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# Outside of

The 1972 Biological and Toxin Weapons Convention (BTWC) contains a relatively obscure article that anticipates the provision of assistance in cases where a state party has been exposed to danger as the consequence of a treaty violation. At the seventh review conference of the BTWC (2011) states parties paid considerably more attention to the provision than previously, and they also framed it in the context of global health security, recognising that ‘health and security issues are interrelated at both the national and international levels’<sup>i</sup>. The expanded understanding came a decade after the al Qaeda strikes against New York and Washington and the subsequent anthrax letters mailed to media outlets and members of the US Congress, two events that shaped US and international security policies at the time. It also came when the world grew increasingly concerned about new, emerging and re-emerging diseases that could potentially spread quickly across the globe.

The seventh review conference also decided on the working agenda for the period until the next review conference in 2016 (the so-called inter-sessional process), which included the item on how to strengthen implementation of Article VII, including consideration of detailed procedures and mechanisms for the provision of assistance and cooperation by states parties. The meetings of experts (MX) and meetings of states parties (MSP) were to consider the topic in 2014 and 2015<sup>ii</sup>. As it happened, the 2014 MX took place when the Ebola crisis in West Africa was beginning to peak.

Until today no BTWC state party has ever invoked the article. Consequently, nobody has a concrete idea of how to trigger it. No country, institution or person has been designated as the

recipient of a request for assistance. Moreover, nobody knows what might happen should a state party call on the article. To better understand the functioning of Article VII, the Paris-based *Fondation pour la recherche stratégique* has run three tabletop exercises (TTX), one in 2016 and two in 2019. These aimed to clarify the purpose of the provision and uncover specific issues that might arise if a state party were ever to activate the provision. This article summarises the main issues to have emerged from them.

## Understanding Article VII

The single paragraph of Article VII reads as follows: Each state party to this convention undertakes to provide or support assistance, in accordance with the UN 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.

Given that ‘undertakes’ is commonly interpreted as a formal obligation rather than a mere promise, the provision requires action by all BTWC states parties once the UN security council (UNSC) has determined the exposure to danger. Assistance is commonly interpreted as humanitarian aid. However, this reading of the word raises the question why the treaty negotiators stipulated that the provision or support of assistance has to be in accordance with the UN charter and inserted the prior requirement of UNSC determination that a state party has been exposed to a danger as a result of a treaty violation.

Full answers to these questions may have been lost in the fog of history<sup>iii</sup>. The original incarnation of Article VII, namely Article IV of the British draft convention of 1969, had to be read in conjunction with the original Article III,

which foresaw an investigative mechanism under the responsibility of the UN secretary general. The victim state could submit a request for an investigation if it believed a biological weapon (BW) had been used against it. Third states could also submit such a request but had to address it to the UNSC rather than the secretary general, presumably because access to the site of the BW attack in another country was not guaranteed.

The functioning of the investigative mechanism and roles of various protagonists were detailed in a proposed UNSC resolution that was to accompany entry into force of the future BTWC. In a July 1969 address to diplomats in Geneva, British minister of state Fred Mulley clarified that the purpose of draft Article IV was to have a deterrent against BW use through mandatory provision of assistance by other states parties who would all have equal responsibility in maintaining the integrity of the convention.

Specifically, he said: My second point is that the obligation on parties would not be simply to seek action by the security council. It would be an obligation - or rather an affirmation of intention - to take some kind of action themselves in accordance with the charter to assist the victim, rather than an obligation to take action against the aggressor - though of course the security council might decide that the latter was called for too.

As presented, Mulley appeared to indicate that (individual) assistance was a moral and humanitarian responsibility under the UN charter that did not specifically require UNSC sanction. Any retaliation against an aggressor, the statement makes clear, would require a separate or additional UNSC decision.

The revised draft treaty the UK circulated in August 1969 lost much of



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the original clarity of purpose. The new version of the draft UNSC resolution now made explicit reference to the inherent right, recognised under chapter VII, article 51 of the charter, of individual and collective self defence. This may have been the consequence of strong concerns expressed by the US in bilateral consultations.

Whereas just over a month earlier Minister of State Mulley could unambiguously argue that the draft provision called for individual action in support of the victims of a BW attack on humanitarian grounds, the insertion of an explicit reference to Article 51 undermined that claim. Given that a BW attack amounts to an act of war, appropriate assistance could thus mean vastly different things to different countries. (In particular, a BW attack against a Nato member could have triggered a response under Article 5 of the North Atlantic Treaty, which refers to the right of individual or collective self defence recognised by Article 51 of the UN charter.)

Negotiations subsequently stalled for almost a year and a half until in March 1971 the socialist states presented their own draft convention. In it, and in the later treaty proposal submitted jointly by the socialist states and the US, Article IV had been dropped. About a month before negotiations were finalised, Morocco reintroduced the assistance provision, which became the current Article VII. Various elements of previous discussions seem to have been amalgamated into the single sentence, but the process that led to Article VII's final formulation is unclear.

Finally, what does the article's final clause, '...if the security council decides that such party has been exposed to danger as a result of violation of the convention' actually mean? Whereas the treaty negotiators clearly had BW use in

mind, 'violation of the convention' is much broader. Moreover, the BTWC in its current shape does not refer to 'use' in its full title or Article I that contains the core prohibition on BW development, acquisition or possession.

The conscious exclusion of 'use' followed the decision to separate negotiations on a BW ban from those on a chemical weapons (CW) treaty, as a consequence of which the negotiators did not wish to undermine the 1925 Geneva Protocol outlawing utilisation of both CW and BW. Nonetheless, a widely shared understanding asserted that the explicit prohibition on development, production and stockpiling automatically entailed a prohibition on use. The fourth review conference (1996) inserted this interpretation under Article I in its final document. BW use thus definitely constitutes a major treaty breach, but could a state party request aid if exposed to dangers resulting from other types of treaty violations? Once might think of an incident near a country border similar to the accidental release of anthrax spores from a secret and illicit Soviet BW facility near Sverdlovsk (today Yekaterinburg) in 1979 that resulted in scores of deaths.

## How to trigger Article VII?

Through the process of quinquennial review conferences states parties reach common agreements on the BTWC articles, both in terms of updating common understandings and agreeing on the types of actions that need to be undertaken. The inter-sessional process - a series of annual MXs followed by MSPs in between review conferences - generate common understandings. These common understandings may, among other things, advance the interpretation of a particular provision or phrase in the light of evolving security conditions, science and technology, and other

developments. Formal endorsement at the next review conference reflects state practice and therefore evolution of the treaty regime. Broadly speaking, before 2011 Article VII seems to have fallen mostly outside these processes and not all review conferences contributed to clarifying or expanding the understanding of the article.

When the provision was considered, the tendency has been to focus on clarifying the nature of the assistance, identifying and describing roles of international organisations, and discussing how assistance could be delivered. A pivotal moment in the process to request assistance remains the decision by the UNSC, even though states parties reached the common understanding that relief could be provided ahead of such a decision or in a situation where the UNSC does not act. Less attention has been paid to the questions of how to invoke Article VII, which institutions would or should be involved in the process, and what the consequences of an assistance request might be.

To better understand how Article VII might be triggered and the consequences of such action on the organisation of international assistance, the *Fondation pour la recherche stratégique* organised three TTXs. The first of these took place in cooperation with the UN Institute for Disarmament Research at the start of the eighth BTWC review conference on 8-9 November 2016. It sought deeper appreciation of the BTCW's unique contribution in addition to the assistance efforts expected from international organisations, relief associations and individual countries. The TTX also put into sharper relief certain questions BTWC states parties will have to address even before the first item of assistance is shipped to the disaster area. Failing to do so, the TTX suggested that states,



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depending on their individual assessment of the risks following the outbreak and the cause of the epidemic, may decide on totally different courses of action, an outcome that might severely hamper the international coordination of efforts to stem the outbreak and assist victims<sup>iv</sup>.

The second TTX took place at the UN Regional Centre for Peace and Disarmament (UNREC), Lomé, Togo on 29 and 30 May 2019, and was organised by the *Fondation pour la recherche stratégique* in partnership with the BTWC implementation support unit (ISU). The Lomé TTX brought together experts from the Francophone countries in West Africa: Benin, Burkina Faso, Côte d'Ivoire, Guinea, Mali, Mauritania, Niger, Senegal and Togo. It aimed to achieve better understanding of the elements required to trigger Article VII and the consequences such action may have on the organisation of international assistance. Discussions in Lomé especially highlighted the relationship between normal assistance in case of a health emergency and the types of assistance that might specifically be delivered under the BTWC<sup>v</sup>.

The third TTX, again in cooperation with the BTWC ISU, was organised at the UN in Geneva on 8-9 August 2019. Unlike the first two exercises, the focus was on a zoonotic pathogen and involved the deliberate release of anthrax bacteria against animal herds leading to human casualties. Three elements stood out, namely the applicability of Article VII to the scenario involving a non-human bio agent attack; the uncertainties resulting from a lack of data on the extent of the anthrax outbreak and informed estimates of animal and human casualties; and the absolute need to avoid conflict escalation lest the outbreak becomes uncontrollable<sup>vi</sup>.

## Insights from the tabletop exercises

On the surface, implementation of Article VII seems straightforward. A party to the BTWC believes or has evidence that it is a victim of a BW attack and requests international assistance, whereupon the international community responds with various forms of relief aid. The UNSC must determine that the requesting state party has been exposed

to a danger resulting from a treaty violation. However, the community of states parties has formally recorded its shared understanding that UNSC determination is not a prerequisite for initiating international assistance, thereby implicitly returning to original purpose of the reference to the UN charter in the treaty provision.

Each of the TTXs pointed to two major complications, however. Firstly, initial measures by states parties in response to a disease outbreak will likely be driven by public health concerns. The urgency to save lives will compete with the need to ascertain the origin of the outbreak. Secondly, unless people actually observe delivery of the biological agent, the most likely scenario is that credible indications of deliberate use will appear weeks, if not months, into the epidemic. Meanwhile local, regional and international health response mechanisms will have been activated and resources deployed to the affected region. From the perspective of Article VII there are several implications.

First, uncertainty will surround initial consideration of triggering Article VII. Early indication of malicious intent does not amount to evidence. The 2016 and Lomé TTXs contained hints but left a great deal of ambiguity as to the origin of the outbreak in the first two stages of the respective scenarios. Nobody considered invoking Article VII in the opening stage. In the second stage participants listed several dilemmas, which in the end made them decide against using the provision.

Among those dilemmas were uncertainty about the procedure for launching a request under Article VII, and hence uncertainty about the consequences of the request. In particular, participants were conscious of the fact that the request implied an allegation of use. Given that the outbreak occurred in a zone of armed conflict, potential conflict escalation was high on their minds. Involvement of the UNSC in the process was another source of uncertainty. They noted that there was no guarantee that the UNSC would make a determination and were concerned that individual UNSC members might politicise the request for their own

purposes, thereby potentially escalating the conflict. In both exercises the victim state worried about early loss control over the Article VII process and feared negative consequences for disease relief, including operations already underway.

Second, uncertainty also applied at another level: the nature or quality of information in support of the request. While Article VII makes no reference to evidential support, the original British proposal expected the victim state to supply all the evidence at its disposal in support of its complaint to the UN secretary general. As noted earlier, the proposed UNSG's involvement concerned an investigation of alleged use<sup>vii</sup>. Conscious of the importance of evidence in support of an Article VII procedure, participants in the first TTX considered different options, including the UN secretary general's mechanism to investigate allegations of BW or CW use (established by the UN General Assembly in 1987 and the UNSC in 1988), international organisations such as the World Health Organisation (WHO), the International Organisation for Animal Health (OIE), and the Food and Agricultural Organisation (FOA), as well as Interpol. However, they realised that none of these tools fall under the BTWC.

Representatives from these, and a few other international organisations participated in the third TTX. While confirming that they have capacities and procedures to investigate outbreaks, they also noted that undertaking such a mission with the purpose of determining whether an outbreak was unusual but natural, or deliberate, risked compromising their neutrality and hence their primary mission. Interpol explained that it could assist a member with an investigation into alleged use as long as the possibility existed that a terrorist or criminal entity might be responsible. However, it would terminate such assistance as soon as indications emerge that a state may be the culprit.

At the second TTX in Lomé participants, most of whom had experience in disaster management or intervention, including during the Ebola epidemic in West Africa, were worried that a formal international investigation might delay emergency responses. Most



of them recognised the need for an investigation but added that a presumption of deliberate intent or a body of evidence strongly suggesting the intentional nature of the epidemic should suffice. Information about the nature of the outbreak could be obtained from the WHO, neighbouring countries and humanitarian NGOs.

Third, as already mentioned, indications of a deliberate release of pathogens may become apparent only after the epidemic has been spreading for a while. Operations to control the outbreak and help victims would already be underway. Following some outcomes from the first TTX, participants in the Lomé exercise were specifically asked to consider possible implications of triggering Article VII. They worried about an extra (international) layer of decision-making that might complicate coordination and interfere with operations on the ground.

When in the third stage of the exercise participants received notice that the victim state had activated Article VII, representatives from the two other countries exercising were confused. Since the start of the epidemic they had already been providing assistance, set up communication networks, and coordinating measures to stem the spread of the disease. Given that assistance now became an international obligation under the BTWC, they were unsure whether what they were already undertaking sufficed to meet the new situation or whether they had to make additional resources available. Their response reflected the lack of a clear answer to the question of what BTWC Article VII could offer in terms of assistance above and beyond standard international health crisis response mechanisms.

Finally, in all three TTXs participants strove to de-escalate the conflict as indications of a possible deliberate release of infectious agent began to multiply. The primary concern was always to contain the outbreak and assist victims. After the matter had been identified in the first TTX, participants in Lomé were explicitly tasked to identify ways to manage the conflict if Article VII were to be invoked. One suggestion was for BTWC states parties to find a way to decouple assistance under Article VII from the implicit accusation that another state might be responsible for a BW attack. In that scenario, the investigation of alleged use and identification of the perpetrator could begin once the epidemic was under control and receding.

A second proposed option was to include a mechanism in the Article VII request process to delay UNSC involvement following indications that the outbreak might have been deliberate. Here discussions zoomed in on the role Article V might play. The provision foresees consultations to resolve any concerns about the objectives of the BTWC or the application of its provisions. The advantage of the extra step would be that all interested states parties could participate in the Article VII decision process in an effort to resolve the crisis. Its main disadvantage is that convening an Article V meeting has to follow a formal procedure agreed at the third review conference (1991) and that the process would probably take several months. However, the Lomé participants also cautioned that diplomatic interactions cannot take long as there is no break in the spread of an epidemic.

The third TTX in Geneva looked closer at the idea. Instead of organising a full meeting, the TTX scenario relied on another agreement reached at the third review conference, which stated: A formal consultative meeting could be preceded by bilateral or other consultations by agreement among those states parties involved in the problems which had arisen. This allowed the addition of an extra negotiation stage by the three countries being played, prior to the victim country submitting its request to the UNSC. The continental power most active in regional conflict resolution accordingly issued urgent invitations referring to, rather than invoking, Article V to the other countries on the continent after it became clear that the victim country was about to send an Article VII request to the UNSC.

The outcome was interesting. The victim country maintained its belief that there had been a major breach of the BTWC, and that its neighbour was responsible for the outbreak, but chose not to accuse it formally. In doing so, it accepted a proposal by a third country emphasising assistance and diplomatic engagement to bring the conflict to an end, notwithstanding its reservation that it might still call out its neighbour at a later stage if the proposed efforts were to falter. The expressed willingness of other regional countries to contribute to the assistance operations and actively engage with the neighbour in pursuit of a negotiated resolution of the conflict helped to convince the victim state not to proceed with the Article VII request. (Continued over)

<sup>i</sup> .Final Document of the Seventh Review Conference, BWC/Conf.VII/7, Part II Final Declaration, para. 40, p. 15.

<sup>ii</sup> .*Ibid.*, Part III Decisions and Recommendations, para. 9(b), p. 21.

<sup>iii</sup> .This section is based on a detailed study of the negotiation of Article: Jean Pascal Zanders, *The Meaning of 'Emergency Assistance': Origins and negotiation of Article VII of the Biological and Toxin Weapons Convention* (The Trench and the Fondation pour la recherche stratégique, Ferney-Voltaire and Paris, 8 August 2018), URL <<http://www.the-trench.org/wp-content/uploads/2018/08/Meaning-of-Emergency-Assistance-Final.pdf>>.

<sup>iv</sup> .Jean Pascal Zanders, Elisande Nexon and Ralf Trapp, *Report of the Tabletop Exercise (TTX) on the Implementation of Article VII of the Biological and Toxin Weapons Convention (BTWC)* (Fondation pour la Recherche Stratégique: Paris, July 2017), URL <<http://www.the-trench.org/wp-content/uploads/2013/06/201707-FRS-BTWC-Article-VII-TTX-report.pdf>>.

<sup>v</sup> .Jean Pascal Zanders, Ralf Trapp and Elisande Nexon, *Report of the Tabletop Exercise (TTX) on the Implementation of Article VII of the Biological and Toxin Weapons Convention (BTWC)* (Fondation pour la Recherche Stratégique, Paris, August 2019), URL <<http://www.the-trench.org/wp-content/uploads/2019/08/0190804-BTWC-Article-VII-TTX-Lom%C3%A9-report-Final-EN.pdf>>.

<sup>vi</sup> .Report pending. For a summary of the exercise: Jean Pascal Zanders, 'Third tabletop exercise on emergency assistance in case of biological weapon use – First impressions', The Trench (blog posting), 13 August 2019, URL <<http://www.the-trench.org/third-tabletop-exercise-bw-use/>>.

<sup>vii</sup> .See Zanders (2018), pp. 13-14.

### In conclusion

Since the 2011 review conference states parties to the BTWC have shown a growing interest in the implementation of Article VII. The increasing incidence and size of naturally occurring disease outbreaks had stimulated consideration of how and by which means emergency assistance could be delivered to a victim of a BW attack.

The process and consequences of invoking the article are unclear, however. At the present stage of understanding, triggering the provision seems to have major disadvantages that outweigh any possible humanitarian benefits, the most important one being conflict escalation as a consequence of the allegation of deliberate BW use implied by Article VII. Such escalation might lead to the breakdown of crisis communication channels to deal with the outbreak between the parties concerned or even interrupt the provision of assistance altogether.

Based on the outcomes of the first two TTXs, the third TTX introduced a possible mechanism to allow BTWC states parties to interact with each other before formal invocation of Article VII. It led to an interesting outcome: a process of regional conflict mediation together with the provision of assistance put the triggering of Article VII on hold.

In the three exercises participants also tended to avoid involving the UNSC as the consequences of a UN decision are totally unpredictable. Other concerns related to how Article VII might interfere with ongoing relief operations at both operational and decision making levels.

In conclusion, BTWC states parties should look carefully at the process for triggering Article VII as the consequences might negate all efforts to gain assistance. In particular, there seems to be a role for a round of consultations among states parties before the request is sent to the UNSC.

As for next steps, BTWC states parties should consider convening an exercise focussing solely on the process of triggering Article VII, and not on the organisation of assistance. At present there is only one working paper in circulation, submitted by South Africa before the 2016 review conference. That country has subsequently submitted several revisions. Nonetheless, it still calls for a state party to submit the assistance request directly to the UNSC and specifies certain conditions that must be met, including the type and nature of evidence that should accompany the request.

Each of the tabletop exercises has revealed deep discomfort with such a process. Moreover, the third TTX found that the proposal was not applicable to the scenario involving the release of anthrax bacteria against animal herds because the working paper only considers BW against humans. In Lomé, the participants from West Africa specifically recommended that the South African document should be gamed to understand its full implications on all levels of responding to an epidemic, especially considering that international relief operations would most likely be under way before indications of deliberate intent begin to emerge.

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