

# Origins of Article VII of the BTWC

## *The meaning of 'Emergency Assistance'*

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# Why study negotiation history of Article VII?

- *Tabletop exercise (November 2016)*
  - Triggering Article VII has major political implications
    - Prior assumption that outbreak is deliberate (major BTWC breach)
    - May exacerbate ongoing conflict
    - Decision-making in UN Security Council (UNSC) may become highly politicised + veto risk
  - Procedural uncertainty too made participants hesitate to invoke Article VII
    - Demand of proof of allegation was important
    - However, what constituted 'proof' was uncertain
      - To be presented by victim?
      - To be confirmed by external body (e.g., UN Secretary-General investigative mechanism)?
  - Different actor types saw different value in Article VII
    - E.g. alleged perpetrator saw it as transparency tool and means of exoneration
- *Lack of procedures*
  - UN has not looked into possible roles in case Article VII is triggered
  - No procedures are currently available
  - If UNSC were to receive request, first task would be to understand Article VII and what negotiators intended

# Key negotiation moments

- 6 August 1968: UK submits working paper outlining a BW-only convention
- 10 July 1969: UK submits draft convention + UNSC resolution
- 26 August 1969: UK introduces revised draft convention + UNSC resolution
- 18 August 1970: UK introduces 2<sup>nd</sup> revision
- 30 March 1971: Socialist countries circulate draft BTWC
- 5 August 1971: Socialist countries submit revised draft BTWC; USA submits identical, but separate draft convention
- August – September 1971: Negotiation of final document; insertion of elements from UK draft treaty into Socialist proposal

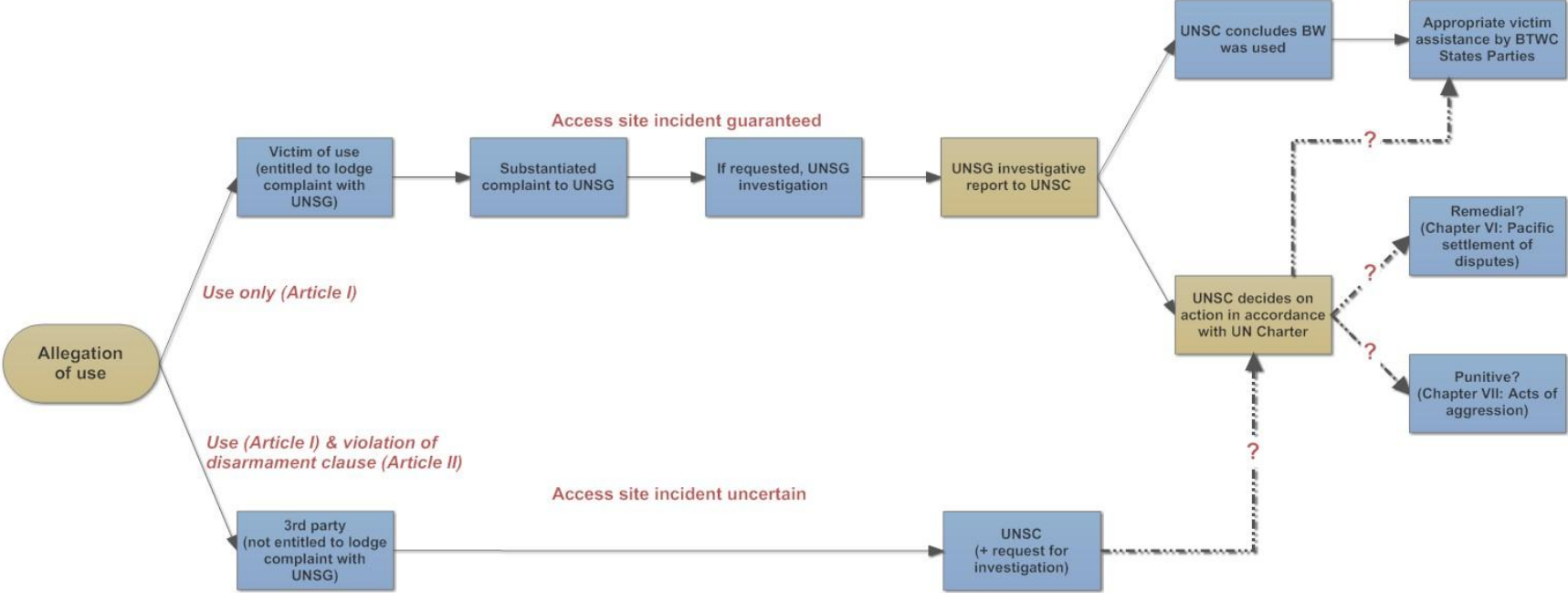
# Core ambitions in original UK proposal

- **Prohibition**
  - BW use (draft Article I)
  - BW development, acquisition, possession (draft Article II)
- **Investigation (draft Article III)**
  - Victim of BW use: complaint + evidence to UNSG, who investigates and reports to UNSC (Article III, 1)
  - 3<sup>rd</sup> party complaint: complaint + evidence to UNSC (Article III, 2)
  - Allegation of violation of draft Article II: complaint + evidence to UNSC (Article III, 2)
- **Assistance (draft Article IV)**
  - Victim of BW use: confirmation of alleged use by UNSC, other States Parties provide or support 'appropriate assistance'
  - UK view: 'appropriate assistance' = humanitarian
- **Draft UNSC Resolution**
  - UNSC takes upon itself to act following a complaint
  - Specific and independent role for UNSG in case a victim lodges a complaint
  - UNSC to develop investigative procedures in advance

# Core characteristics of original UK proposal

- Assistance is strictly humanitarian
  - Consistent with UN Charter
  - Assistance is humanitarian and moral responsibility of *individual* states under UN Charter
- Strict separation of victim assistance from confronting aggressor
  - Hence draft UNSC Resolution to set up specific modalities
  - Separate UNSC decision processes envisaged to 'authorise' humanitarian assistance → assistance should not be contingent on political considerations
  - Different procedure for 3<sup>rd</sup>-party complaints → directly to UNSC
    - Motive: low likelihood of access to site of incident; different UNSC action required
- Prevention of UNSC veto
  - UNSC only confirms validity of complaint (no other action)
  - BTWC States Parties then provide or support humanitarian assistance
- Draft Articles III (investigation) and IV (assistance) seen as '*deterrent*'
  - Functional substitutes for lack of verification (viewed as impossible)

# Mechanism envisaged in UK draft BTWC



# Critical negotiation stages

- **UK proposals**
  - Primary focus on BW use (Laws of war)
  - Disarmament elements (ban on development, acquisition and possession)
  - Investigation of alleged use and other treaty violations
  - Assistance provision
  - Accompanying text for UNSC resolution on UNSG investigation and UNSC action in case of allegation of use
- **Socialist (and US) proposals**
  - Primary focus on disarmament
  - No direct reference to BW use (except in preambular paragraphs and reference to 1925 Geneva Protocol)
    - Disarmament precludes BW use
  - No assistance provision
  - Consultative process (future BTWC Article V)
  - Complaints procedure for treaty violations involving UNSC (future BTWC Article VI)
  - UNSC only to '*consider*' a complaint: any action requires separate decision (→ veto risk)
- **Integration of UK and Socialist proposals**
  - Primary focus on disarmament
  - No direct reference to BW use
  - Reintroduction of UK assistance provision as BTWC Article VII (but now in a disarmament framework) → *loss of purpose?*
  - No accompanying draft UNSC resolution to outline role of UN bodies → *loss of process?*

# Revised draft UNSC resolution

- 26 August 1969: revised UK draft convention, incl. new preambular paragraph in draft UNSC resolution:

REAFFIRMING in particular the inherent right, recognised under Article 51 of the Charter, of individual and collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

- **Impact:**
  - Loss of strict separation between victim assistance & confronting aggressor
  - 'Assistance' could now mean many different things besides 'humanitarian'
    - Made clear in several statements after introduction of Socialist (& US) draft treaties



# Article VII

Each State Party to this Convention undertakes to **provide or support assistance**, in accordance with **the United Nations Charter**, to any Party to the Convention which so requests, **if the Security Council decides** that such Party has been exposed to danger as a result of **violation of the Convention**.

# 'Violation of the Convention'

- Original purpose (UK)
  - BW use
  - Draft convention had focus on banning use
- Socialist draft treaty
  - Focus on disarmament (weapon elimination; prevention of BW development, production, stockpiling & transfer)
  - Reference to treaty violations other than use?
    - E.g. Accidental release of an agent from an illicit research or production facility
- Interpretation during negotiations after insertion Article VII
  - UK reinterpreted deterrence function: deterrence against use = deterrence against acquisition and possession
  - USA: any type of violation (reinforcement of the UK's deterrence argument)
  - USSR: any type of violation; systematically argued against inclusion of 'use' in draft BTWC
  - Other countries too

# 'If the Security Council decides'

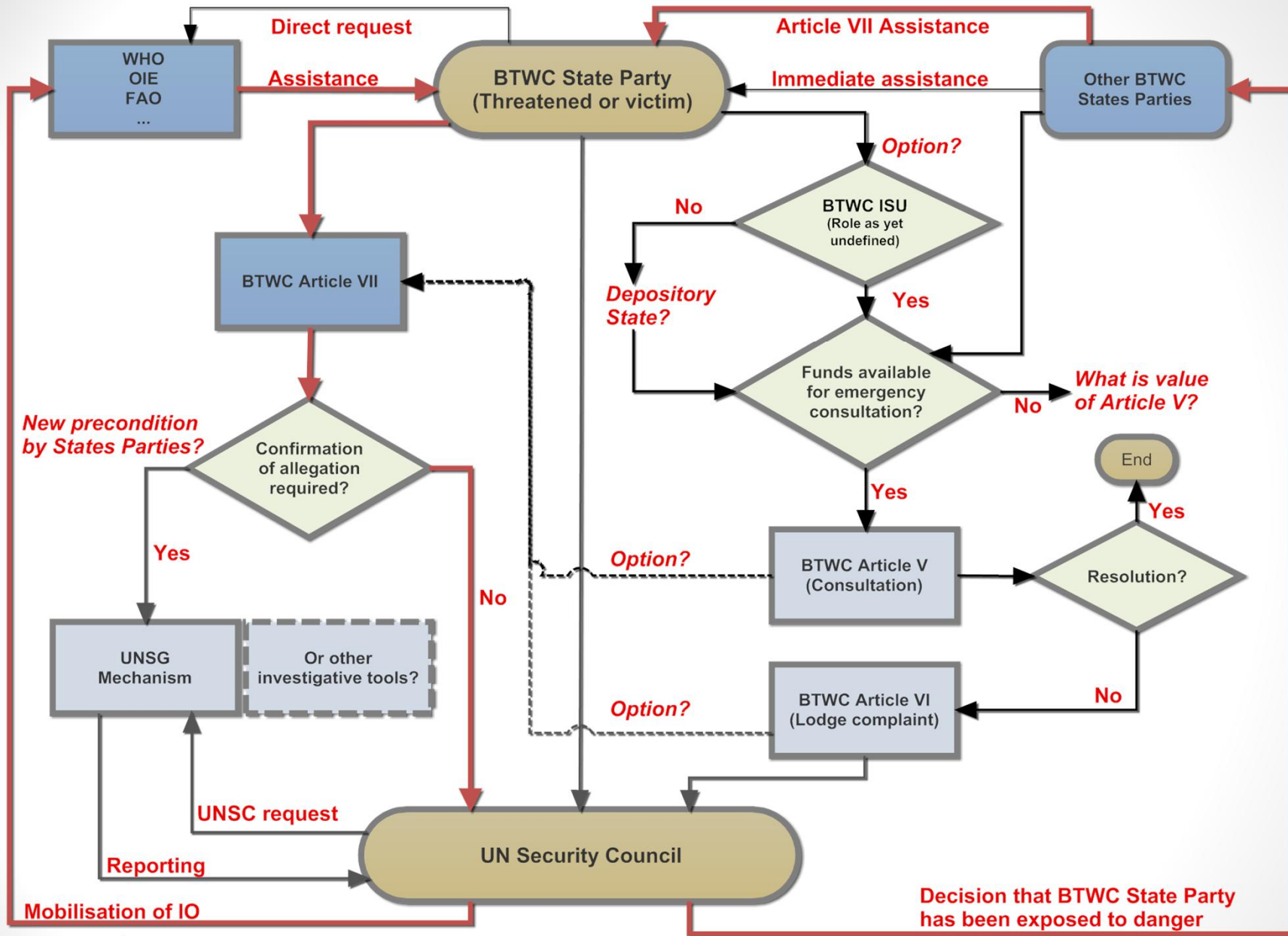
- Original purpose (UK)
  - UNSC *confirms*, based on UNSG investigative report
  - No decision
  - Purpose: moral pressure in support of individual humanitarian action; removal of political/ideological grounds to refuse humanitarian assistance
- Socialist draft treaty
  - Ban on use removed from draft treaty
  - Inclusion of consultation (future Article V) and complaints procedure (future Article VI)
  - UNSC will *consider* a complaint
  - No longer a process involving independent investigation by UNSG foreseen
  - No longer any separation between victim assistance from confronting aggressor
- Interpretation during negotiations after insertion Article VII
  - Not really considered in any detail
  - Acceptance of clause without much consideration of implications
  - Today function in Article VII unclear; no clear reference to which Chapter in UN Charter
  - Linkages between BTWC Article VII and Articles V and VI unclear and unspecified

# 'The United Nations Charter'

- Original purpose (UK)
  - Emphasis of individual moral and humanitarian obligations
- Socialist draft treaty
  - No equivalent provision included
- Interpretation during negotiations after insertion Article VII
  - Not really considered in any detail
  - Not linked to UNSC decision
  - Specific meaning today unclear in view of lack of explicit prohibition on use

# 'Assistance'

- Original purpose (UK)
  - Humanitarian
  - Victim had autonomous right to lodge a complaint in case of being a victim of BW use
  - Other States Parties provide or support assistance individually
- Socialist draft treaty
  - No equivalent provision included
- Interpretation during negotiations after insertion Article VII
  - Humanitarian consideration drove reintroduction of original UK idea
  - Today, no specific role & procedure for victim of use foreseen
    - Trend towards collective determination of outbreak seems to exist in today's deliberations
    - Will international community 'judge' on severity of crisis before responding to invocation of Article VII?
  - Investigative mechanisms foreseen outside of the BTWC



- ➔ Article VII actions
- ➔ Alternatives

# Some concluding thoughts

- Normal that today States Parties have different ideas and opinions
- Many questions about how to trigger (or indeed the purpose of) Article VII remain
  - Is it still an individual action by a victim state party?
  - Is it based on a collective judgement by all states Parties, and therefore collective action?
    - If so, what are the mechanisms/procedures for arriving at such collective judgement?
- **Key considerations:**
  - How severe must a crisis be to trigger Article VII?
  - Are other violations of the BTWC provisions putting a State Party in danger still part of the present considerations?
  - If BTWC States Parties do not agree on mechanisms/procedures, other institutions will take over in case of a crisis
    - All mechanisms under consideration exist outside the BTWC and have their own decision mechanisms
  - Once Article VII has been triggered, the whole process of assistance provision is out of the hands of the BTWC States Parties
  - Who will determine that the violation of the BTWC (which triggered the response) has been resolved?
- **For the present, how and when will States Parties register current common treaty interpretations?**

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