

ARTICLE XII: REVIEW CONFERENCES

by Nicholas A. Sims & Graham S. Pearson

Consideration of Article XII at the Fourth Review Conference

1. Article XII of the Convention states that:

Five years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Depositary Governments, a conference of States Parties to the Convention shall be held at Geneva, Switzerland, to review the operation of the Convention, with a view to assuring that the purposes of the preamble and provisions of the Convention, including the provisions concerning negotiations on chemical weapons are being realized. Such review shall take into account any new scientific and technological developments relevant to the Convention.

2. At the Fourth Review Conference of the BTWC held on 25 November to 6 December 1996, the Final Declaration¹ in respect of Article XIII stated that:

1. *The Conference decides that a Fifth Review Conference shall be held in Geneva at the request of the majority of States Parties, or in any case, not later than 2001.*

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

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

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

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

- *The conclusions of a Special Conference, to which the Ad Hoc Group shall submit its report, including a legally-binding instrument to strengthen the Biological and Toxin Weapons Convention, which shall be adopted by consensus, to be held as soon as possible before the*

¹United Nations, *The Fourth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Geneva, 25 November - 6 December 1996, BWC/CONF.IV/9, Geneva 1996.

commencement of the Fifth Review Conference; and further action as appropriate;

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

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

Developments since the Fourth Review Conference

3. The Fifth Review Conference has been held no later than 2001 as requested in the Final Declaration of the Fourth Review Conference. The various items that the Fourth Review Conference decided should be considered have all been included in the Provisional Agenda² as Agenda items 10, 11 and 12:

10. Review of the operation of the Convention as provided for in its Article XII

(a) General debate

(b) Articles I - XV

(c) Preambular paragraphs and purposes of the Convention

11. Consideration of issues identified in the review of Article XII contained in the Final Declaration of the Fourth Review Conference and possible follow-up action

12. Work done to strengthen the Convention in accordance with the decision of the 1994 Special Conference

Issues for the Fifth Review Conference

4. The Conference is recommended to extend its review of Article XII and the corresponding section of the Final Declaration so as to ensure

(a) the continuation, and if possible the perpetuation, of the review process, and

(b) the authorisation of its General Committee to undertake continuing tasks as a [Committee of Oversight] in order to provide interim supportive institutions, designed to bridge the interval between the Fifth and Sixth Review Conferences.

²United Nations, *Report of the Preparatory Committee for the Fifth Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Geneva, 25 - 27 April 2001, BWC/CONF.V/PC/1, 1 May 2001.

It is recommended that the Article XII section of the Final Declaration be drafted in two parts, to reflect this cumulative extension of the review.

Part One

5. It is recommended that **Part One** be based on the three paragraphs concerning Article XII which were agreed in 1996, appropriately updated.

6. Paragraph 1 would simply replace '*Fifth*' by '*Sixth*' and '*2001*' by '*2006*'. The possibility would thereby be retained of a majority of States Parties choosing a date earlier than 2006. If they did not exercise this power of '*requisition*', the Sixth Review Conference would accordingly take place in 2006. Paragraph 1 would therefore read as follows:

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

7. In paragraph 2, the first two mandatory agenda items, which are derived from Article XII itself, should continue to take pride of place. The third and fifth agenda items should also be repeated; it is, however, recommended that at the end of the fifth agenda item the words "*the Fourth Review Conference*" be replaced by the words "*this and earlier Review Conferences*"

because there are still outstanding requests from the Review Conferences of 1986 and 1991 as well as 1996 which await action by the Secretary-General of the United Nations such as those in connection with the implementation of Article X.

8. Still in paragraph 2, the fourth agenda item may present problems. States Parties are likely to be divided over what references should be made to the Ad Hoc Group, here as elsewhere in the Final Declaration. It is recommended that qualifying clauses be introduced, to enable the Conference to cope with this situation:

" - The conclusions of a Special Conference, if held before the Sixth Review Conference for the purpose of receiving the report of the Ad Hoc Group, including a legally-binding instrument to strengthen the Convention, which shall have been adopted by consensus. The inclusion of this agenda item is without prejudice to the positions of States Parties on [the future work of the Ad Hoc Group and on] matters under negotiation in the Ad Hoc Group."

The words within square brackets would only be needed if consensus could not be reached at the Fifth Review Conference on repeating from 1996 - with a qualifying "*without prejudice*" clause in 2001 - the appeal, under paragraph 5 of the Article XIV section, to all States Parties to participate actively in the Ad Hoc Group with a view to the early completion of its work to strengthen the Convention. The language recommended for that paragraph in the chapter on Article XIV in this Briefing Book reads:

5. The Fifth Review Conference appeals to those States Parties to the Biological and Toxin Weapons Convention which have not taken part in the Conference to participate in the implementation of provisions contained in the

Final Declaration of this Conference. The Conference also appeals to all States Parties, without prejudice to the positions of States Parties on matters under negotiation in the Ad Hoc Group of States Parties, to participate actively with a view to the early completion of work to strengthen the Convention.

9. Paragraph 2 would thus read as follows:

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

- The impact of scientific and technological developments relating to the Convention;*
- The relevance of the provisions of, and the implementation of the Chemical Weapons Convention on the effective implementation of the Biological and Toxin Weapons Convention, duly taking into account the degree of universality attained by such conventions at the time of the Sixth Review Conference;*
- The effectiveness of confidence-building measures as agreed at the Second and Third Review Conferences;*
- The conclusions of a Special Conference, if held before the Sixth Review Conference for the purpose of receiving the report of the Ad Hoc Group, including a legally-binding instrument to strengthen the Convention, which shall have been adopted by consensus. The inclusion of this agenda item is without prejudice to the positions of States Parties on [the future work of the Ad Hoc Group and on] matters under negotiation in the Ad Hoc Group;*
- The requirement for, and the operation of, the requested allocation by the United Nations Secretary-General of staff resources and other requirements to assist the effective implementation of the relevant decisions of this and earlier Review Conferences;*

10. Paragraph 2 will need an extra agenda item added at the end, as its sixth agenda item, if the recommendation in **Part Two** below is adopted:

"- The report of the General Committee of the Fifth Review Conference, or other continuing representative body, constituted as a [Committee of Oversight] under paragraph 4 below, including any recommendation that its mandate be extended, with or without amendment, to bridge the interval between the Sixth and Seventh Review Conferences."

11. Paragraph 3 should move from recommendation to decision, in order to confirm the permanence of the Convention and to emphasise the importance of placing its quinquennial review process on an established and continuing basis:

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

Part Two

12. Paragraphs 4 to 9 of the Article XII section of the Final Declaration, as proposed below, would break new ground. The following background analysis³ sets out the argument for these new paragraphs.

13. Article XII of the Convention provided only for one Review Conference, five years after the BTWC's entry into force. In 1980 it was touch and go whether the First Review Conference would reach agreement on convening another; its timing remained contentious until late 1984. The Review Conferences of 1986, 1991 and 1996 generated expectations of a continuing series at 5-year intervals. This is the pattern into which the Fifth Review Conference fits.

Formal functions

14. All five Review Conferences are primarily governed by the Article XII mandate *"to review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention...are being realized."* This includes taking into account the impact of *"any new scientific and technological developments relevant to the Convention."* That is their common agenda.

15. Each Conference's Final Declaration has supplemented the common agenda with specific tasks laid upon the next Review Conference. The Fourth Review Conference asked the Fifth also to consider the relevance of the provisions and implementation of the CWC on the effective implementation of the BTWC (updating the original Article XII provision that *"negotiations on chemical weapons"* be given particular attention); the effectiveness of confidence-building measures agreed at the Second and Third Review Conferences; the conclusions of the expected (post-Ad Hoc Group) Special Conference *"and further action as appropriate"*; and the UN Secretary-General's provision of staff and other resources required to assist the effective implementation of Fourth Review Conference decisions.

Informal functions

16. In practice, the Review Conferences have acquired additional, informal functions. These are performed imperfectly and unevenly (as indeed are the formally stated functions). However, they are essential for the nurturing of the BTWC treaty regime. In the absence of other institutions, the evolution of that regime has depended heavily upon the Review Conferences and their Final Declarations performing four, inter-connected, functions in particular:

1. Registering consensus on definitions and extended understandings of specific terms used in the Convention, especially those which reinforce the general purpose criterion and comprehensive coverage of Article I.

³Nicholas A. Sims, *Nurturing the BWC: Agenda for the Fifth Review Conference and Beyond*, CBW Conventions Bulletin, No 53 (Septemeber 2001), pp. 3 - 5.

2. Identifying and elaborating procedures within the framework of the Convention, notably Article V, using the latent potential of the text as it stands together with the definitions and extended understandings it has accumulated through this review process.

3. Reaffirming the positions established at earlier Review Conferences (the *acquis*) and moving beyond them to the extent consensus allows.

4. Steering the evolution of the BTWC treaty regime through the next five years.

17. In 2001 the third of these functions is vitally important. The Fifth Review Conference will need to hold the line and stop the BTWC's *acquis* unravelling, even if not much forward movement is possible on this occasion. There is value in the cumulative drafting process, in which the last Review Conference's Final Declaration is the starting point and new language is added. Such cumulation deepens and extends the common positions, agreed procedures and politically-binding commitments which the BTWC States Parties are willing to endow with their collective authority. This time, cumulation may be relatively slight, because of the effort required to stop the BTWC going backwards, But every little helps, especially in a pervasive climate of demoralisation and distrust following the US statement of 25 July 2001 and the resulting failure of the Ad Hoc Group on 17 August 2001 even to agree a procedural report, let alone conclude a Protocol.

Steering the treaty regime

18. There is also a strong case for paying particular attention in 2001 to the fourth of the informal functions listed above: steering the evolution of the BTWC treaty regime through the next five years. This is not something at which previous Review Conferences have excelled. They have left the BTWC to evolve in an uncoordinated fashion, divergent and unbalanced as between the different sectors into which its treaty regime can be divided for purposes of analysis. To achieve convergence and equilibrium in its constructive evolution will require deliberate steering. But in the absence of any other treaty institutions it is up to the Review Conference to undertake such steering or create the means by which a representative body may act on its behalf; or it will not be done at all.

19. The treaty regime does need steering -- it will not flourish through neglect. And it must be steered by its States Parties collectively. The BTWC is a fully multilateral treaty, binding 143 sovereign states, and it needs institutions to match.

Interim supportive institutions

20. What should these institutions be? In the long run, no doubt, the Organization for the Prohibition of Bacteriological (Biological) and Toxin Weapons planned in the Protocol will suffice. But until there is an OPBW with the experience and capacity to serve the needs of the Convention as well as the Protocol, the Convention requires a modest set of interim supportive institutions to nurture its treaty regime and help it to flourish as, with careful steering, it starts to overcome its long-recognised fragility.

21. In 1990-91 several such initiatives were proposed, and the Third Review Conference gave serious consideration to setting up an inter-sessional body or at least a secretariat unit to help states maximise the value of their newly enhanced programme of confidence-building measures.

22. A representative Committee of Oversight would do much to remedy the BTWC's chronic institutional deficit. It should be served by a small dedicated secretariat.

23 That opportunity was narrowly missed in 1991. Now the case has re-emerged with new urgency. If the Fifth Review Conference cannot expect in three weeks to register much more than a lowest common denominator of agreement, it can at least make possible some progress after 7 December 2001, by addressing the problem of the continuing dearth of institutional capacity.

24. Almost every useful advance one could imagine coming out of the Fifth Review Conference and the taking forward of the *acquis* from the earlier Review Conferences would benefit from continuing institutional capacity. The simplest way to create this capacity is to give the General Committee of the Conference (its office-holders and regional group coordinators, plus regionally representative vice-presidents) a continuing identity and a mandate, to act on the Conference's behalf until the Sixth Review Conference. Then its mandate might be extended, with or without amendment, to cover the interval between the Sixth and Seventh Review Conferences. (The Seventh Review Conference, in 2011, is the earliest date at which even on the most optimistic assumptions a permanent OPBW might be ready to permit integration of the Convention and Protocol institutions.)

25. Advantages of simplicity argue in favour of extending the life of the General Committee through 2001-2006 in the first instance. Its chairmanship would be straightforward (the presidency of the conference) and its funding, as an appendix of the conference, would be *pro rata* as for the conference itself, thereby avoiding argument over two issues which vitiated the institutional proposals at the Third Review Conference.

26. The alternative of a smaller *bureau*, elected by the General Committee from among its membership (for example, retaining the Conference office-holders and regional coordinators but not the vice-presidents), has also had its advocates. In the draft mandate which follows, and which sets out the proposed functions and methods of working of the representative body, both variants are offered and a range of possible titles suggested.

Language for the Final Declaration

27. Two things must be re-emphasised. First, the case for a modest set of BTWC institutions is a long-established one, developed and articulated since the 1980s: it is not to be misperceived as an alternative to the Protocol or as insurance against the eventuality of definitive failure in the quest for a Protocol. Second, they must be seen as interim institutions, pending eventual integration of Convention and Protocol institutions in a permanent OPBW. They are not a substitute for an OPBW, and their

creation would not be an alternative to continued pursuit of a legally-binding Protocol, open to all to join.

28. Deliberately, this text has been developed for the Article XII section of the final declaration, and not under the rubric of "further action as appropriate" which would relate it to the 'strengthening' process identified with the Ad Hoc Group and might cause it to be misinterpreted as a substitute for the conclusion of a Protocol.

29. The Fifth Review Conference can put in place the institutional means to steer the BTWC treaty regime into constructive channels and nurture its evolution, pending the arrival of a Protocol and an Organization (the OPBW) which remain vital to its strengthening.

30. It is recommended that the following additional language be adopted in the Article XII section of the Final Declaration as paragraphs 4 to 9:

4. The Conference, conscious of the need for interim institutions in support of the Convention to bridge the five years' interval between the Fifth and Sixth Review Conferences, and without prejudice to the positions of States Parties on the strengthening of the Convention through a legally-binding instrument, requests its General Committee [to constitute itself as a continuing body until the Sixth Review Conference] [to elect x of its members to constitute a continuing body until the Sixth Review Conference] under the name [Committee of Oversight] [Continuing Committee] [Interim Committee] [Representative Committee] and in that capacity, under the authority of this Conference and without detracting from the functions of the Depositary Governments designated under Article XIV:

(a) to follow up the Final Declaration and decisions of this Conference;

(b) to exercise a general oversight over the effective application of the provisions of, and the balanced operation of, the Convention, including its programme of confidence-building measures established by the Second and Third Review Conferences, in the interests of the States Parties as a collectivity;

(c) to assist States Parties in fulfilling their obligations under the Convention and their politically binding commitments, including the programme of confidence-building measures, under the Final Declarations of successive Review Conferences;

(d) to promote universal adherence to the Convention, including the organisation of demarches on its behalf to States Signatories which have yet to ratify their signatures, to encourage their ratification, and to non-signatories, to encourage their accession to the Convention;

(e) to represent the States Parties to the Convention as a collectivity in relations with the United Nations, and with other organizations as appropriate;

(f) to establish, as it finds necessary for the exercise of its functions, subsidiary organs such as a Legal Advisory Panel and a Scientific Advisory Panel with appropriate terms of reference;

(g) to establish, in consultation with the Secretary-General of the United Nations, a small secretariat dedicated exclusively to the service of the Convention including this Committee and its Panels;

(h) to report to the Sixth Review Conference, including a recommendation on whether this mandate should be extended, with or without amendment, under the authority of the Sixth Review Conference to bridge the interval between the Sixth and Seventh Review Conferences.

5. The Committee shall meet no less often than once a year between the Fifth and Sixth Review Conferences.

6. The Committee shall operate by consensus.

7. The Committee may be invited by any State Party to assist in undertaking consultation and cooperation pursuant to Article V, and may accede to such an invitation provided no State Party objects, without detracting from the right of any State Party to request that a Formal Consultative Meeting be convened in accordance with the decisions of successive Review Conferences and the procedures agreed by them, under Article V, or to lodge a complaint with the United Nations Security Council under Article VI.

8. The Committee shall issue interim reports on its work, in addition to the report to the Sixth Review Conference required under paragraph 1(h) above. Such reports shall be addressed to all States Parties and shall also be made available to States Signatories, the United Nations, and other organizations as appropriate;

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

Language for the Fifth Review Conference

31. It is recommended that the following language be adopted by the Fifth Review Conference for its section on Article XII in its Final Declaration:

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

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

- *The impact of scientific and technological developments relating to the Convention;*
- *The relevance of the provisions of, and the implementation of the Chemical Weapons Convention on the effective implementation of the Biological and Toxin Weapons Convention, duly taking into account the degree of universality attained by such conventions at the time of the Sixth Review Conference;*
- *The effectiveness of confidence-building measures as agreed at the Second and Third Review Conferences;*
- *The conclusions of a Special Conference, if held before the Sixth Review Conference for the purpose of receiving the report of the Ad Hoc Group, including a legally-binding instrument to strengthen the Convention, which shall have been adopted by consensus. The inclusion of this agenda item is without prejudice to the positions of States Parties on [the future work of the Ad Hoc Group and on] matters under negotiation in the Ad Hoc Group;*
- *The requirement for, and the operation of, the requested allocation by the United Nations Secretary-General of staff resources and other requirements to assist the effective implementation of the relevant decisions of this and earlier Review Conferences;*
- *The report of the General Committee of the Fifth Review Conference, or other continuing representative body, constituted as a [Committee of Oversight] under paragraph 4 below, including any recommendation that its mandate be extended, with or without amendment, to bridge the interval between the Sixth and Seventh Review Conferences.*

3. *The Conference decides that conferences of States Parties to review the operation of the Convention shall be held at least every five years.*

4. *The Conference, conscious of the need for interim institutions in support of the Convention to bridge the five years' interval between the Fifth and Sixth Review Conferences, and without prejudice to the positions of States Parties on the strengthening of the Convention through a legally-binding instrument, requests its General Committee [to constitute itself as a continuing body until the Sixth Review Conference] [to elect x of its members to constitute a continuing body until the Sixth Review Conference] under the name [Committee of Oversight] [Continuing Committee] [Interim Committee] [Representative Committee] and in that capacity, under the authority of this Conference and without detracting from the functions of the Depositary Governments designated under Article XIV:*

- (a) *to follow up the Final Declaration and decisions of this Conference;*

(b) to exercise a general oversight over the effective application of the provisions of, and the balanced operation of, the Convention, including its programme of confidence-building measures established by the Second and Third Review Conferences, in the interests of the States Parties as a collectivity;

(c) to assist States Parties in fulfilling their obligations under the Convention and their politically binding commitments, including the programme of confidence-building measures, under the Final Declarations of successive Review Conferences;

(d) to promote universal adherence to the Convention, including the organisation of demarches on its behalf to States Signatories which have yet to ratify their signatures, to encourage their ratification, and to non-signatories, to encourage their accession to the Convention;

(e) to represent the States Parties to the Convention as a collectivity in relations with the United Nations, and with other organizations as appropriate;

(f) to establish, as it finds necessary for the exercise of its functions, subsidiary organs such as a Legal Advisory Panel and a Scientific Advisory Panel with appropriate terms of reference;

(g) to establish, in consultation with the Secretary-General of the United Nations, a small secretariat dedicated exclusively to the service of the Convention including this Committee and its Panels;

(h) to report to the Sixth Review Conference, including a recommendation on whether this mandate should be extended, with or without amendment, under the authority of the Sixth Review Conference to bridge the interval between the Sixth and Seventh Review Conferences.

5. The Committee shall meet no less often than once a year between the Fifth and Sixth Review Conferences.

6. The Committee shall operate by consensus.

7. The Committee may be invited by any State Party to assist in undertaking consultation and cooperation pursuant to Article V, and may accede to such an invitation provided no State Party objects, without detracting from the right of any State Party to request that a Formal Consultative Meeting be convened in accordance with the decisions of successive Review Conferences and the procedures agreed by them, under Article V, or to lodge a complaint with the United Nations Security Council under Article VI.

8. The Committee shall issue interim reports on its work, in addition to the report to the Sixth Review Conference required under paragraph 1(h) above. Such reports shall be addressed to all States Parties and shall also be made

available to States Signatories, the United Nations, and other organizations as appropriate;

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