC's utility in general and particularly in the fight against bioterrorism seems slightly changed. However, discussion of binding measures – verification or other – and any permanent institutionalisation remained impossible.

The NAM was the only group to issue joint papers and statements, but coordination of its positions seemed difficult (Guthrie 2007: 24; Pearson 2006b: 35), and even though development and cooperation remained clear priorities of the group, the spectrum of opinions within the group was broader than before. The **group of 12 Latin American states** presented positions not unlike some of the EU's and JACKSNNZ's, and far from those of the more radical NAM members.

The group of **like-minded NAM** states that had advocated strong positions at previous meetings – for example Cuba, India, Indonesia, Iran, Malaysia and Pakistan – seemed not as united this time. In part, this may have been due to idiosyncratic motifs: With a

conference president from Pakistan, the Pakistani delegation maintained a relatively low profile and was more constructive, possibly in order not to hinder success for the President. Cuba, in its capacity as NAM coordinator, acted more constructively, too. India had apparently reviewed some of its more radical demands from previous meetings and followed a less confrontational course vis-à-vis the WEOG, which might have been influenced by its increased (economic) cooperation with the USA and others. The more constructive attitude of the USA as well as of these NAM states may also have triggered a kind of virtuous circle of cooperation.

Several general factors may have contributed to this change, too: UN Security Council Resolution 1540 obligates all states to introduce export control legislation.<sup>38</sup> Hence, no state can claim anymore that export regulations represent an illegitimate measure, and the debate around Article III, while still being fought out, was indeed more moderate than on previous occasions. Given the rapid growth of biotechnology in states like India, Cuba and Indonesia, these states may have realised that they could find themselves in a donor position rather than at the receiving end of technological cooperation. Finally, it can be assumed that the intensive exchange of views during the first intersessional process, in addition to objectifying the debate, may have led many states to realise the value of the BWC and the measures discussed in 2003-2005. All these new developments left Iran, the most hard-line of the NAM countries, isolated on many points (CNS 2007), and despite its antagonism to the USA, even Iran made some concessions in the end (Khan 2007: 15).

### 4.3 Negotiating and Agreeing the Final Document: Final Declaration and “Decisions and Recommendations”

#### 4.3.1 *The Final Declaration: Article-by-Article Review of the BWC*<sup>39</sup>

The negotiations on the Final Declaration produced the “*concise and accessible document*” President Khan had called for in his opening statement.<sup>40</sup> Given the apparent tacit agreement not to mention the 2001 draft Final Document, the Final Declaration of 1996 served as the main point of reference for the article-by-article review. Recourse to its language often provided a way out of potential deadlock situations, as this was “previously agreed language” and as such had to be acceptable to all. The review was facilitated by a reader compiled by NGOs, which contained the previous Final Documents from all review conferences and additional sources such as resolutions and CBM forms, and which

38 Resolution 1540 was agreed in 2004 and extended through Resolution 1673 in 2006. It obligates UN members to take measures, including national legislation and export controls, to prevent non-state actors’ access to nuclear, biological and chemical materials that could be used as weapons, and to report to the 1540 Committee (<http://disarmament.un.org/Committee1540/index.html>; 20.06.2006).

39 The language proposals submitted by states parties for the single articles are collated in BWC/CONF.VI/3 (Annex II).

40 Opening Statement by the President of the Sixth Review Conference of the Biological Weapons Convention, Ambassador Masood Khan (Pakistan), Geneva, 20 November 2006.

put all delegations on an equal footing as far as the ability to follow discussions and compare language proposals was concerned.<sup>41</sup> Yet, delegations did not opt for the easy way to copy “old language”; instead, they put this language under scrutiny, removed ambiguities, deleted redundancies or mere repetitions of BWC text, and added new understandings (cf. Pearson 2006b: 24-28; Sims 2007: 359-362).

It was remarkable that except for the most controversial issues like, for instance, verification and technological cooperation, there was a willingness to show flexibility, make concessions (within the respective national red lines) and engage in constructive discussions. On several issues, there was a convergence of opinions. The tone was mostly moderate and collegial, even among states that had previously shown different attitudes. However, the negotiations also saw some bargaining in the form of “package deals” and tit-for-tat strategies, especially in the endgame between the US and Iran (Guthrie 2007: 18; Meier 2006). Resolving the last outstanding issues between these two countries required intense mediation by the president, but in the end both states “*graciously and prudently accommodated each other’s positions*” (Khan 2007: 15).

The Final Declaration comprises a Solemn Declaration, which reaffirms several principles that apply to the convention as a whole, and the article-by-article review, which contains common understandings and interpretations of all BWC articles.<sup>42</sup> The **Solemn Declaration** underlines the value of the BWC and of universalising it, and it reaffirms the scope of Article I (including the effective prohibition of biological weapons use) and Article X. It refers to (non-)compliance<sup>43</sup>, condemns all forms of terrorism and reiterates the importance of preventing terrorist access to biological weapons. Moreover, the contribution of Resolution 1540 to the purposes of the BWC is acknowledged, though this required an intense debate. Another passage, most likely resulting from the intersessional discussions, recognises the importance of raising public awareness and of collaborating with relevant international organisations. The major problem was the reference to previous review conferences, which almost became the stumbling block for consensus.<sup>44</sup>

Of the 15 BWC articles, five required little or no debate at all: **Article II** (destruction or conversion of biological weapons stocks or facilities), **Article VIII** (continued validity of the Geneva Protocol), **Article XIII** (treaty duration and withdrawal procedure), **Article XIV** (depositories, ratification/accession procedure) and **Article XV** (authentic texts) were

41 Briefing Book, BWC Sixth Review Conference 2006, prepared by the British American Security Information Council (BASIC), the Harvard Sussex Program (HSP) and the Verification Research, Training and Information Centre (VERTIC), October 2006.

42 BWC/CONF.VI/6 (<http://www.bwpp.org/6RevCon/documents/2006126thRevConfinal.pdf>; 20.06.2007).

43 It appears problematic that states agreed that the use of biological weapons “by anyone at any time” would pose “fundamental challenges to the Convention’s viability”. After all, not the use as such, but rather the inability of states parties to effectively respond to such use would threaten the BWC’s viability.

44 As the 1996 Solemn Declaration referred to the AHG and to verification, a direct quote of this document was unacceptable for the United States (Meier 2007: 27), but a matter of priority for Iran. The problem was solved by recourse to language taken directly from the agenda.

taken almost word for word from the 1996 Final Declaration; apart from some editorial suggestions or clarifications, there was no debate.

Regarding **Article I**, which contains the basic prohibitions of the treaty, there was unanimous consent to reaffirm that the use of biological weapons, which is not explicitly mentioned in the BWC, is “*effectively prohibited by the Convention*”. Moreover, there was consensus on the scope of the BWC prohibitions; it unequivocally covers any biological agent or toxin and all actual and potential scientific developments that are or could become relevant to the convention. The only dispute in this section was about the question whether or not to include a list of scientific fields relevant to the BWC, and if yes, which fields should be included. In the end, those prevailed who argued that inclusion of such a list could undermine the comprehensive scope of the convention, especially given the rapid and unpredictable scientific developments, and inadvertently create the impression of limiting the number of relevant fields. Deletion of the list rendered the Final Declaration with the broadest possible coverage of “*all scientific and technological developments in the life sciences and in other fields of science relevant to the Convention*”.

There were intense discussions about **Article III** which relates to the non-proliferation of biological weapons. This debate was heavily influenced by the old controversy of industrialised and developing countries about export controls. Yet, several of the conflicts could be resolved in a relatively cooperative way, either because states made concessions or accepted compromise proposals, or else because contested passages became part of “package deals”. The explicit inclusion of “*national export controls*” is an indicator for the converging views on this subject (see chapter 4.2; cf. also Sims 2007: 360). As a new element and a visible result of the intersessional process 2003-2005, this section also refers to biosafety and biosecurity.

**Article IV** contains the requirement for states parties to enact national measures to implement the convention. The pertinent section in the Final Declaration explicitly includes penal legislation and elaborates on important elements, including topics of the first intersessional process such as biosafety, biosecurity, codes of conduct and disease surveillance. There was a debate about the exact relationship between Resolution 1540 and the BWC; states parties had different views on which of the two takes precedence over the other. In the end, the reference to Resolution 1540 remained in the text, but it is phrased in a way that does not detract from the primary authority of the BWC.

**Article V** provides states parties with a consultation mechanism for “*any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention*”. Procedures for consultative meetings were elaborated at the 2<sup>nd</sup> and 3<sup>rd</sup> review conference in 1986 and 1991.<sup>45</sup> In 2006, states parties reaffirmed the validity of these procedures but did not discuss their content or situations in which such meetings may be convened. With regard to CBMs, some Western countries argued for strong

45 BWC/CONF.II/13/II: 5-7; BWC/CONF.III/23 (Part II).

language pointing to the poor participation, whereas some NAM countries insisted on softer language that would acknowledge technical difficulties.<sup>46</sup> The current compromise formula is weaker than the Western proposals were, but still stronger than in 1996.

According to **Article VI**, states parties can request the UN Security Council to investigate any case of suspected violation of the convention. The current text that invites the Security Council *inter alia* to consider requesting the UN Secretary General to carry out an investigation (see chapter 2.2.1) was largely uncontroversial. A controversy developed around a second reference to the Secretary General's investigation mechanism, which encouraged the Secretary General to review and update it. While a number of (mainly Western) states, especially Germany and the United Kingdom (cf. CNS 2007)<sup>47</sup>, favoured strengthening the mechanism and linking it more closely to the BWC regime, several states were reluctant or unwilling to refer to the mechanism in the BWC framework at all, as in their view this might either lead to verification of the BWC (Findlay 2006: 20) or else might distract from exactly this approach. In the end, states parties, as in 2004, simply acknowledged the mechanism's existence and noted the 2006 UN Counterterrorism Strategy which contains a request for updates.<sup>48</sup>

**Article VII** entitles states parties to assistance if biological weapons are used against them. Discussing detailed procedures for such cases has long been a NAM concern, but this issue was also part of the protocol negotiations and thus opened up old wounds. Hence, there could be no call on states parties or DDA to take concrete steps to that end. The compromise formula notes "*the proposal that States Parties may need to discuss the detailed procedures for assistance*", and this issue is also contained in the topic for the 2010 intersessional meetings. States parties undertook to provide assistance to other states parties in cases where a state party "*has been exposed to danger as a result of a violation of the Convention*" (which – considering the new understandings – could be read to include accidents due to deficient biosafety and biosecurity measures). States parties also expressed their willingness to provide assistance in cases where "*danger or damage*" results from biological weapons use by "*anyone other than a State Party*" (which includes non-state actors). This novelty extends the scope of Article VII considerably and reflects the stronger focus on bioterrorism that was conspicuous throughout the conference.

It seems odd that the review of **Article IX**, which calls for negotiations to ban chemical weapons, almost blocked the conference; after all, the Chemical Weapons Convention (CWC) has been in force for 10 years. The controversy did not develop around the CWC

46 Analyses of the CBM participation by region can be found in Hunger/Isla (2006) and in the French working paper (BWC/CONF.VI/WP.4). They show that there is a considerably lower level of participation in regions consisting mainly of NAM countries.

47 Germany and the UK submitted working papers on this subject to the 2004 Meeting of States Parties (BWC/MSP/2004/MX/WP.10 (Germany); BWC/MSP/2004/MX/WP.56 (UK)), as did South Africa (BWC/MSP/2004/MX/WP.15); Germany also prepared a working paper on this subject for the 2006 conference (BWC/CONF.VI/WP.36).

48 For the 2004 text cf. BWC/MSP/2004/3: 5; for the UN Counterterrorism Strategy cf. fn. 13.

as such (whose value was unanimously reaffirmed), but around the question whether and how the BWC review conference could legitimately comment on and call for compliance with the CWC. Underlying this is the debate in the CWC regime about the 2012 deadline for chemical weapons destruction: It is widely considered unlikely that the USA and Russia will meet the deadline, which could be interpreted as a violation of their CWC obligations (cf. Harrington 2007: 30). The proposal can thus be seen as a political side blow directed mainly at the US which had openly accused Iran of violating the BWC in the General Debate. In Geneva, the situation could be cleared, but reportedly the issue was taken to the CWC Conference of States Parties that met in The Hague at the same time.

**Article X** stipulates that BWC parties should facilitate and be able to participate in the exchange of biological equipment, material and know-how intended for peaceful purposes, that they should promote the development and application of biosciences, and that implementation of the BWC must not hamper economic and technological development or the international exchange of the above items. The negotiations were heavily loaded with the political baggage of the traditional conflict between the NAM and the WEOG. Consequently, even though some very basic common ground existed (Khan 2007: 14), there was major redrafting and bargaining right until the end (Guthrie 2007: 18). It was conspicuous, however, that some NAM countries that had previously been very outspoken on development issues kept a lower profile or even acted as mediators in some instances (see also chapter 4.2).

In relation with **Article XI** (amendment of the BWC), Iran informed the conference that it had again, as in 1996, formally proposed amendment of the convention to include “use” in the title and in Article I. The Iranian delegation insisted that this be reflected in the review of Article XI, but other states objected with the argument that amendment proposals were entirely a matter for the depositaries and a special or amendment conference of states parties. In the end, delegations agreed to take note of the Iranian proposal and to invite all states parties to “convey their views to the Depositaries on the proposal”.<sup>49</sup>

All Final Declarations have reaffirmed under **Article XII** that review conferences should be held every five years. The decision to hold the 7<sup>th</sup> review conference “in Geneva not later than 2011” was uncontroversial. Controversial, but agreed in the end, was the decision to include “scientific and technological developments”, “progress of implementation of obligations under the BWC”, and “implementation of the decisions and recommendations agreed upon at the 6<sup>th</sup> review conference” as specific tasks for this conference.

49 The consultation process is still ongoing. However, since many delegations (including many NAM members) already rejected the idea of an amendment during the review conference (Guthrie 2007: 20), it is unlikely that there will be a majority in favour of any follow-up action.

### 4.3.2 *Evaluation of the Article-by-Article Review*

The 2006 Final Declaration represents a comprehensive and thorough review of the BWC; it reaffirms some important understandings, most notably the prohibition of use, the comprehensive scope and the general purpose criterion, but it also contains an updated reflection on the role of the BWC regarding non-state actors and bioterrorism, an increased emphasis on national implementation as well as national and international preparedness, and a recognition of synergies with international organisations and non-governmental and civil society actors (cf. also Sims 2007; Guthrie 2007; Pearson 2006b). Moreover, understandings on most issues of the first intersessional process are reflected in the Final Declaration. Especially considering the mixed expectations prior to the conference and the lingering political tensions that were apparent even in the relatively collegial atmosphere during the event, this is an important step forward for the regime.

Unfortunately, the document remains weak on procedural issues under Articles V, VI and VII. As for Article V, the validity of the existing procedures was reaffirmed, but there was no discussion about their application (or the lack thereof), let alone any elaboration or update. Similarly, the complaint procedure under Article VI was not discussed, and there is not even a more explicit reference to the single available UN mechanism in this context. Article VII will be covered in the intersessional process in 2010, but Articles V and VI, the only ones relating to compliance concerns, will remain unattended to at least until 2011, which means that some fundamental deficits of the regime still remain.

### 4.3.3 *“Decisions and Recommendations”: Cross-Cutting Issues*

The “cross-cutting” issues, which were considered important during the review conference but did not fit in with the article-by-article review, were discussed separately in informal, open-ended consultations. Most of these issues are interlinked: The discussions about tasks for the implementation support unit were influenced by those about CBMs, universality and national implementation; the same is true for the topics of the new intersessional process.

#### *Intersessional Process 2003-2005*

The first intersessional process 2003-2005, mentioned significantly more often by WEOG than by NAM members, was mostly described as useful during the general debate. Criticism came from the NAM in its group statement and working paper. Similarly, the Latin American states highlighted in their working paper that the intersessional process “suffered from limitations as regards the implementation of all the obligations contained in the Convention”. New Zealand, on the other hand, emphasised the “constructive role” of this first intersessional process in “maintaining momentum on BWC issues between review conferences”, but was critical of the fact that the meetings could produce only factual reports and suggested “a more formal system of recommendations made on the basis of intersessional outcomes”. France and the United Kingdom on behalf of the EU listed several actions undertaken in preparation for or in response to the meetings, such as the EU survey of national legislation in 2003, the EU Joint Action of 2006, and various workshops and seminars. They also pointed out that the process enhanced a sense of

ownership of and responsibility for the convention. Japan and the United States submitted working papers in which they reported on their own action taken in response to the intersessional meetings.<sup>50</sup>

The text to be included in the Final Document was among the least contentious elements. A Norwegian draft was amended only once; it reiterates the mandate of the process and states that the meetings

“functioned as an important forum for exchange of national experiences and engendered greater common understanding on steps to be taken to further strengthen the implementation of the Convention”.

It further “notes the contribution” by international organisations, scientific and academic institutions as well as non-governmental organisations and endorses the outcome documents of the meetings of states parties.<sup>51</sup>

It is important that all BWC members shared and expressed a positive assessment of the intersessional process, and it is valuable to have references to all topics included in the (politically binding) Final Declaration. However, states parties did not define specific follow-up action and concrete obligations, and the outcomes were not reflected systematically, which means that part of the mandate, namely to “take effective action”, still depends on the individual states’ initiative only.

#### *Implementation Support Unit (ISU)*

Delegates and observers have long called for permanent institutional or secretarial support in the regime.<sup>52</sup> Prior to the 6<sup>th</sup> review conference and during the General Debate, many states argued that institutional support would be necessary *inter alia* to promote universalisation and national implementation. Probably in order to make it more palatable to the USA, “implementation support unit” (ISU) was mostly used instead of the term “secretariat”. Despite its well-known earlier scepticism and opposition, the USA did not oppose establishment of an ISU during the conference, and there was early consensus that an ISU would be desirable (Guthrie 2007: 19, 22).

Four working papers by Canada, the group of Latin American states, the Netherlands on behalf of the EU, and Norway in consultation with the JACKSNNZ explicitly dealt with implementation support. The papers, like the early negotiations, covered administrative support, facilitation of communication and interaction in the regime, CBMs, national implementation and universalisation as areas in which the ISU could be active. As for the procedural side, none of the papers contained actual figures for staff or the budget, but the Norwegian and the Dutch paper argued for a cost-effective unit within

50 BWC/CONF.VI/WP.8 (EU); BWC/CONF.VI/WP.11 (plus Corr.1, Latin American states); BWC/CONF.VI/WP.18 (New Zealand); BWC/CONF.VI/WP.28 (USA); BWC/CONF.VI/WP.30 (Japan); BWC/CONF.VI/WP.32 (NAM).

51 BWC Final Document, BWC/CONF.VI/6: 19.

52 Cf. Sims (2006a); cf. also Findlay/Woodward (2004); VERTIC (2006); WMD Commission (2006).

DDA. While the Netherlands vaguely mentioned compliance with the BWC, only the Norwegian working paper included tasks related to Article V and VI.<sup>53</sup>

Agreement on a mandate for the ISU was delayed by the difficult discussions about CBMs and national implementation (see below). The draft action plans on national implementation and universalisation contained tasks for the ISU such as maintaining lists of national contact points, compiling information on implementation measures, matching offers of and requests for assistance, and providing reports on activities and progress. However, given the disastrous route that the two plans took in the conference endgame (see below), these tasks disappeared completely. Some participants privately expressed concern that with these losses, the merit of having an ISU at all might be questioned. Luckily, even though the issue was raised during the final debate, no delegation openly withdrew their consent to establishing the ISU.

States parties set up the ISU within the Geneva branch of DDA (now ODA). The mandate includes administrative support and CBMs only, and it is limited to the tasks listed in the Final Document. With regard to administrative support, the ISU will support BWC meetings and facilitate communication of states parties with each other, with international organisations, with non-governmental organisations and with academic and scientific institutions. It will act as a focal point for any information states parties wish or are obliged to submit. Moreover, the ISU is to handle the annual CBM submissions, remind states parties of the annual submission deadline (15 April), compile and distribute data on CBMs, set up a secure website to facilitate information exchange for states parties only, provide assistance or help match offers of and requests for assistance in preparing the CBMs, and “*facilitate activities to promote participation in the CBM process*”. Even though some delegations wished to see a more active role for the ISU in reviewing and analysing the CBM forms<sup>54</sup>, this did not enjoy consensus. The ISU will be funded by BWC members, it is requested to submit an annual report about its activities to states parties, and its mandate and performance will be up for review in 2011.<sup>55</sup>

Unfortunately, this limited mandate might not allow full exploitation of the potential benefits that such a unit could offer to the BWC and its states parties. But it is a step forward to have a secretarial body on a more permanent basis at least until 2011 instead of the previous ad hoc arrangement. States parties now have a constant point of contact and regular communication channels, and combined with the continuous dialogue in the new intersessional process, this may enhance interaction and improve information exchanges.

53 BWC/CONF.VI/WP.1 (Canada); BWC/CONF.VI/WP.7 (EU); BWC/CONF.VI/WP.13 (plus Corr.1; Latin American states); BWC/CONF.VI/WP.16 (Norway).

54 Cf. e.g. BWC/CONF.VI/WP.14 (Switzerland).

55 BWC Final Document, BWC/CONF.VI/6: 19-20.

*A New Intersessional Process 2007-2010*

Based on the assessment that the first intersessional process was useful, many delegations from all regional groups expressed their support for a new series of annual meetings between the 6<sup>th</sup> and the 7<sup>th</sup> review conference in their opening statements. Several states suggested that there could be modifications to the mandate and format as compared to the last process; for example, some stated that the mandate was too limited, that discussions should not be as strictly limited to predefined topics and that these topics should be broader than in 2003-2005, that it should be possible to make decisions and recommendations, not just compile factual reports, and that the agenda should reflect additional elements of the convention.

Six working papers, submitted by Canada, by France and the UK on behalf of the EU, by the group of Latin American States, the NAM, New Zealand in consultation with the JACKSNNZ, and South Africa, also contained concrete proposals for the format and topics of a new intersessional process.<sup>56</sup> They all anticipated annual meetings and maintained the previous practice of having meetings of experts and states parties, though with some modifications such as holding expert meetings only in 2007-2009 followed by a two-week meeting of states parties in 2010 (South Africa), having annual one-week expert meetings and two-week meetings of states parties with a mandate to adopt decisions (Latin American states), or combining the experts' and states parties' meetings into one annual two-week session (Canada). New Zealand and Canada advocated that the meetings discuss general matters of concern to the BWC, while the EU proposed that states parties should be able to make decisions whenever there is consensus without having to refer issues to the 7<sup>th</sup> review conference.

Given the universal preference for a new intersessional process in principle, discussions immediately turned to the topics and format which were among the trickier issues for negotiation. As regards the **duration** and **sequence**, most delegations favoured separate meetings of experts and states parties to allow for a digestion of the expert discussions, while others preferred to hold the meetings "back-to-back", mainly for economic reasons (Guthrie 2007: 21; Sims 2007: 357). Meetings are now kept separately, as in the first cycle, but expert meetings will last one week instead of two, like the NAM working paper suggested. The meetings in 2007 will be chaired by the NAM, in 2008 by the Eastern Group, in 2009 by the WEOG and in 2010 again by the NAM (Guthrie 2007: 21). The Western Group will then chair the 7<sup>th</sup> review conference in 2011. This was agreed with the understanding that the rotation cycle for the review conferences would be held separate from that of the intersessionals and that the chair of the review conference would also be the chair of the first intersessional (Pearson 2006b: 23).

56 BWC/CONF.VI/WP.1 (Canada); BWC/CONF.VI/WP.8 (France/UK); BWC/CONF.VI/WP.11 (Latin American states); BWC/CONF.VI/WP.18 (New Zealand); BWC/CONF.VI/WP.20 (South Africa); BWC/CONF.VI/WP.32 (NAM).

As regards **decision-making**, several states strictly opposed giving the meetings a stronger mandate. Others, within the WEOG and the NAM, favoured allowing the meetings of states parties to make decisions or recommendations without having to wait for approval by the next review conference, which could delay any follow-up action for several years. However, states finally agreed that like in 2003-2005 the meetings “*will reach any conclusions or results by consensus*”. While this mandate does not envisage binding decisions at all meetings, at least it does not preclude such decisions either, provided there is consensus (cf. Meier 2007: 28).

As for the **work programme**, there was broad consensus to have items on national implementation (including enforcement, as the USA had suggested in its general statement), biosafety and biosecurity, oversight and education/awareness-raising. Also, the inclusion of assistance and cooperation in the case of suspected biological weapons use as well as cooperation to improve disease surveillance and health systems, while requiring certain efforts to find an acceptable wording, were consensual in principle. Bioterrorism as an additional topic was dropped relatively early in the process due to the objections of Russia in particular (Meier 2007: 28). A Russian proposal to discuss “*terms and definitions relevant to the convention*” did not find the support of any other delegation and was deleted in the final phase of the deliberations (CNS 2007; Pearson 2006b).<sup>57</sup> The most difficult issue to resolve was the question of whether and how to include scientific and technological developments as well as cooperation and exchanges in the use of biotechnology for peaceful purposes. There was no agreement that the former should be part of the intersessional process at all, but as a compromise, it was combined with education and awareness-raising. On the latter, the informal consultations between Western and NAM delegations were difficult. It was stated at one point that some reference to Article X had to be included, because otherwise some NAM could have withdrawn their consent to a new process entirely. States parties finally agreed on a lengthy and inaccessible passage that included references to international cooperation in the peaceful use of biotechnology and capacity-building in disease surveillance, but not to export controls (or their removal), as previous proposals had done.<sup>58</sup>

**Recurring topics** were propagated by the EU and Canada and initially included in the draft decisions on the 2007-2010 process. The argument was that some issues merit annual attention, either in order to create more incentives and political pressure, like in the case of implementation, universalisation and CBMs, or because the issue itself requires constant attention, like scientific and technological developments. Annual consideration of implementation and universalisation was also envisaged in the draft action plans, but

57 The inclusion of lists, definitions and threshold quantities had already been a contentious issue during the protocol negotiations in the Ad Hoc Group (Littlewood 2005: 81). The topic was vehemently opposed by a number of delegations on the grounds that it could weaken the general purpose criterion and hence the comprehensive scope of the BWC.

58 The work programme is contained in BWC Final Document, BWC/CONF.VI/6: 20-21. For a comparison of various drafts of the intersessional programme cf. Pearson (2006b: 29-31).

when these action plans were dropped, the two themes were also lost as recurring topics. The opposition of some states parties left scientific and technological developments being only marginally addressed in 2008, and as there was strong resistance by some delegations to dealing with CBMs during the intersessional process at all, it was impossible to gain consensus on having them either as a recurring theme or as a one-time topic.

In 2007, states parties will discuss national implementation, including enforcement, coordination among law enforcement institutions, and regional and sub-regional cooperation. The topics for 2008 will be biosafety and biosecurity as well as oversight, education, awareness-raising and codes of conduct (also in the context of potentially dangerous scientific and technological developments). Both sets of topics take up issues that were discussed in 2003 and 2005, but they are now broader and more detailed.

The topics for 2009 and 2010 have not been discussed previously in their current form. In 2009, the meetings will address international cooperation and exchange in biosciences, capacity-building in combating infectious diseases, and identification of needs and opportunities to provide assistance – topics that are related to Article X. These meetings will provide an important opportunity to discuss the expectations, perceived problems and different views on this Article. Contrary to some concerns expressed during the review conference, such a discussion could actually contribute to de-politicising and de-ideologising this issue, as it forces states to reflect on and express their expectations, define their needs, and recognise what is already being done under Article X.<sup>59</sup> Since this discussion would take NAM concerns seriously, it could also weaken the basis of the NAM's criticism of WEOG policies in this context. Moreover, it could render the cooperation aspect more credible in the efforts to achieve universality; after all, this was one of the reasons Article X was included in the BWC in the first place.

In 2010, states parties will discuss assistance in the case of alleged use of biological or toxin weapons, which will include domestic preparedness and public health. Another topic of great concern to many NAM countries, this topic potentially includes a wide range of issues from a strong focus on domestic health systems to international health cooperation to questions of how to determine the source of an attack and how to ensure effective responses.

Agreement on a new work programme was not a matter of course. Even though the mandate is as limited as the last was, it is good to have new intersessional meetings on useful topics that are not a mere repetition of the previous ones. The topics address some deficits of the regime, and, if worked on effectively, could even contribute to mitigating one of the dominant political conflicts in the regime. Given the very limited time available for the meetings, however, this will require intense preparation and a lot of political good will.

59 Pearson argues that “it is likely that progress reports [on Article X implementation, U.B.] would have demonstrated that Article X is already being implemented very effectively by many States Parties especially in the developed world” (Pearson 2006b: 36).

### *Confidence-Building Measures (CBMs)*

Proposals as to how CBM submission could be facilitated, how the forms could be reviewed and improved, and how participation could hence be increased, had been discussed by states and NGOs already prior to the conference.<sup>60</sup> In the General Debate, most states that mentioned CBMs signalled their readiness to review or at least thoroughly discuss the measures. Some proposed establishing a working group during the conference or in its wake, or suggested including CBMs in a second intersessional process.

Six working papers by Canada, by France on behalf of the EU, by the group of Latin American states, by South Africa, and by Switzerland (nationally and in consultation with the JACKSNNZ) covered CBMs in more detail.<sup>61</sup> They all considered the review of the existing CBMs necessary and desirable, and they called for more user-friendly forms to facilitate submission and increase the utility of the process; suggestions included employing more tick boxes and multiple-choice questions (which could also mitigate the translation problem), reducing ambiguities in the language and making the forms electronically available to facilitate submission and dissemination. Switzerland propagated making the CBMs publicly available on the Internet, arguing that “*wider access to CBMs can be an incentive for States Parties to increase quality and quantity of the data submitted*”. The Latin American states proposed that guidelines be developed to enhance CBM implementation.<sup>62</sup> Proposals regarding the function of DDA or the ISU included preparing summaries of CBM elements and trends (Canada), sending out reminders before and after the annual deadline (EU), as well as analysing the returns, checking their plausibility and clarifying misunderstandings or omissions (Switzerland).

Despite intense efforts and the many concrete proposals, agreement could not even be reached to open discussions on modest technical improvements to the forms. Many Western and NAM states, including the USA, would have accepted a working group to that end during the conference, but other delegations opposed this (cf. Sims 2007: 365). Likewise, the USA and China refused to accept CBMs as a topic for the intersessional process (Meier 2007: 28; cf. also CNS 2007; Sims 2007: 365). The only modification that could be agreed was the possibility for states parties to submit the CBMs electronically, and for DDA (in future the ISU) to distribute them electronically and make them available on a secure website.<sup>63</sup>

60 Cf. Geneva Forum (2006); Tokyo Seminar (2006); BWC/CONF.VI/PC/INF.1 (Canada). For more general NGO proposals cf. Feakes/Pearson (2006: 41-42); Isla/Hunger (2006); Pearson (2006b); VERTIC (2006: 63-70); for proposals based on an analysis of the actual CBM returns cf. Hunger/Isla (2006); Isla (2006); for an earlier analysis and recommendations cf. Geissler (1990).

61 BWC/CONF.VI/WP.1 (Canada); BWC/CONF.VI/WP.4 (France); BWC/CONF.VI/WP.12 (plus Corr.1; Latin American states); BWC/CONF.VI/WP.14 (Switzerland); BWC/CONF.VI/WP.21 (South Africa); BWC/CONF.VI/WP.37 (Switzerland).

62 Canada compiled a guide to the completion of the CBMs in 2004. It is available at [www.opbw.org/cbms/Guide\\_files/v3\\_document.htm](http://www.opbw.org/cbms/Guide_files/v3_document.htm); 20.06.2007.

63 BWC Final Document, BWC/CONF.VI/6: 22.

There is currently no mandate for any collective action to review the CBM system. This, however, does not preclude states from taking individual action to that end in order to facilitate effective action once a review becomes possible (cf. Sims 2007: 366). One example for such action is the current initiative by Switzerland and a group of non-governmental experts: It aims at analysing the domestic data collection processes and their overall approach regarding CBM completion with the goal of better understanding the causes for (non-)participation and providing a more solid basis for future discussions on improvements to the process.

### *Universalisation*

Universalisation of a treaty and its norms through achieving universal membership is a common objective in all arms control and disarmament regimes. With 157 full members, the BWC significantly lags behind the NPT (190 members<sup>64</sup>) and the CWC (182 members), but in the absence of a BWC organisation or regular meetings, BWC members have not taken any collective action so far.<sup>65</sup>

During the General Debate, universalisation was the issue mentioned most frequently, and the idea of intensified action received unanimous support in all regional groups. The four working papers about universality, submitted by Australia, by South Korea (both in consultation with the JACKSNNZ), by the group of Latin American states, and by Italy on behalf of the EU, emphasised the need for concerted action.<sup>66</sup> They also considered some form of secretariat, implementation support or coordination necessary to support this concerted action and to fulfil a variety of other tasks.

Discussions on a draft Action Plan on Universalisation, inspired by a similar plan under the CWC, went relatively smoothly (Pearson 2006b: 32). States parties agreed to promote universalisation through bilateral, regional and multilateral activities, to inform the ISU of their activities and of a national point of contact, and to report to the meetings of states parties of their activities. The chairs of the intersessional meetings will act as coordinators for universalisation efforts and provide annual progress reports. The ISU will support these activities, but is not supposed to take any action on its own.<sup>67</sup>

The relegation of the original “Action Plan” to a decision on “Promotion of Universalisation” in the Final Document was due to a much more virulent controversy around the Action Plan on (National/Comprehensive) Implementation (see below) and not to differences around universalisation as such. Nevertheless, since there are no specific

64 The UN website still lists North Korea, which declared its withdrawal from the treaty in 2003 and whose current status is unclear, as NPT member (<http://disarmament.un.org/TreatyStatus.nsf>; 20.06.07); the non-members are Cook Islands, India, Israel, Niue and Pakistan.

65 For ideas for a more effective universalisation strategy cf. Feakes (2006); Feakes/Pearson (2006: 37-39).

66 BWC/CONF.VI/WP.6 (Italy), BWC/CONF.VI/WP.9 (plus Corr.1, Latin American states), BWC/CONF.VI/WP.15 (Australia), BWC/CONF.VI/WP.19 (South Korea).

67 BWC Final Document, BWC/CONF.VI/6: 23.

activities and/or targets mentioned, and since there is only a vague mandate for the chairs of the intersessionals and the ISU, this decision will likely be less effective than an action plan with a stronger mandate could have been (cf. Pearson 2006b: 35).

### *National (Comprehensive) Implementation*

National implementation was discussed as a cross-cutting issue but could not be included in the Final Declaration, although its importance was widely acknowledged in the General Debate. The Canadian working paper suggested that states parties promote national implementation with specific goals, time lines and methods, report regularly e.g. at the meetings of states parties and in CBMs, and provide implementation support. Germany had prepared an analysis of the current state and practice of national implementation and suggested that states parties develop a catalogue of existing legislation to guide states in establishing or improving their legislation. Japan presented concrete proposals on relevant national measures.<sup>68</sup>

Despite the agreement that progress in this area was desirable, the discussions around a draft Action Plan on National Implementation were extremely difficult and ultimately failed. Such an action plan had been a preference of many Western states, but NAM delegations were reluctant to accept what several members called an imbalanced view on the BWC. The conflict became virulent when the NAM tabled an additional draft Plan of Action on Implementation of Article X.<sup>69</sup> Several Western states opposed the approach of singling out just one article, while several NAM states made their acceptance of the first action plan conditional on greater emphasis on Article X implementation. The compromise effort by the president to merge the two documents into one Action Plan on Comprehensive Implementation failed, as it still contained elements that were unacceptable to some Western states, especially the USA (Khan 2007: 15; Meier 2007: 28; Sims 2007: 362), but on which NAM states like Iran, Algeria, China, Cuba and India insisted (CNS 2007; Meier 2007: 29). In order not to jeopardise a consensus outcome, President Khan proposed to delete both implementation action plans and turn the third into a decision on the “Promotion of Universalisation” (Khan 2007: 15). While this may have been the wisest decision given the hardening fronts, it is nevertheless deplorable. There was widespread recognition of the significance of national implementation, and an action plan that required national focal points in states parties and that nominated coordinators for collective efforts would have helped greatly. In the absence of a mandate for the ISU, the initiative is now left to individual states and NGOs.

68 BWC/CONF.VI/WP.1 (Canada); BWC/CONF.VI/WP.3 (Germany); BWC/CONF.VI/WP.17 (Japan).

69 For full versions of some drafts cf. Pearson (2006b: 32-35); cf. also Guthrie (2007: 25-28).

## **5. Recommendations and Conclusions**

The 6<sup>th</sup> review conference showed that meaningful and pragmatic cooperation is possible in the regime, and it revealed a degree of interest, activism and sense of ownership among states parties that bodes well for the next cycle of intersessional meetings. There is now a full and comprehensive review of the BWC that contains important consensual reaffirmations and new understandings; and there is a much improved working atmosphere (no doubt brought about by the constant interaction and exchange in 2003-2005, as it facilitated the recognition of common interests and fostered a shared perception of current circumstances, risks and necessities). Moreover, the results in the form of collective follow-up action go beyond merely keeping the dialogue alive and can potentially mitigate some of the deficits identified in chapter 2, namely insufficient implementation and a lack of organisational support. Bearing in mind the political context, these are positive results, and it is useful to have an expanded focus on biological issues, which now includes non-state actors and problems that stem from biology but are only indirectly related to biological weapons. Viewing the outcome from a more abstract arms control perspective, however, it becomes clear that major deficits of the regime remain unattended to, as, except for improved communication, the current measures hardly foster predictability and stability in inter-state relations.

The following recommendations flow from these two different perspectives. They include measures to make effective use of what is available in the new intersessional process and in the current political situation, especially in the areas of implementation, but also regarding cooperation under Article X and assistance under Article VII. They also suggest considering some ideas that go beyond the topics for 2007-2010 but that are nevertheless doable and do not require new negotiations, as they are based on existing measures and ideas.

### **5.1 The Intersessional Process 2007-2010**

As time for discussion will be shorter than in the last process and the issues equally voluminous, a lot will depend on thorough preparation of all meetings. The 6<sup>th</sup> review conference has shown that advance circulation of papers and proposals as well as early discussions and exchanges of views can contribute to a good working atmosphere and to preparing a common ground. Especially in 2007 and 2008, states parties can resort to a vast number of documents, proposals, documentations and compilations that were gathered during the last intersessional process. Hence, it is to be hoped that they will be able to make maximum use of the two weeks allotted to the meetings each year. It would be useful to invite practitioners from academia and commerce to the expert meetings who are potential multipliers for all those measures that cannot be enacted at state level but have to emanate from the stakeholders' communities. Given the solid basis for the discussions, states hopefully will not satisfy themselves with reaching vague common conclusions. Instead, they could try to come to binding recommendations and have states parties report on their implementation at the following meetings.

### 5.1.1 *National Implementation (2007) and Awareness-Raising (2008)*

The 2007 intersessionals will provide an important opportunity to somewhat compensate for the loss of the Action Plan on National Implementation. While it might not be politically feasible to resurrect the action plan in its previous form, as the debates of 2006 would likely resurface, it may be worthwhile to consider reviving at least some elements, such as

- tasking the ISU to provide and coordinate assistance,
- reporting to the ISU and other members on the state of and progress with national implementation,
- encouraging states parties to designate national focal points or points of contact.

Reporting would ideally happen before a specific deadline or to the following meeting of states parties, as the time gap might be too large and the sense of urgency lost if it were postponed until 2011. Since all states are obligated to report under Resolution 1540 /1673 and CBM E anyway, the additional effort would be minimal for those who already fulfil these obligations, but the benefit would be significant: States parties would demonstrate the willingness to not only discuss and promote certain measures, but also to ensure effective action. In addition, such a requirement would significantly increase the political pressure to act and enhance compliance with Resolution 1540 and CBM E. The pressure on those states that do not yet have legislation and regulations in place would be much higher with a reporting requirement.

Several of the topics for 2007 (national implementation) and 2008 (biosafety, biosecurity, oversight, education, awareness-raising, codes of conduct), albeit different, should allow for some analogous approaches, such as:

- developing catalogues, databases and/or checklists of important measures<sup>70</sup>,
- establishing (real or virtual) working groups to compile such databases and checklists outside the meetings (to save time for discussion of the new elements of the topics),
- organising seminars, workshops or, where suitable, electronic exchanges not simply on a regional basis, but based on identified needs, on types of legal or administrative systems, or on types of legislation and regulations to be dealt with (identification of which would be much facilitated by checklists).

### 5.1.2 *Action Related to Article X (2009) and Article VII (2010)*

As the deliberations at the 6<sup>th</sup> review conference showed, Article X and related issues provide one of the major problems in the BWC regime. While the debates around export controls appear somewhat mitigated (see chapter 4.2), those around technological exchange, cooperation and development are still virulent. At the same time, the past

70 Cf. e.g. BWC/CONF.VI/WP.3 (Germany).

intersessional process has demonstrated that discussions outside negotiation fora can contribute to depoliticising issues and facilitate a convergence of views and perceptions, and there is no reason why this should not work with Article X in a similar way.

Currently, there seems to be more rhetoric and ideology than substance to these debates. At the same time, there are real concerns and needs in the developing world as regards for instance the effectiveness of health systems and the availability of affordable medication, and increased action could help ameliorate the overall situation there. It could also contribute to better domestic preparedness against biological threats, which is a crucial concern in the regime. Moreover, Article X was included in the BWC as an incentive for countries to join the treaty, and this purpose is not obsolete today. More visible cooperation might still induce some states outside the treaty to accede to it and contribute to a sustained support for it among members. Finally, an objectified debate would tackle one of the major political stumbling blocks for progress in the regime.

Hence, there are several reasons to take Article X more seriously than in the past. A serious debate would force NAM members to reflect on and voice their expectations and needs more concretely, and it would offer the industrialised countries an opportunity to demonstrate what is already being done under Article X. The intersessional meetings in 2009 could be used to initiate such a process, but it will certainly need more than two weeks to achieve visible results. States parties could thus consider holding additional meetings or establish specific working groups on single topics; this could for example be done by making use of the consultation provision under Article V (see below).

As for the topic for 2010, assistance in the case of biological weapons use, the mandate only lists “*national capabilities for disease surveillance, detection and diagnosis and public health systems*” as a specific element of this issue. It would be useful if discussions were not limited to this but could overcome the historical reservations and include actual assistance procedures to facilitate coordination of help and quick responses. This could include:

- establishing primary points of contact in states parties, but also at the UN or the ISU, to facilitate coordination of requests for and offers of assistance,
- compiling systematic information on which type of assistance states could provide (e.g. detection/diagnosis, medical or logistical support etc.),
- providing information on measures in place to react to bioweapons incidents.

If elaborated and propagated adequately, such action could also serve as an additional incentive to join the treaty, especially given the newly agreed understanding that Article VII might also cover cases of non-state actor use of biological agents or toxins.

## 5.2 Recommendation for Action Beyond the Intersessional Process

While the conditions for productive work within the current context are relatively good, the limits within which BWC members move are still narrow. To make the BWC more effective as an arms control measure, it might be necessary not only to fully exploit the options within these limits but also to try to carefully and slowly push them. This could be

done for instance by addressing three measures that would not require new negotiations, but that, if strengthened, could provide a more predictable framework for inter-state relations and solidify the regime: Article V (consultation procedures and CBMs), the UN Secretary General's investigation mechanism, and universalisation of the BWC norms.

### 5.2.1 Article V – Consultation Procedures and CBMs

Article V, which provides for consultations among members, has been invoked only once, and only for the gravest case possible: the allegation of biological weapons use.<sup>71</sup> However, the Article covers “any problems” related to the convention. If depoliticised and stripped of the sole connotation of accusation and BWC violation, this consultation process could provide a useful additional *ad hoc* forum for states parties. In order to reduce politicisation from the outset, states could in advance informally and transparently explore the willingness of others to take part in this process and then jointly convene a consultative meeting. These meetings should be focussed and deal with specific issues. Possible initial topics include Article X elements and CBMs, both of which will have no or not enough room in the intersessional discussions.

As regards CBMs, even if collective action will have to wait until 2011, so many concrete proposals have been made that there is ample material to prepare for this occasion early (cf. Sims 2007: 366). In the meantime, it is left to individual states to

- use all political and diplomatic channels available to encourage participation in the CBM process,
- continue to informally explore areas for improvement,
- set up a forum to discuss current problems and analyse their sources, e.g. using the consultation procedures,
- publish their CBMs on the Internet, in this context share their experiences regarding domestic preparations, and lobby to increase acceptance of CBM publication in other countries.

Luckily, over recent years there has been a marked increase in interest among certain states parties in making CBM information publicly available on a voluntary basis.<sup>72</sup> If these states successfully lobbied others to do likewise, publication could slowly become

71 In 1997, Cuba accused the USA of having spread a plant pest (*Thrips palmii*) over its territory; the issue could not be fully resolved, as the consultations did not deliver any definitive results (cf. e.g. Zilinskas 1999: 206-217).

72 Background communication with Piers Millett, ISU. In the past, Australia (2001, 2003, 2004, 2005), Finland (2005), Lithuania (2005), Malaysia (2005), Sweden (2005), Switzerland (2002, 2003, 2004, 2005), the UK ((2003, 2004, 2005) and the USA (2003) made their CBMs publicly available ([www.unog.ch](http://www.unog.ch); [www.opbw.org/cbms/annual\\_cbm.htm](http://www.opbw.org/cbms/annual_cbm.htm)). At the time of writing, the UK and Germany have published their 2006 CBMs on the Internet; Switzerland has indicated it will do likewise (<http://www.auswaertiges-amt.de/diplo/de/Aussenpolitik/Abruestung/BioChemie/VerbotBioWaffen-dt-Jahresmeldg06.pdf> (Germany); <http://www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1065432161527> (UK)).

the rule rather than the exception, which would shift the burden of justification from those publishing CBMs to those keeping them classified. States that have concerns about publishing their full CBMs, or that are prevented from doing so by complex interagency processes or domestic regulations, could consider making the submissions partially available. While this is far from ideal, some information may still be better than none.

### 5.2.2 Investigation of Alleged Use of Biological Weapons

As described in chapter 3.1, the UN Secretary General's mechanism is currently the only procedure available to the UN Security Council and to BWC states parties to investigate cases of suspected biological weapons use under Article VI. It would be important that BWC parties collectively acknowledge more strongly than before the value of this mechanism for the BWC and strengthen its ties with the regime.

In the meantime, it will be up to ODA and UN members to make the mechanism in its current form more effective. Hopefully, the ODA review of the investigation guidelines and procedures will pay special attention to the different requirements for investigations of alleged chemical weapons use (which have been carried out before) and biological weapons use (which has never been investigated). But even upon completion of the review and update process, the degree to which it can be used effectively will still remain unclear, given that the investigation teams will only be put together *ad hoc* and that many experts will likely never have participated in an investigation of this kind. In the long run, it would be desirable to have a standing group of experts at the Secretary General's disposal.<sup>73</sup> In the meantime, training sessions for the rostered experts and also for ODA staff would contribute significantly to making the mechanism more effective and reliable<sup>74</sup>, especially since it is crucial that investigations are carried out in a timely and impartial manner. Such training sessions could also test and improve states' domestic preparedness for an investigation on their territory, e.g. in the event of a suspected attack by another state or non-state actors. Since there is currently no basis for collective action to this end in the BWC framework, such training activities would have to be organised by individual states in cooperation with ODA. The discussions in Geneva showed that there should be sufficient interest among states parties to support such undertakings.

### 5.2.3 Universalisation of the BWC Norms Through International Customary Law<sup>75</sup>

In the BWC forum, universalisation is usually discussed as achieving universal membership of the BWC. However, international norms can achieve universal status also through international customary law. Universally binding norms offer the chance to

73 For different ideas on how such a standing expertise could look like cf. e.g. Becker et al. (2005); Findlay (2005); Rosenberg (2004, 2007); cf. also DDA (2004).

74 Cf. Littlewood 2006. Cf. also BWC/CONF.VI/WP.37 (Germany); BWC/MSP/2004/MX/WP.56 (UK).

75 I am grateful to Philip Liste for helpful comments on this section. On WMD and international law cf. Fidler (2003).

unequivocally distinguish “right” from “wrong” behaviour, including the possibility of legitimate action in response to “wrong” behaviour. They also offer a very strong foundation on which the international community can act if these norms are violated, through multilateral action in the framework of existing treaties, through the UN Security Council or through the UN Secretary General.

BWC members have agreed to take more intensive action on universalisation, and the EU has committed its members to “*working towards the ban on biological and toxin weapons being declared universally binding rules of international law, including through universalisation of the BTWC*” in its Common Position (see chapter 3.3.2, emphasis added). In parallel to – and by no means instead of – this approach, it could also be explored to what extent the norm prohibiting development, stockpiling and especially proliferation of biological weapons is already part of international customary law (cf. Findlay 2005: 8), or how it could become part of it.

Customary international law is built upon two components: state practice and *opinio iuris*. As for state practice, a great majority of states have never developed or possessed biological weapons or have long renounced them voluntarily. For several decades, non-possession and non-proliferation of biological weapons has been the rule rather than the exception in international relations, and there is no “persistent objector” insisting on the right to possess biological weapons. In turn, the international community has repeatedly condemned possession and proliferation of biological weapons, and the UN Security Council has declared the proliferation of nuclear, biological and chemical weapons and of materials for their manufacture a “*threat to international peace and security*”.<sup>76</sup> Arguably, the norm contained in the BWC is so strong that today no state can or will legitimately claim to possess and have developed biological weapons, no matter if the state in question is a member of the BWC or not.<sup>77</sup> The biological weapons taboo has been very strong for more than a century (cf. Zanders 2003), and there is a taboo on biological weapons use that has long been considered international customary law (SIPRI 1973). If the prohibition of use is considered a universally binding norm, this should extend to the preparation of such use, i.e. development and possession of biological weapons.

Hence, even a cursory overview of state practice strongly points towards a universal standard, so that consideration of this approach appears well founded. In order to explore to what extent the prohibition of biological weapons as contained in the BWC has entered international customary law, it would be important to

- investigate state practice (the renunciation of biological weapons) in more detail,
- explore the degree to which this practice is based on a sense of obligation on the part of states (*opinio iuris*),

<sup>76</sup> Note by the President of the Security Council, S 23500, 31.01.1992; UN Security Council Resolutions S/RES/1540 (2004); S/RES/1673 (2006) (<http://documents.un.org>; 20.06.2007).

<sup>77</sup> Cf. also Statement by the BioWeapons Prevention Project (BWPP) to the 6th Review Conference of the BTWC, Geneva, 21.11.2006: 2.

- solicit opinions of leading international law scholars on this question,
- request an advisory opinion of the International Court of Justice, similar to that on the legality of nuclear weapons.<sup>78</sup>

This would by no means render the treaty itself irrelevant. In addition to representing the legal foundation of the regime, it provides procedures – however weak they may currently be – to deal with suspected norm violations, it is the basis for a wide range of measures in the biological field (biosafety, biosecurity, public health, bioterrorism, and others), and it provides a legal framework within which verification and compliance measures of whatever form could be agreed one day. Moreover, the process of a norm entering international customary law can be lengthy and difficult, and in the meantime it is important that the existing norms are strengthened as much as possible. The advantage of having an additional strategy would be that, if successful, the international community will have a solid legal basis for action even against non-BWC members, and the United Nations – through the Security Council and/or the Secretary General – could play a much more effective role than is currently the case.

### 5.3 Conclusions

Is there light at the end of the tunnel for the BWC? The past five years have shown that the constant interaction in the BWC regime had a positive impact upon state interaction even in an antagonistic situation. The feeling of success and ownership, the convergence of interests in a number of areas, and the broad common ground across the regional groups that could be established at the 6<sup>th</sup> review conference provide advantageous conditions for further solidifying the BWC. Its members have broadened their view on the scope and dimensions of the “biological problem”, including for example aspects of biosafety and biosecurity alongside with police and health issues, and progress has been made in these areas. This came with the recognition that other actors formerly considered outside the BWC regime may have an important role to play in this expanded setting.<sup>79</sup> Even the political conflict around export controls appears somewhat abated, though it remains to be seen to what extent this will spill over to other Article X issues. The focus of the work has shifted to pragmatic steps to tackle a range of problems that are either national (like implementation, awareness-raising or domestic preparedness) or shared problems (like infectious diseases or bioterrorism) that are exogenous to state-to-state relations, and the 6<sup>th</sup> review conference encouraged the hope that there might be further progress during the next intersessional process in this area.

It seems thus fair to say that there is indeed some light at the end of the tunnel. However, only some of the deficits are being addressed at all, so this applies only to one of

78 “Legality of the Threat or Use of Nuclear Weapons”, International Court of Justice Advisory Opinion of 8 July 1996 (<http://www.icj-cij.org>; 20.06.2007).

79 For an overview over the relevant actors and measures in the biological weapons context cf. Millett (2006).

two tracks in the BWC regime that diverged after 2001. The other one that could be leading to more stable state-to-state relations through increased transparency, binding obligations and verification of states' compliance is still left in the dark. This was a deliberate decision at this point and without it, progress in the other areas would not have been possible. But the recent successes notwithstanding, this approach carries the risk that the BWC may become just one of several instruments to tackle biological problems of all kinds, and that states may settle on a low level of ambition as far as the arms control and security aspects of the BWC are concerned. Yet, the BWC does not only serve as a normative framework for all these other activities but has its very own value as an arms control instrument, too, and as such, it remains weak.

To sustain the BWC's unique functions, states parties will eventually have to turn to procedural issues, initiate a new discourse on compliance and verification as well as re-focus on inter-state relations, since an interplay of a deteriorating international security environment, new scientific and technological developments, and intensive yet intransparent biodefence activities could produce or intensify "traditional" security risks. Bringing light to this second track would, however, require a profound policy shift in some states. Yet, it is important not to lose sight of this aspect, and the regime has proved sufficiently dynamic to incorporate a wide range of measures in varying forms. Only if both tracks are being followed – not necessarily in a one-in-all approach, but in the same framework of action – will the regime be truly strengthened and the potential of the BWC as an arms control instrument and core of the regime be fully exploited.

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## **Abbreviations**

AHG	Ad Hoc Group
BWC	Biological Weapons Convention
CBMs	Confidence-Building Measures
CWC	Chemical Weapons Convention
DDA	(UN) Department for Disarmament Affairs (until March 2007)
EU	European Union
ISU	Implementation Support Unit
JACKSNNZ	Japan, Australia, South Korea, Switzerland, Norway, New Zealand
NAM	Non-Aligned Movement
NGOs	Non-Governmental Organisations
NPT	Non-Proliferation Treaty
ODA	(UN) Office for Disarmament Affairs (since March 2007)
PrepCom	Preparatory Committee
UN	United Nations
WEOG	Group of Western and Other States