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Report

Compliance with the BTWC: strategies towards the 2016 Review Conference

Wednesday 23 – Friday 25 September 2015 | WP1416

In association with:





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As the Biological and Toxin Weapons Convention (BTWC) approaches its Eighth Review Conference in December 2016, the long-term viability of the biological non-proliferation regime is in question. Plagued with questions about its verifiability from its inception, the Convention has a long and difficult history with attempts to strengthen its provisions. How do States Parties define compliance, and can consensus on this definition be constructed before the 2016 meeting? How can States Parties demonstrate their compliance with the Convention, and what measures can be taken nationally, internationally, and collectively to assess this compliance? What are realistic objectives for the 2016 Review? Are there other threats to the long-term credibility of the BTWC?

Key points

- Verification and compliance issues remain unresolved, despite significant support among States Parties for further strengthening of the Convention. There are limits to what outcomes can realistically be achieved, given the lack of attention the BTWC receives from the international community and the limited resources states can and will devote to it.
- The next Review Conference offers an opportunity to assess a number of possible compliance mechanisms, including peer review processes and an Open-Ended Working Group on future negotiations on a legally-binding protocol.
- The 2016 Review Conference's agenda will also need to address other ways to strengthen and develop the Convention, including revising the Intersessional Work Programme, enhancing the S&T review process, and improving the capacity to investigate use of biological weapons or respond to an outbreak.
- Peer review, such as the pilot process by France in 2013 and the current BENELUX exercise, offers one means by which States Parties can provide information about their compliance and assess the data provided by others, and the States that have been participating in these exercises will likely be able to offer a number of lessons learned from their experiences.
- Russia has proposed establishing an Open-Ended Working Group at the 2016 Review Conference to begin drafting proposals to be included in a legally binding protocol to the BTWC.

Compliance with the BTWC: What does it look like?

1. So far, the biological disarmament regime has been largely successful at limiting the acquisition and use of biological weapons, and the BTWC has been a crucial element of the international norm against their possession and use. Yet since its inception, the BTWC has entailed a number of shortcomings. The Convention's institutional deficit, the challenge of ensuring that it remains up to date with regard to advances in science and technology, and the lack of guidance in the Convention on how to assess compliance or punish violations have led some to worry about its health and longevity. States Parties have searched for innovative solutions to these limitations; as a result, the BTWC has evinced signs of positive progress, including the establishment of the Implementation Support Unit (ISU) and the development of an intersessional process (ISP) to contribute to the treaty's strengthening in the periods between Review Conferences.
2. However, verification and compliance issues, which have plagued the Convention since its negotiation, remain unresolved. In part, this is due to the troubled history of negotiations on a legally binding mechanism to verify compliance. It may also be due to the fact that BTWC-related issues tend to stay below the radar of senior policymakers; instances and allegations of use have historically been dealt with outside of the BTWC context, and here have been few BW-related crises that might have forced States Parties to grapple with the effectiveness, or lack thereof, of the BTWC.
3. Since the 2011 Review Conference, States Parties have cautiously begun to explore the issue of compliance and how it might be demonstrated. States Parties demonstrate significant support for further bolstering of the Convention, but little consensus about the best method to do so. Moreover, obstacles loom for any attempt to strengthen the Convention. One hindrance is relevance, in that many States Parties do not feel threatened by biological weapons and therefore do not see the value of putting their resources toward the BTWC.
4. A second challenge is engagement; at the moment, only a small number of states devote much attention to the BTWC, and many countries lack the capacity even to allocate resources to Confidence-building Measures (CBMs) and other elements of the existing architecture, much less to further obligations. A third obstacle is resource allocation: the current ISP has made little progress on substantive work in part because of the difficulty of accomplishing anything of significance in a two-week timeframe, and States Parties may be reluctant to dedicate any additional time or funding to the BTWC's functioning, even in a post-recession period. Without the provision of further resources, there are limits to what outcomes can realistically be achieved.
5. Currently, States Parties do not agree on how to define compliance. They argue over which articles of the BTWC constitute "core" obligations, whether failure to implement the BTWC at a national level constitutes a compliance issue, whether compliance is a binary state or a continuum, and what should be the threshold for concern. Perhaps the most significant disagreement, however, is over the question of who is qualified to make compliance judgments. In the U.S. view, for example, a formal multilateral mechanism for compliance verification with an independent international organization is a tool, not a substitute for state judgment. Other States Parties argue that while compliance assessments by individual states can be helpful, the final judgment must be multilateral, since individual assessments may be subjective or politically motivated; in the view of these States, only a multilaterally agreed mechanism for compliance verification can provide assurance and act as a deterrent against non-compliance.

Defining and demonstrating compliance

6. At the heart of any mechanism to strengthen the Convention is information. There are various means by which states can provide information to others (including information exchanges, confidence-building measures, or compliance reports), but it is impossible

to determine a State's compliance with the Convention without baseline data on their implementation of the BTWC and relevant activities within their territories. There are also numerous ways to assess that information, including peer review processes, consultations, civil society assessments, inspections, or other means that could be undertaken by individual states, groups of states, international organizations, or other actors. The current effort to identify appropriate compliance methodologies reflects an attempt to identify the best ways for States Parties to share information about what they do and for others to assess and validate that information.

7. Several states have offered proposals or launched new processes to explore compliance assessment. The Netherlands, Belgium, and Luxembourg are piloting a peer review mechanism, based on an earlier proposal by France; meanwhile, the Russian Federation has launched an initiative to return to negotiations based on the 1994 Ad Hoc Group mandate.

Peer review initiatives

8. Inspired by France's successful peer review exercise in 2013, Belgium, Luxembourg, and the Netherlands are conducting a BENELUX Peer Review exercise aiming to enhance national implementation through voluntary exchanges of information. The peer review consists of two phases; the first, "written" phase allows the States a chance to exchange their 2015 CBMs and review each other's forms, posing questions or requests for clarification as needed. The second phase provides for meetings and visits; each country organizes an event and invites the other two States. The event will consist of a meeting with presentations from a peer review team and a series of visits to one or more of the biological defence facilities described on the host country's Form A.
9. The BENELUX exercise is based on the existing political commitment to complete CBMs. Although these forms cover the entire scope of implementation, the current peer review exercise focuses on two elements: national biological defence research, and national legislation related to BTWC implementation, with particular focus on biosafety and biosecurity. Creating a mechanism to provide feedback on CBMs may increase their role as a declaration tool within the Convention.
10. Belgium, Luxembourg, and the Netherlands aim to present the outcome of the exercise at the next Meeting of States Parties in December 2015. They also plan to share their experiences at the 2016 Review Conference in the hope of encouraging further international cooperation on compliance assessment, particularly with regard to peer review.
11. There is some hesitation about peer review as an overall concept, although it is a highly cost-effective approach. Although not a comprehensive verification method, peer review mechanisms can build understanding and insight into how biological research is being performed in different countries. However, questions remain about what activities are conducted as a part of a peer assessment (particularly the precise nature of on-site visits), what methodology would be used to ensure that the review is sufficient rigorous and does not whitewash significant compliance issues, and what constitutes a State's "peers" and whether its allies can provide objective analyses of its compliance. In the case of the BENELUX initiative, the cost limited peer review to the neighbouring countries. The participants see the current peer review exercise as an opportunity to share best practices and raise awareness, not a one-size-fits-all tactic: there are no set formats for the assessment or the question-and-answer phase of the process, and the next group of countries who conduct a peer review might take a different approach or choose to focus on a different set of issues.

The Russian initiative: returning to the 1994 mandate

12. The Russian proposal advocates a return to negotiations on a legally binding protocol to strengthen treaty implementation, an approach based on the mandate approved by consensus at the 1994 BTWC Special Conference. This mandate is so open that states could discuss a broad range of possibilities under its auspices, but the mandate is linked historically to a legally binding instrument, and most States Parties would probably expect that discussions under the mandate would lead to this outcome. A legally binding agreement would avoid some of the shortcomings inherent in other proposals for mechanisms to promote compliance with the Convention, which rely on political arrangements. Namely, developing countries see non-legally binding approaches as advantageous only to States Parties with the resources to participate in the proposed activities; such proposals rely on national experts to evaluate information, and it can be difficult to determine whether these experts are providing their professional opinion or acting on instructions from their governments; and they are vulnerable to fluctuations in the political climate, such as national elections or economic instabilities.
13. At the 2015 Meeting of Experts, Russia put forward a proposal that the 2016 Review Conference should establish an Open-ended Working Group (OEWG) to begin drafting proposals to be included in a legally binding instrument. They suggested that the OEWG could consider measures to promote national implementation, procedures to monitor developments in science and technology, mechanisms for assistance and protection against biological weapons, and a mechanism for investigating alleged use, among other issues. Notably, the proposal does not mention verification, since it would likely be impossible to achieve consensus on that element. Nonetheless, Russia's position is that all other areas can and should be included in the negotiations. Russia has also proposed creating an international body, the Organisation for the Prohibition of Biological Weapons (OPBW), to serve as an implementing agency for the legally binding measures.
14. The Russian proposal combats many of the frustrations that some States Parties have expressed about the BTWC's operation; namely, that the ISP is insufficient to achieve much of substance, that the treaty suffers from an institutional deficit, and that the Convention's status as a legal norm with no enforcement provisions is not strong enough to prevent the use of biological weapons. However, there are concerns about the proposal from other member states. First, it is unclear whether restarting negotiations would lead to engagement from more states: adding further work in Geneva might only exacerbate the lack of participation from developing countries with limited resources. On the other hand, creating a structure might generate renewed interest from States Parties that have generally ignored the BTWC or seen it as irrelevant to their own concerns. Second, negotiating a protocol or other instrument could potentially take up a great deal of time and push aside other important work; the best solution might be to take a dual-track approach and conduct negotiations concurrently with other work under an ISP, but attention to other important issues might still be lost. As the Chemical Weapons Convention demonstrates, even a successfully negotiated legally binding mechanism for verification is not a panacea, and national implementation is and will remain an ongoing issue. Third, it is unclear how the changes in science and technology that have occurred since 1994, including the widespread use of broadband internet, the diffusion of biotechnology, and the advances in genetic sequencing, might affect the 1994 mandate or the negotiations process. Fourth, some States, particularly members of the Non-Aligned Movement (NAM), feel that the Russian proposal is not sufficiently comprehensive since it does not address the issue of verification. Nevertheless, several of these States acknowledge that it may be necessary to set aside that issue for the time being to achieve consensus. Finally, some States Parties are concerned that another negotiation failure might negatively affect the Convention, by either creating acrimony among member states or distracting States Parties from the question of the objectives

and future of the Convention. However, it is possible that the removal of the contentious issue of verification from discussion in the OEWG – at least unless and until a participating state brings it up – might increase the chances for a successful negotiation this time.

Special conference

15. One option to deal with the issue of compliance might be to hold a Special or Executive Conference outside of the normal Review Conference timeframe. Such a conference could be held at the midpoint of the next review cycle, in mid-2019. This would enable States Parties to identify key issues for the Special Conference at the 2016 meeting, and then give them two and a half years to identify possible approaches and solutions. The Convention does not limit the number of conferences that can be held.

Investigating alleged use of biological weapons

16. The BTWC does have some options for investigating and responding to possible use of biological weapons. The United Nations Secretary-General can initiate an investigation into the possible use of chemical or biological weapons, and under Article VII, States Parties will provide or support assistance to a party to the Convention requesting such help if they have been put in danger by a violation of the Convention, as determined by the UN Security Council.
17. Assisting the victims of a biological attack is one of the few areas of common interest for the next Review Conference, and it has taken on new relevance in the aftermath of natural epidemics such as the Ebola outbreak. The Ebola experience provided a number of lessons and has led to the establishment of more immediate and reactive response mechanisms, although these are outside the context of the BTWC.
18. Specific mechanisms to deal with the outcomes of deliberate attacks as opposed to natural outbreaks are probably unnecessary, as the expertise required to assist states would be the same in either case. However, deliberate biological attacks do pose a unique difficulty, namely how to deal with the conflicting aims of investigation of the attack and assistance to the ill: providing care to the victims of a biological attack might mean that important evidence is destroyed, while the demands of an investigation might prohibit sufficiently timely medical intervention. That being said, both natural and deliberate outbreaks requiring assistance are rare, and the capability is not sufficiently exercised. Therefore, it is necessary to have a mechanism that will work for both natural epidemics and deliberate attacks, and there are sufficient commonalities – such as communications, health and safety procedures, and the organization of the team – to warrant maintaining a single entity for both. It may be possible to circumvent the issue by training teams responding to disease outbreaks in developing countries to also conduct investigations.
19. The UN Secretary-General's mechanism (UNSGM) has also gained prominence in recent years; although the UNSG launched two investigations of chemical weapons use in 1992, the mechanism had not been invoked since due to the hope of a negotiated verification protocol, but the chemical weapons attacks in Syria and subsequent investigation led to renewed interest in the mechanism.
20. Certain States Parties, including Sweden, France, the United Kingdom, Germany, Denmark, and Australia, have been involved in the UNSGM revitalization process by training experts on the UN roster and exploring how best to calibrate analytical laboratories and evaluate their validity and accuracy. However, further work is needed to ensure that the mechanism is in place in the event of an attack so that a prompt investigation can be conducted. Among other issues, the experts who would carry out the investigation would need to train and work as a team. In a chemical investigation, these experts would be drawn from the Organisation for the Prohibition of Chemical Weapons (OPCW); the BTWC has no such corps on which to draw, but the team must nevertheless be prepared. As well, the investigations are all done in the experts' spare

time, and the training and laboratory collaborations are financed on voluntary contributions. Some financial strengthening will be necessary to ensure that the mechanism can be sustained in the future.

21. Some States Parties remain uncomfortable with the relationship between the UNSGM and the BTWC. At the time the mechanism was developed, the Chemical Weapons Convention (CWC) did not yet exist and the BTWC protocol was not on the table. In the wake of these developments, some States might prefer to see the UNSGM disappear. They express concern that the Secretary-General might decline to conduct an investigation in a permanent Security Council member state, and note that there was no role for States Parties in the investigation process. However, others claim that the CWC and BWC do not offer a viable alternative. The OPCW's mechanism for challenge inspections has not been invoked, and these States Parties argue that the UNSGM, which carries the authority of the Secretary-General's office, is politically easier to achieve in the event of use than an OPCW challenge inspection and could be more independent. Moreover, the UNSGM provides an option to deal with states such as Syria that are not members of the relevant Convention, as well as areas not under the government's control.

Challenges for the 2016 Review Conference

22. The BWC is in as good health as one could expect: it has been kept up to date, despite the rapid pace of scientific and technological development; instances of biological weapons use have been rare, defying expectations in the early days of the Convention; and progress toward universal membership has been slow but steady. Naturally, work must still be done to ensure that the Convention remains relevant and effective, and the purpose of a five-yearly Review Conference is to tweak the Convention's functioning and revise practices.
23. It can be difficult to judge the NAM's voice on some issues, and the perspectives of critical states are not always heard in the run-up to the meeting. The reality of multilateral negotiations at the Review Conference means that members of WEOG will need to be realistic about how their ideas will match up with the expectations of NAM states and other political groupings.

Improving confidence-building measures

24. The Eighth Review Conference provides opportunities to improve participation in and functioning of CBMs. CBMs can be important tools for providing reassurance and alleviating doubts or concerns, but compliance assessments will rarely appear as definitive yes-or-no statements. By completing CBM forms, states can provide data that will add up to an impressionistic picture of its state of compliance, not a "yes-no" judgment about its compliance status.
25. The 2016 Conference could make a number of adjustments to increase the confidence that CBMs provide other parties about a particular state's compliance and improve participation in the process. For example, the ISU could include a countdown to the submission deadline on its website and issue announcements when a state submits its report, thereby stimulating interest and awareness. The Review Conference could also facilitate the creation of an online database of searchable CBMs with accessible data and encourage public submission of CBMs, which would bolster transparency. The CBMs could also be expanded to promote oversight of dual-use research of concern. Most importantly, the 2016 Review Conference provides an opportunity for states to consider what information they need to feel assured about their fellow signatories' compliance with the Convention, and to develop approaches to the CBMs that would reflect this information. Although CBMs are not a replacement for a verification protocol, they should nevertheless be useful even if a legally binding instrument never comes to fruition.

The intersessional work programme

26. Most States Parties seem to feel that the current ISP is insufficient for substantive work. However, using the ISP for anything more substantive may not be feasible given the time and resources it currently receives.
27. A number of suggestions have been put forward to improve the ISP's effectiveness. Proposals to adapt the intersessional period include using working groups to enhance its technical consultations; strengthening the ISU by giving it additional funding and staff; providing more oversight and steering of the process, possibly through ISU supervision or by continuing conversations and political engagement throughout the year; and improving the Meeting of States Parties (MSP) by giving it some decision-making authority. This last suggestion may be unpopular among some States Parties, particularly members of the NAM who may be reluctant to devolve decision-making power from the Review Conference, especially if their resources do not permit significant participation in the annual meetings. However, delegating some authority to the MSP within agreed-upon parameters could enable and consolidate work, particularly on complicated issues such as reformulating the CBMs.

Science and technology: what is the future of the S&T review process?

28. The BTWC requires that, in reviewing the operation of the Convention, States Parties take developments in science and technology (S&T) into account. It is crucial for States Parties to stay current about such developments so that they have a clear understanding of science's capacities today and can more accurately assess a State's compliance. Moreover, the S&T review process helps to safeguard the Convention's relevance by ensuring that its general purpose criterion in Article I still covers the full scope of possibilities for nefarious use of biology, as well as providing an opportunity to explore how developments in science and technology can advance detection. However, the treaty itself does not give any direction for how this review should occur.
29. Thus far, the review process has largely consisted of the submission to the Review Conference of background papers by States Parties or the ISU, with some assistance from the academic community. There is, therefore, no methodological analysis of developments across the Convention, and most States do not hear about advances in S&T until after the Review has already begun, thereby limiting their ability to take developments into account during the review process. Furthermore, conducting the S&T review every five years means that States Parties are often already behind on important developments; genetic engineering, for example, has emerged rapidly as a relevant technology due to its accessibility, low financial barrier, and ease of use, but the treaty's S&T review process does not move fast enough to capture its growing importance.
30. The BTWC could draw on a number of other models for its review process, such as the OPCW's Scientific Advisory Board, the subsidiary body of the Convention on Biodiversity, and the expert ad hoc groups of the World Organisation for Animal Health, all of which are examples of inclusive groups drawing upon the expertise of technical specialists and circulating that expertise to diplomats representing member states.
31. Part of the difficulty with conducting an S&T review is that some States Parties may not be aware of every development within their territory; after all, biological technologies are widely available and difficult to monitor. S&T reviews have not traditionally dealt with awareness-raising among scientists, but the review process could incorporate this issue and identify ways that States Parties can engage with the scientific community.
32. Another challenge with S&T review lies in identifying which topics are relevant. Interactions between scientists and government experts are a valuable element of the ISP. However, diplomats rarely have sufficient scientific background to identify what questions need to be asked, and scientists may need guidance to know what developments are important for the Convention. During the current ISP, S&T review has been a standing agenda item, an improvement over previous intersessional

periods. Yet the broad range of issues presented during the current ISP has made it difficult for diplomats to interact with the expert scientists or to prioritize what is truly important for the Convention's functioning. Delegation members may be able to alleviate this problem somewhat and ensure they are receiving appropriate inputs from the academic community by soliciting input on particular topics and overseeing the information they receive to ascertain that it is credible and policy-relevant. In order to have meaningful interactions and debate, policymakers need to be able to identify areas where they need advice, and scientists need to be able to identify areas of concern. There may also be a role for the ISU, in that it could update its website to reflect relevant topics and present the background science in an understandable way; however, involving the ISU in this way would require further resources.

33. To improve the process, if it is maintained as a standing agenda item at future Meetings of States Parties, an Open-Ended Working Group or Group of Experts could receive compilations prepared by scientific experts from National Academies or other fora, deliberate on these findings before or during the Meeting of Experts, and deliver a substantive report to the Meeting of States Parties that would assess the relevance of key developments to the Convention. The MSP could then discuss the policy implications of these findings and possible actions. This process would ensure that States Parties retain their decision-making power, but would keep the process open for scientific debates.

Next steps and future challenges

34. With regard to the Eighth Review Conference, a package of measures is starting to emerge, with linkages between certain elements. There are many areas of common interest that could help to strengthen the Convention, including ISU expansion, improvements to the S&T review process, a greater role for Article VII in response to naturally occurring outbreaks, and national implementation of the Convention's provisions. There will also be challenges at the next Review Conference, such as the different understandings of the Convention's verifiability, as well as what can feasibly be achieved. It will be critical to identify which issues have good prospects for agreement as well as which issues probably cannot achieve consensus in 2016, and to figure out how to manage the latter issue set over the next five years.
35. To determine how linkages between issues are being constructed and what emphasis different delegations place on certain elements, it is important to create opportunities for informal discussion in a variety of regions among large and small players with diverging views before the 2016 Review Conference. During the run-up to the Seventh Review Conference, there were a series of meetings held in Manila and elsewhere; a similar process could be helpful for 2016. Such informal gatherings could also help States Parties develop joint proposals on issues of shared interest and thereby avoid the problem of 2011, in which multiple proposals addressed the same issue, which was confusing to States who were not engaged in the preparatory process. Informal preparatory meetings will also give States Parties additional time to consider proposals.
36. The question of what will happen after 2016 with regard to both the ISP and future Review Conferences remains unclear. It is evident that many Member States want further engagement and progress after the next Review Conference. Opinion still seems to be divided over the Russian proposal to return to negotiations on a legally binding instrument, although the issue is not fading away and has the potential to generate renewed engagement. Negotiations on such an instrument are one way to make sure that everyone has buy-in and could create the opportunity for greater high-level political attention. One element of the next ISP may need to be an exploration of whether a legally binding instrument is feasible, given the development of S&T since the 1994 mandate and the current political climate.

37. It is possible that States Parties will choose to hold a midterm conference to take forward some of these issues without the rigidity of the five-year process. Although the term “Special Conference” carries some baggage because of the 1994 mandate, having the option for interim decision-making power might help to make progress on compliance and other contentious issues.

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Wilton Park | November 2015

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