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The Meaning of 'Emergency Assistance'

Origins and negotiation of Article VII of the Biological and Toxin Weapons Convention

by Dr Jean Pascal Zanders

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Working paper

The Trench

25, Avenue du Jura
01210 Ferney-Voltaire
France

Mob.: +33-6-4549 3262
e-mail: jpzanders@the-trench.org
Internet: <www.the-trench.org>

Fondation pour la recherche stratégique

4 bis rue des Pâtures
75016 Paris
France

Tel.: +33-1-4313 7777
Internet: <www.frstrategie.org>

Introduction

Article VII of the Biological and Toxin Weapons Convention (BTWC) belongs to the more obscure provisions. It reads as follows:

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.

Since the treaty's entry into force in 1975, states parties hardly looked at the one-paragraph article. Up to the 7th Review Conference (2011) the only additional understandings and agreements concerned general implementation procedures and possible roles of appropriate international organisations, including the World Health Organisation (WHO), the World Organisation for Animal Health (OIE) and the Food and Agricultural Organisation (FAO), as well as coordination functions for the United Nations (UN).¹ Attention to the article increased markedly at the 7th Review Conference, a consequence of a heightened perceived worldwide risk from emerging and re-emerging diseases, fears of outbreaks resulting from biosecurity and -safety lapses in high-containment laboratories, concerns about scientific and technological advances in the life sciences that could be misused for hostile purposes, potential terrorist or criminal interest in highly contagious pathogens, and so on. The Ebola outbreak in West Africa between 2013–16 and subsequent evaluation of the international response raised concerns among the BTWC states parties about how the international community might respond to a deliberate disease outbreak,² whether as a consequence of an act of war or terrorism.

These trends have led to an affirmation of the humanitarian dimension of Article VII. As Nicholas Sims noted in his study of the treaty's early functioning: 'Statements made in the UN, with an eye on future references to the negotiating history of the convention, indicate that this article is generally understood to refer to humanitarian, not military, assistance.'³ With nothing seemingly contradicting today's humanitarian imperative, most attention has so far gone to the organisation and coordination of international response to the release of a highly infectious biological weapon (BW).

¹ BTWC Implementation Support Unit (2012), Additional agreements reached by previous Review Conferences relating to each article of the Convention, United Nations Office for Disarmament Affairs, 13–14. URL <<https://www.unog.ch/bwc/news>>.

² WHO Ebola Response Team. (2016). 'After Ebola in West Africa – Unpredictable Risks, Preventable Epidemics'. *New England Journal of Medicine* (375: 6). URL <<https://www.nejm.org/doi/pdf/10.1056/NEJMs1513109>>.

³ Sims, Nicholas A. (1988). *The Diplomacy of Biological Disarmament*. Basingstoke, Macmillan, 24.

Questions about triggering Article VII

Much less understood is how Article VII can be activated. There are no procedures; there has not been any determination who should be involved in the process. Which are the (possible) roles for the BTWC Implementation Support Unit (ISU), the treaty's three depositary states (Russia, United Kingdom and United States), the UN Secretary-General (UNSG), or the UNSC is a question that remains unanswered. It should be added in this context that some actors or available tools are of much more recent origin and were consequently not envisaged during the treaty negotiation. The mandate for the ISU was decided at the 6th Review Conference (2006). The UNSG's mechanism to investigate allegations of chemical and biological weapons (CBW) use received endorsement from the UNSC and the UN General Assembly (UNGA) in 1988 and has since then been strengthened. Through the review process, BTWC states parties have elaborated a consultative mechanism under Article V to address compliance concerns.

Moreover, given the humanitarian framework guiding today's debates on implementing Article VII, from the perspective of triggering the provision there are several dissonant elements. The article has its origins in a 1968 working paper by the United Kingdom proposing a separate treaty banning biological warfare. The language underwent several reiterations over the next three years and at one point disappeared entirely from the draft convention, only to resurface in its current formulation just before the conclusion of the negotiations. The different versions of the article left traces from earlier intentions and understandings, meaning that the intent behind certain phrases that may be uncertain or appear confusing today. This is particularly the case for the following:

- *provide or support assistance*: what is the nature of the assistance, humanitarian, military, or any other type?
- *in accordance with the United Nations Charter*: why does the article include a reference to the UN Charter, particularly since the Charter allows for punitive actions and even resort to military force under Chapter VII? In addition, if the assistance is humanitarian, as assumed today, what prompted the reference to the UN Charter? The word 'humanitarian' features only once in the founding text (Chapter I, Article 1, 3); the words 'aid' or 'assistance' (in the sense of humanitarian or non-military aid) are absent. Furthermore, while the UN's mandate includes the promotion of arms control and disarmament, nothing in the Charter makes it responsible for monitoring treaty compliance or addressing treaty violations.

Besides Article VII, only Articles V and VI refer to the Charter or UNSC. The context concerns the resolution of any problems relating to the BTWC's objective, way of implementation, or breaches of the convention.

Article V raises the possibility of organising bi- and multilateral consultations and cooperation 'through appropriate international procedures within the framework of the United Nations and in accordance with its Charter' in case direct interaction between the parties concerned is impossible or unproductive. Overall the provision is vague. Review conferences have tried to clarify it, in particular with regard to the convening of a consultative meeting.⁴

Article VI grants a state party the right to lodge a complaint with the UNSC if it believes that another state party has breached its treaty obligations. Furthermore, should the UNSC initiate an investigation, all states parties undertake to cooperate with such investigation.

However, states parties have not elaborated on the references to the UN Charter and the UNSC. They have also not answered whether there is or should be any linkage between either Articles V or VI and Article VII.

- *if the Security Council decides that such Party has been exposed to danger*: why is there a requirement for Security Council action if assistance can be provided under basic humanitarian principles? On what basis will the UNSC make this decision?

The Third and Fourth Review Conferences (1991 and 1996) noted under both Articles V and VI the UNSG's investigative mechanism as endorsed in UNSC Resolution 620 (1988) and UNGA Resolution 45/57 (1990) and 'to consult, at the request of any State Party, regarding allegations of use or threat of use of bacteriological (biological) or toxin weapons and to cooperate fully with the United Nations Secretary-General in carrying out such investigations'. Later review conferences refer back to this text and have not elaborated any further on the references to the UN Charter or the UNSC.⁵

The UNSC, as its name indicates, bears primary responsibility for the maintenance of international peace and security (Chapter V, Article 24, 1). Logic therefore suggests that Article VII applies exclusively to the deliberate use of a pathogen or toxin as a weapon. This would thus exclude a situation of a country facing an outbreak after an accidental release of a disease-causing agent from a neighbour's secret BW research or production facility (similar to the anthrax outbreak near Sverdlovsk in 1979).⁶ In other words, according to this interpretation Article VII refers to an *act of war*, even though the BTWC lacks references to 'use' in both its title and Article I.

- *as a result of violation of the Convention*: does this clause imply violation of any part of the BTWC? If affirmative, this could include illicit weapon programmes or out-

⁴ BWC Implementation Support Unit (2012). *op cit.*, 10–11.

⁵ *Ibidem*, 12–13.

⁶ Author e-mail correspondence with Nicholas A. Sims, 2 July 2018.

breaks resulting from illicit activities. How would this square with the interpretation that Article VII only refers to an act of war?

Furthermore, only states parties can violate the BTWC, which implies that dangers arising from other actors—non-states parties (signatory or non-signatory states) or non-state actors—could not be the subject of Security Council action, and therefore not of state party assistance.

This research paper

In November 2016, in the margins of the 8th Review Conference of the BTWC, the Fondation pour la recherche stratégique (FRS) and UN Institute for Disarmament Research (UNIDIR) held a tabletop exercise (TTX) to understand better the elements that would have to be in place to trigger Article VII and the consequences such action may have on the organisation of international assistance. The TTX revealed that decision-making was severely hampered because of the article's lack of clarity, uncertainty about possible procedures and their consequences on the process as a whole, and the types of actors that could be called upon (e.g. UNSG, ISU, depositary states, etc.).⁷

Discussions at a workshop on 'Article VII of the BWC and the UN System', held in New York on 12–13 December 2017 as part of the Project on strengthening global mechanisms and capacities for responding to deliberate use of biological agents, also touched upon the specific responsibilities of UN organs following activation of Article VII. The question was raised whether there was any relevancy in trying to recover the negotiators' original intentions. In reply, UN officials said that since the implications of triggering Article VII had never been studied and no procedures have ever been put in place, following a request the first task for the UN would be to study legal and negotiation documents to determine which types of action might be possible and which roles the UNSC and UNSG might play.

This research paper traces the article's negotiation history between 1968 and 1971. During those three years negotiations took some sharp turns, and draft treaty texts were dropped and replaced by alternatives that framed BW control in radically different ways. In the final two months of negotiation, some degree of synthesis between different approaches took place. With respect to Article VII, when Morocco in August 1971 introduced an amendment to reinsert language based on the British proposal, the context had completely changed, not in the least because the original draft provisions banning methods of biological warfare and a mechanism to investigate allegations of BW use had been dropped. Whereas Article IV in the original British draft convention formed part of the fabric to prevent

⁷ Zanders, Jean Pascal, Nexon, Elisande and Trapp, Ralf (2017). *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. URL: <http://www.the-trench.org/wp-content/uploads/2013/06/201707-FRS-BTWC-Article-VII-TTX-report.pdf> >.

biological warfare, the later Article VII had no obvious connections to the BTWC's core prohibitions in Articles I – III. It also lacked direct or explicit links to Articles V and VI. Moreover, the humanitarian intent, systematically affirmed by British government officials and diplomats, became blurred at times, especially after an addition to a draft UNSC resolution that was to accompany the BTWC made explicit reference to Article 51 of the UN Charter on individual and collective self-defence. It shifted the focus away from aiding the victim of a biological attack to possible assistance in countering the aggressor.

I wish to thank Nicholas Sims, Emeritus Reader in International Relations at the London School of Economics & Political Science (LSE), University of London, for sharing his insights and recollections of the BTWC negotiation process and comments on an early draft of this study. I also wish to express my appreciation for the continuing support by Elisande Nexon and the Fondation pour la recherche stratégique for this Article VII project. Final thanks go to the staff members of the BTWC Implementation Support Unit Daniel Feakes and Alex Lampalzer for allowing access to the BTWC archives and assistance with the search for documents. Gaps, errors and omissions are all mine.

This working paper represents work in progress. I have not yet had access to all negotiation documents (there is notably a gap for developments in 1970 and early 1971) and more background information on national decisions is still required. The paper also forms part of a broader research project focussing on triggering Article VII run by the FRS and The Trench. A final version of this working paper will be produced later in the year. Meanwhile, comments and additional information may be sent to jpzanders@the-trench.org.

Jean Pascal Zanders
Head, The Trench
Senior Research Associate, Fondation
pour la recherche stratégique

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Table of Abbreviations

BTWC	Biological and Toxin Weapons Convention
BW	Biological weapon
CBW	Chemical and biological weapons
CCD	Conference of the Committee on Disarmament
CW	Chemical weapons
ENDC	Eighteen Nation Disarmament Committee
FAO	Food and Agricultural Organisation
FRS	Fondation pour la recherche stratégique
ISU	Implementation Support Unit
OIE	World Organisation for Animal Health
NPT	Non-Proliferation Treaty
TTX	Tabletop exercise
UN	United Nations
UNGA	UN General Assembly
UNSC	UN Security Council
UNIDIR	UN Institute for Disarmament Research
UNSG	UN Secretary-General
WEOG	Western European and Others Group
WHO	World Health Organisation

Background to Article VII

Early in 1968 negotiations in the Eighteen Nation Disarmament Committee (ENDC) led to the adoption of the Nuclear Non-Proliferation Treaty (NPT), which was subsequently opened for signature on 1 July. Looking at future weapon control options, the United Kingdom began exploring the question of CBW. The UNGA had become increasingly alarmed by the widespread US use of riot control and anti-plant agents as weapons of war in Southeast Asia, leading to calls for strengthening controls on CBW. London began exploring the option in bilateral consultations with Washington in 1967. The idea to separate chemical weapons (CW) from BW from an arms control viewpoint seems to have arisen first at a meeting between the British Arms Control and Disarmament Research Unit and the US Arms Control and Disarmament Agency in October. British archives are mute on how the idea became the foundation for the UK's proposal to solely ban BW the next year.⁸

London decided early in its policy formulation on the need for a new international agreement. An initial thought to expand on the 1925 Geneva Protocol prohibiting CBW use in war ran into immediate problems. First, the United States was then not yet a party. Second, the United States equated CW with lethal agents. As a consequence, it had systematically argued since the late 1920s that use of riot control agents in combat operations does not amount to chemical warfare. Given the contrary interpretation by the parties to the Protocol, even trying to persuade Washington to sign up to the ban while it was widely using lachrymatory agents in Vietnam immediately appeared futile.⁹ Finally, in the 1962–70 Yemen War, after a four-year pause, Egypt resumed CW attacks at the end of 1966. While Egypt was a party to the Geneva Protocol, Yemen was not. The applicability of the document was therefore in question. Furthermore, the Soviet Union backed the republican cause after the overthrow of the Yemeni monarchy, which may also have discouraged international condemnation of Egypt's chemical warfare operations. Regional geopolitics resulted in the US State Department also undertaking concerted efforts to limit criticism of Egypt's CW use.¹⁰ Together with the USSR's opposition to intrusive verification—a prerequisite for CW disarmament—these factors may have persuaded policy planners in London of a greater chance of success for a separate BW treaty (even though several senior British officials continued to express serious misgivings about the absence of suggestions for verification).

In the course of July 1968 a Working Party on CBW set up in the Defence and Overseas Policy Committee considered a Foreign Office paper on microbiological warfare, which

⁸ Walker, John R. (2012). *Britain and Disarmament*. Farnham, Ashgate, 52–55.

⁹ *Ibidem*.

¹⁰ Orkaby, Asher Aviad. (2014). *The International History of the Yemen Civil War, 1962-1968*. Doctoral dissertation. Cambridge, MA, Harvard University, 258.

listed several points for inclusion in a BW treaty.¹¹ This document was to become the UK's working paper submitted the next month to the ENDC. Two discussion elements are of direct relevance to the present paper, namely investigations of alleged use of BW and support for efforts to counter the use or threatened use of BW.

Investigative responsibilities for the World Health Organisation

Even before the establishment of the Working Party on CBW, possible roles for the WHO cropped up in reference to investigations or inspections. Recognising that a convention could not be fully verifiable, an early draft of the Foreign Office paper discerned a role for the WHO to investigate alleged use. However, subsequent discussions questioned whether the body's constitution could allow such investigations and whether its members would be willing to alter the organisation's mandate.¹²

A second possible role for the WHO, namely investigating allegations of breaches of the core treaty prohibitions, was deemed less suitable. Instead, the British officials and experts preferred a 'body of competent experts' for that role.¹³

In the final considerations before the submission of the working paper to the ENDC, the Minister of Health confirmed that investigative responsibilities under the future treaty would be contrary to the WHO's constitution. He further recommended that the proposed panel of UN experts also be competent to investigate complaints so as to avoid opening WHO conferences to discussion of the Vietnam war (which hitherto had been successfully resisted).¹⁴

Support for efforts to counter the use or threatened use of BW

During deliberations in July, the proposal was added that the future convention ought to include an undertaking to support, in accordance with the UN Charter, efforts to counter the use, or threatened use of microbial methods of warfare. The idea was to adopt a UNSC resolution to this effect and have states party to the treaty issue similar declarations.

The inspiration came from the NPT, and more specifically UNSC Resolution 255 adopted on 19 June 1968, in which certain nuclear-weapon state permanent members offered (later defined as 'positive') security assurances to non-nuclear weapon states by promising that they would have to act immediately in accordance with their obligations under the UN Charter. Some states also expressed their intention that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon state party to the

¹¹ Walker (2012), 63–67.

¹² Walker (2012), 57; 61.

¹³ Walker (2012), 64; 66.

¹⁴ Walker (2012), 69.

NPT that is a victim of an act or an object of a threat of aggression in which nuclear weapons are used. The resolution's operative clauses are:

The Security Council,

[...]

1. *Recognizes* that aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State would create a situation in which the Security Council, and above all its nuclear-weapon State permanent members, would have to act immediately in accordance with their obligations under the United Nations Charter;

2. *Welcomes* the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act or an object of a threat of aggression in which nuclear weapons are used;

3. *Reaffirms* in particular the inherent right, recognized 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.¹⁵

The Foreign Office Legal Advisers and UN (Political) Department pointed out that a treaty banning BW would not distinguish between possessor and non-possessor states and therefore argued that a similar initiative was inappropriate.¹⁶ A revised proposal made it into the ENDC working paper (see below).

¹⁵ UNSC Resolution 255 (1968), 'Question Relating to Measures to Safeguard Non-Nuclear-Weapon States Parties to the Treaty on the Non-proliferation of Nuclear Weapons', 19 June 1968, via URL <<http://www.un.org/en/sc/documents/resolutions/1968.shtml>>.

¹⁶ Walker (2012), 66.

Emergence of a UK draft treaty

In July 1968 the UK announced its intention to submit proposals for a convention to ban or proscribe the use for hostile purposes of microbiological agents causing death or disease by infection in man, other animals or crops. On 6 August ENDC members received a four-page working paper.¹⁷ It did not contain a treaty proposal. Rather it identified for discussion elements for such a treaty and offered a rationale for each one of them. The basic proposition was that the Geneva Protocol required strengthening. The UK paper noted that while this agreement had been violated several times with respect to chemical warfare, 'the use of microbiological methods of warfare has never been established'.¹⁸ It therefore proposed to move ahead with the formulation of new obligations restricting microbiological methods of warfare. Separation of BW from CW went against longstanding tradition to consider both weapon categories in tandem and UN attempts to devise an multilateral disarmament treaty.

Given the dissatisfaction with the Geneva Protocol as departure point, British thinking tended to centre upon the laws of war rather than weapon elimination, even though the working paper described several disarmament ingredients. When introducing the working paper to the ENDC, Minister of State Fred Mulley added more texture to the proposals, which tended to reinforce the perception that a more effective ban on use was the UK's primary objective. He thus commented:

My Government suggests that States should (a) declare their belief that the use of microbiological methods of warfare of any kind and in any circumstances should be treated as contrary to international law and a crime against humanity, and (b) undertake never to engage in such methods of warfare themselves in any circumstances.¹⁹

This position was practical rather than fundamental. It rested on the premise that strict verification processes were impossible and a need to control a range of dual-use activities without hampering legitimate research and commercial enterprise. Several elements therefore sought to provide interlocking and mutually reinforcing mechanisms to prevent BW use. One such idea was 'a competent body of experts, established under the auspices of the United Nations, [to] investigate allegations made by a party to the Convention which appeared to establish a *prima facie* case that another party had acted in breach of the obligations established in the Convention. The Convention would contain a provision by

¹⁷ Conference of the Eighteen-Nation Committee on Disarmament, 'Working Paper on Microbiological Warfare' by the United Kingdom, Document ENDC 231*, 6 August 1968.

¹⁸ *Ibidem*, para. 3.

¹⁹ Conference of the Eighteen-Nation Committee on Disarmament, Final Verbatim Record of the Three Hundred and Eighty-Seventh Meeting, ENDC/PV.387, 6 August 1968, p. 4, para. 4.

which parties would undertake to cooperate fully in any investigation and any failure to comply with this or any of the other obligations imposed by the Convention would be reported to the Security Council.²⁰ In his address to the ENDC, Mulley expanded on the idea of an investigative tool:

In short, in paragraph 8 of the paper we envisage the establishment of machinery for the investigation of complaints either that microbiological methods of warfare have been employed or that one of the other obligations established by the convention has been infringed. It goes without saying that any allegations, to qualify for investigation, would have to be made by States, not individuals or organizations, and that they would need to be supported by the necessary evidence. We have consciously refrained from suggesting how the competent body of experts should be appointed or what the composition of this body should be; but clearly it would need to include experts both in microbiology and in the potential means of delivery of microbiological agents in hostilities.²¹

Investigations, according to the comment, could be carried out not just in case of an allegation of use, but also in the event of complaints about other treaty violations.

The working paper concluded with a reflection on a possible role for the UNSC:

Consideration should be given to the possibility of including in the Convention an article under which the parties would undertake to support appropriate action in accordance with the United Nations Charter to counter the use, or threatened use, of microbiological methods of warfare. If such an article were included it might be endorsed by the Security Council in rather the same way as the Council welcomed and endorsed the declarations made by the United States, the Soviet Union and the United Kingdom in connexion with the Non-Proliferation Treaty.²²

In his address to the ENDC, Mulley echoed some elements raised during the internal deliberations:

Finally, in paragraph 10 we have suggested that all parties should accept an obligation to cooperate in countering the use, or threatened use, of microbiological methods of warfare. We feel that if such an article were included this might do more than anything else to give parties the security they need if they are to assume the additional obligations which we envisage. In the non-proliferation treaty the security assurances took the form of a Security Council resolution (resolution 255 (1968); ENDC/226*), backed by declarations of the three

²⁰ Document ENDC 231*, 6 August 1968, para. 8.

²¹ ENDC/PV.387, 6 August 1968, p. 6, para. 14.

²² Document ENDC 231*, 6 August 1968, para. 10.

nuclear-weapon Powers. But in this field there are no microbiological weapon States and non-microbiological weapon States — we are all on the same footing; and we therefore felt that the best approach would be to write this undertaking into the convention itself, with the possibility that it might be strengthened by Security Council endorsement.

The way in which the UK presented its thoughts was in fact the outcome of a compromise with the United States reached during bilateral consultations earlier in the year. Washington was vehemently opposed to a treaty without verification and warned London that it would feel obliged to attack any such proposal. A thought paper encouraging further study of a variety of disarmament issues, in contrast, was acceptable. The USA eventually also agreed to have the UNSG prepare a study on CW. Nevertheless, the UK also told its US counterparts that even with the delay, because of domestic concerns about CBW it would have to table a draft convention at the new ENDC session in January 1969. The working paper would in effect be a brief for lawyers to draft treaty language.²³

The ENDC welcomed the UK paper. Members, however, raised a variety of concerns, mostly relating to the separation of both weapon categories and the relationship of the suggestions to the Geneva Protocol. Several states welcomed the idea of a UNSG CW study, whose scope was eventually expanded to cover BW too at the suggestion by Poland. On 20 December 1968 the UNGA tasked the UNSG with the preparation of the report and to submit it to UN members, if possible, by 1 July 1969.²⁴

The first version of the UK draft convention

On 10 July 1969, after the UNSG's report had been issued, the UK tabled its draft treaty. The four-page document also included text for a draft UNSC resolution.²⁵ Draft Article I sought to outlaw biological warfare. Draft Article II proscribed the acquisition and possession of BW, research aimed at BW production, and to destroy or divert to peaceful purposes BW holdings within three months after entry into force of the convention.

Draft Articles III and IV are central to the present study. The former comprised three paragraphs to address violations of the future convention.

1. Any Party to the Convention which believes that biological methods of warfare *have been used against it* may lodge a complaint with the *Secretary-General of the United Nations*, submitting all evidence at its disposal in support of the complaint, and request that the complaint be investigated and

²³ Walker (2012), 58.

²⁴ United Nations General Assembly, Resolution 2454 (XXIII). Question of general and complete disarmament. 20 December 1968.

²⁵ Conference of the Eighteen-Nation Committee on Disarmament, 'Biological Warfare: Draft Convention and accompanying draft Security Council Resolution' by the United Kingdom, Document ENDC/255, 10 July 1969.

that *a report on the result of the investigation be submitted to the Security Council.*

2. Any Party to the Convention which believes that *another Party* has acted in breach of its undertakings under *Articles I* and II of the Convention, but which is *not entitled to lodge a complaint under paragraph 1* of this Article, may similarly *lodge a complaint with the Security Council* and request that the complaint be investigated.

3. Each of the Parties to the Convention undertakes to co-operate fully with the Secretary-General and his authorized representatives in any investigation he may carry out, as a result of a complaint, in accordance with Security Council Resolution No..... .

The first paragraph would allow a state that believes BW have used *against it* to lodge a complaint with the *UNSG*. It should submit all evidence at its disposal in support of the complaint, and request that the complaint be investigated and that a report on the result of the investigation be submitted to the Security Council. The second paragraph addressed both BW use and violations against the disarmament provision (Article II). As regards use, the difference with the first paragraph is that the complaint may be lodged by a party other than the presumed victim. However, that party must address its complaint to the UNSC rather than to the UNSG.

In his explanation of the draft convention to the ENDC, Mulley emphasised the importance of a quick and automatic investigation:

It is of course desirable that investigation of all complaints should proceed as quickly as possible in order to strengthen the deterrent effect of such machinery. Quick and automatic investigation should be possible where a party alleges that biological methods of warfare have been used against it, because in that case the complainant would provide all the facilities for carrying out an investigation.

He suggested that the different procedure (via the UNSC) for an investigation in a third party had to do with uncertainty of access to the incident site:

In other cases, facilities for carrying out investigations would have to be provided by parties who might well object to doing so. In those circumstances it would not be possible to have automatic investigation.²⁶

Draft Article IV was the precursor to Article VII of the BTWC:

Each of the Parties to the Convention affirms its intention to provide or support appropriate assistance, in accordance with the United Nations Charter, to any

²⁶ Conference of the Eighteen-Nation Committee on Disarmament, Final Verbatim Record of the Four Hundred and Eighteenth Meeting, ENDC/PV.418, 10 July 1969, p. 10, para. 22.

Party to the Convention, if the Security Council concludes that biological methods of warfare have been used against that Party.

Just like with Article III, Mulley framed Article IV as a deterrent against infringement. He saw it as a measure not identical, but equivalent to the security guarantees extended by nuclear-weapon states under the NPT.

As a further deterrent against infringement, parties would affirm their intention, under article IV, to provide or support appropriate assistance, in accordance with the United Nations Charter, to any party against which biological methods of warfare had been used. This question of security assurances is a difficult one, as we have found in other contexts, and I shall now make only two points. The first is that we are not, as in the non-proliferation Treaty, dealing with weapons which some countries have and are going to keep but which other countries do not have and are not going to acquire. Under the non-proliferation Treaty the nuclear-weapon States will have a particular responsibility for the security requirements of the non-nuclear-weapon States, but under this draft convention all parties would be equal and would have an equal responsibility in the security field. 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.²⁷

The final sentence of this paragraph is important. It signals clarity of purpose behind draft Article IV. The UK intended it as a tool for individual rather than collective action. Such action consisted solely of victim assistance. Humanitarian action is consistent with the UN Charter. Any retaliation against an aggressor, the statement makes clear, would require a separate or additional UNSC decision.

The sole paragraph in Mulley's explanation of the draft treaty dedicated to draft Article IV is conspicuous for the one clause he does not mention: 'if the Security Council concludes that biological methods of warfare have been used against that Party'. If a UNSC conclusion was critical to triggering assistance, the clause would have stood central in his clarification. 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. Confirmation by the UNSC of BW use, according to this interpretation, would have eliminated any (political or other) justification for not assisting a victim of BW.

²⁷ ENDC/PV.418, 10 July 1969, p. 11, para. 24.

The draft UNSC resolution accompanying the British proposal was key to the functioning of the investigative mechanisms:

The Security Council.

Welcoming the desire of a large number of States to subscribe to the Convention for the Prohibition of Biological Methods of Warfare, and thereby undertake never to engage in such methods of warfare; to prohibit the production and research aimed at the production of biological weapons; and to destroy, or divert to peaceful purposes, such weapons as may already be in their possession,

Noting that under Article III of the Convention, Parties will have the right to lodge complaints and to request that the complaints be investigated,

Recognizing the need, if confidence in the Convention is to be established, for appropriate arrangements to be made in advance for the investigation of any such complaints, and the particular need for urgency in the investigation of complaints of the use of biological methods of warfare,

Noting further the declared intention of Parties to the Convention to provide or support appropriate assistance, in accordance with the Charter, to any other Party to the Convention, if the Security Council concludes that biological methods of warfare have been used against that Party,

1. Requests the Secretary-General
 - (a) to take such measures as will enable him
 - (i) to investigate without delay any complaints lodged with him in accordance with Article III.1 of the Convention;
 - (ii) if so requested by the Security Council, to investigate any complaint made in accordance with Article III.2 of the Convention; and
 - (b) to report to the Security Council on the result of any such investigation.
2. Declares its readiness to give urgent consideration
 - (a) to any complaint that may be lodged with it under Article III.2 of the Convention; and
 - (b) to any report that the Secretary-General may submit in accordance with operative paragraph 1 of this Resolution on the result of his investigation of a complaint; and, if it concludes that the complaint is well-founded, to consider urgently what action it should take or recommend in accordance with the Charter.
3. Calls upon Member States and upon Specialized Agencies of the United Nations to co-operate as appropriate with the Secretary-General for the fulfilment of the purposes of this Resolution.

This draft resolution thus invested the UNSG with an investigative mechanism. The third preambular paragraph recognised the need to make appropriate arrangements in advance, more so as any contingency would have to be addressed with utmost urgency. Furthermore, it outlined a procedure. A party to the convention who believes that it has been the victim of a biological attack can submit the request for an investigation to directly to the UNSG; other parties lodging a similar complaint would have to go through the UNSC, which may then task the UNSG to investigate the alleged BW use. (As noted earlier, this interposition of the UNSC may have been linked to the uncertainty about access to the incident site and to ensure cooperation with the UNSG investigation by all parties concerned.) The UNSG was to report back to the UNSC, which could then decide on further action if it concluded that the allegation was well-founded. Third, following adoption of the draft resolution, the UNSC would have declared its unreserved willingness to consider any complaint or report submitted by the UNSG. This was to ensure that no permanent member might wield a veto.

The revised UK draft convention

On 26 August the UK tabled a revised version of its draft convention.²⁸ Draft Articles III and IV remained unchanged, except for a modification to paragraph III, 2 requiring the complaining party to supply all supporting evidence at its disposal (thus making it in line with paragraph III, 1). Draft Article I now included an additional clause to recognise obligations under other pertinent international treaties, notably the Geneva Protocol.²⁹

With reference to the topic of the present study, the single most important change to the text was the insertion of a new final preambular paragraph in the 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.

Ambassador I. Porter linked the modification to concerns by some ENDC members about the interpretation of draft Article IV (on assistance):

We have also made one change in our draft Security Council resolution by adding a preambular paragraph which reaffirms the right of individual and collective self-defence recognized in Article 51 of the United Nations Charter.

²⁸ Conference of the Eighteen-Nation Committee on Disarmament, 'Biological Warfare: Draft Convention and accompanying draft Security Council Resolution' by the United Kingdom, Document ENDC/255/Rev.1, 26 August 1969.

²⁹ Conference of the Eighteen-Nation Committee on Disarmament, Final Verbatim Record of the Four Hundred and Thirty-First Meeting, ENDC/PV.431, 26 August 1969, p. 14, para. 44.

This paragraph is designed to meet concerns expressed to us that article IV of the draft convention might be taken to derogate from that right.³⁰

The public record of deliberations, as far as the author has been able to ascertain, does not reveal an ENDC member that may have raised the concern. The working assumption is therefore that the matter was raised bilaterally, possibly in the context of consultations with the United States.³¹

This new preambular paragraph carried the potential of confusing the purpose of draft Article IV. 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.³²

The addition had no noticeable immediate impact. Several reasons explain this. First, the new language was inserted into a proposal for a UNSC resolution that was complementary to the future convention to establish the mandate to create the UNSG's investigative mechanism and to ensure as much as possible that the UNSC would investigate the complaints and take appropriate action if the complaint proved to be well-founded.³³ It did not amend or supplement the draft treaty proper. Second, the British proposal to split the negotiations for CBW control was highly controversial. Most ENDC members questioned that approach and consequently did not engage with the specifics in the draft treaty and accompanying UNSC resolution. Third, the ENDC had just received the UNSG's study on CBW and was in the midst of assessing the findings. Moreover, delegates were occupied with extracting arguments from the report that buttressed their position to keep both weapon categories in the same negotiation basket. Finally, it would still take over a year and a half before negotiations on the future BTWC were to take off. The impulse was to come from a totally different treaty proposal by the Socialist group of countries that emphasised disarmament elements over provisions on strengthening the laws of war. It did not contain an explicit prohibition on use. Consequently, there was no necessity to investigate alleged

³⁰ ENDC/PV.431, 26 August 1969, p. 15, para. 50.

³¹ In his book *Britain and Disarmament*, John Walker did not cover domestic UK decision making respecting the BTWC negotiations in 1969 and 1970 because no significant progress was recorded during both years.

³² For instance, Article 5 of the 1949 North Atlantic Treaty establishing the North Atlantic Treaty Organisation (NATO) describes assistance in the framework of Article 51 of the UN Charter: 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, *will assist* the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.'

³³ ENDC/PV.418, 10 July 1969, p. 12, para. 27.

BW use or provide assistance to victims. The Socialist proposal instead argued that if BW development, production and stockpiling were proscribed, then no opportunity for biological warfare could emerge. When some countries proposed to insert some elements from the UK proposal, such as draft Article IV, into the Socialist document, the context for discussion had shifted significantly and hardly anybody considered the implications of the UNSC roles in case of treaty infractions.

Second revision

1970 was a year without much ENDC activity on the future BTWC. A year after having circulated its revised draft convention, the UK issued a second revision. One of the most significant changes concerned the inclusion of 'toxins' in the text after discussions on the definitions of BW and toxins in ENDC meetings and the US renunciation of toxins in addition to BW. Of the draft articles central in this study, III, 2 had some words modified, whereby 'has acted in breach of its undertaking under Articles I and II' was replaced with '*is in breach of any of its* undertakings under Articles I and II'.³⁴

On 23 October Poland submitted to the UNGA on behalf of nine Socialist countries a Revised Draft Convention on the Prohibition of the Development, Production and Stockpiling of Chemical and Bacteriological (Biological) Weapons and on the Destructions of Such Weapons.³⁵ It would prove to be the last integrated proposal covering both arms categories. Its emphasis was on disarmament — the elimination of existing weapon capacities and the prevention of acquisition and possession of future weapons. It did not directly mention CBW use.

³⁴ Conference of the Eighteen-Nation Committee on Disarmament, 'Revised draft Convention for the Prohibition of Biological Methods of Warfare and accompanying draft Security Council Resolution' by the United Kingdom, Document CCD/255/Rev.2, 18 August 1970.

³⁵ United Nations General Assembly, Question of Chemical and Bacteriological (Biological) Weapons: Letter dated 23 October 1970 from the Permanent Representative of Poland to the United Nations addressed to the President of the General Assembly, Document A/8136, 23 October 1970.

The endgame: deliberations through 1971

During the early months of 1971 progress on the BTWC was stalled over the question whether BW and CW should be the subject of a single treaty as stated during meetings and in resolutions of the UNGA First Committee, or whether the Conference of the Committee on Disarmament (CCD), the successor body to the ENDC, should move ahead with a separate BW agreement as proposed by the UK. Three fundamental issues underlay the different viewpoints, namely:

- the Western refusal to consider verification measures. The West felt a need for more complex and intrusive verification mechanisms for CW, which required more time to mature. A ban on BW it believed to be by and large unverifiable; hence it advocated to move ahead with a treaty prohibiting BW containing some transparency and consultation tools while verification mechanisms for a CW treaty could be explored further;
- the British emphasis on the prohibition of BW use, which many CCD members feared would undermine the 1925 Geneva Protocol. In addition, as many parties to the Geneva Protocol had registered reservations, certain non-aligned states warned against a dual system of legal obligations in which BW use would not be completely excluded; and
- many states felt that CW and BW belonged historically into a single arms category and that their separation would confuse the world.

A breakthrough came on 30 March when a group of nine Socialist countries circulated their 'Draft Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) weapons and toxins and on their destruction'.³⁶ The document departed radically from their proposal to the UNGA for a CBW disarmament treaty five months earlier.³⁷ It had a double effect. On the one hand, opponents of the separation had to grudgingly accept the pragmatic course forward over an ideal wish. On the other hand, CCD members now had two proposals to consider, which overlapped with each other in several respects and offered alternative approaches for addressing certain more contentious

³⁶ Conference of the Committee on Disarmament, 'Draft Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) weapons and toxins and on their destruction' by the Byelorussian Soviet Socialist Republic, Bulgaria, Czechoslovakia, Hungary, Mongolia, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics, Document CCD/325, 30 March 1971.

³⁷ UN General Assembly, *op cit.*, document A/8136, 23 October 1971.

issues. Most importantly, while realising that some hard bargaining lay ahead, they also sensed an opportunity to break the deadlock over CBW in the CCD.

Article VII: an element of deterrence

The development was important for the future Article VII. Having two concrete proposals in front of them, delegates began to seek clarification on the purpose of certain draft provisions and the intentions behind some phraseology. Use of BW, the ways in which parties to the future convention should respond to such a treaty violation, and prevention of BW use became the subject of many suggestions and deliberation. In that process, the understanding of original British Article IV's purpose (which was to reemerge as Article VII) evolved fast and opened new possible interpretations.

As noted earlier, the prohibition on BW use was central to the UK's disarmament vision. In the most recent version of the draft treaty, document CCD/255/Rev.2 of 18 August 1970, it was the subject of the first article.³⁸ Its centrality was underscored by draft Article III, 1 that foresaw a complaints procedure and a state party's right to request the UNSG to investigate the complaint. The resulting investigative report was to be submitted to the UNSC. Furthermore, states parties were expected to fully cooperate with the UNSG's investigation. The British treaty proposal also included language for a resolution to be adopted by the UNSC that laid out the modalities for such an investigation.

Draft Article IV — precursor to Article VII — supplemented draft Article III:

Each of the Parties to the Convention affirms its intention to provide or support appropriate Assistance, in accordance with the United Nations Charter, to any Party to the Convention, *if the Security Council concludes* that biological methods of warfare have been used against that Party.

Even though not spelt out explicitly in the draft treaty or the proposed UNSC resolution, in the current sequence of provisions the phrase 'if the Security Council concludes' most likely implied a decision following the study of the UNSG's investigative report.

The British draft treaty thus foresaw a *sequence* of actions that linked draft Articles III, 1 and IV:

1. Accusation of violation of Article I;
2. Substantiated complaint by the victim accuser to the UNSG;
3. If also requested, investigation of allegation of use by the UNSG;
4. Submission of the UNSG's investigative report to the UNSC;

³⁸ Conference of the Committee on Disarmament, 'Revised draft Convention for the Prohibition of Biological Methods of Warfare and accompanying draft Security Council Resolution' by the United Kingdom, Document CCD/255/Rev.2, 18 August 1970.

5. Conclusion by the UNSC whether or not the accuser was the victim of BW use;
6. According to operative paragraph 2(b) of the draft resolution accompanying the proposed treaty, urgent consideration by the UNSC 'what action it should take or recommend *in accordance with the Charter*'; and
7. States parties provide or support *appropriate assistance* to the victim.

Three elements should be noted in this respect.

First, draft Article III also foresaw in violations of Article II (non-acquisition and stock-piling, ban on research, and destruction of conversion) and authorised a state party to file a complaint with the UNSC (rather than the UNSG because of possible refusal to access the incident site) and request it to investigate the complaint.

Second, the draft BTWC did not specify which remedial or punitive actions states parties could or should be undertake, nor did it foresee any type of consultative mechanism (which is also clear from the fact that an accusing state party transmits its complaint directly to the UNSG without any intervening role for other states parties or even the depositary states).

Third, draft Article IV indicated that the only condition for triggering appropriate assistance is **confirmation** by the UNSC that the accuser was indeed victim of a violation of draft Article I. Assistance was therefore seen to be independent of an explicit UNSC decision or resolution to such effect.

However, as the 6th step in the sequence of actions already noted, the accompanying draft UNSC resolution envisaged urgent UNSC consideration any necessary action in accordance with the UN Charter. Does this imply that in original British thought an extra UNSC decision for 'appropriate assistance' was required? Or was this the functional substitute for the missing remedial or punitive actions in the draft BTWC? If the latter case, then the reference to the UN Charter could have been pacific settlement of disputes under Chapter VI³⁹ or action with respect to threats to the peace, breaches of the peace, and acts of aggression under Chapter VII.⁴⁰ Considering that BW use by one state party against another state party amounts to an act of war, any measure under Article 51 deemed necessary to maintain or restore international peace and security cannot be excluded as an envisaged possibility at the time of the negotiations. In the 1968 version of the draft UNSC resolution the UK referred explicitly to Article 51. Recourse to the Charter provision had not been ruled out in the later text; instead it introduced additional ambiguity as to possible international responses to the deliberate use of disease.

³⁹ Charter of the United Nations, Chapter VI,
URL <<http://www.un.org/en/sections/un-charter/chapter-vi/index.html>>.

⁴⁰ Charter of the United Nations, Chapter VII,
URL <<http://www.un.org/en/sections/un-charter/chapter-vii/index.html>>.

To return to the negotiations during the spring of 1971, the draft BTWC circulated on 30 March by the Socialist countries focussed on weapon elimination and non-acquisition rather than the laws of war. In the words of Soviet Head of Delegation A. A. Roshchin:

The basic aim of the agreement is to preclude completely the possibility of the use in war of bacteriological weapons and toxins. The achievement of that aim is ensured by the provisions of articles I and II of the draft convention under which each State party to the convention undertakes not to develop, produce, stockpile or otherwise acquire microbiological or other biological agents or toxins of such types and in such quantities as are not designed for peaceful purposes.⁴¹

Prevention of use was to be achieved through preclusion of BW possession. Both in preambular paragraphs and draft Article VIII, the document emphasised the centrality of the Geneva Protocol. Roshchin emphasised that 'By concluding the proposed convention the parties to it would thereby confirm their adherence to the purposes and principles of the Geneva Protocol of 1925 and stress the importance of that document and its prohibition of the use of chemical and bacteriological means of warfare'.⁴² One consequence of the difference with the UK approach to eliminating the possibility of biological and toxin warfare was the absence of provisions addressing the consequences and response to alleged BW use. In contrast to British draft Article III, draft Article VII limited the complaint procedure and the UNSC's roles to the breach of the (disarmament) obligations. The first paragraph also only allowed a state party to submit the request for 'consideration';⁴³ UNSC action was not automatic. Whereas the British version 'requested' an investigation, without this automaticity, nobody could discard the risk of a veto against a decision proposal to such effect.

Respecting the question of investigating alleged BW use and assistance, the UK responded in two steps. On 6 April, Ambassador Henry Hainworth did not dismiss out of hand the Soviet reasoning that through disarmament the use of biological methods of warfare would become all but impossible in practice. He promised further examination of the thrust of that argument. However, he asked the CCD members to consider the importance of the complaints procedure in case of alleged BW use, adding that 'This is probably the most effective *deterrent* against non-observance contained in CCD/255/Rev.2'. He continued that 'Likewise, it would be a great loss to leave out the provisions in article IV of

⁴¹ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Fifth Meeting, CCD/PV.505, 30 March 1971, p. 15, para. 31.

⁴² *Ibidem*, p. 17, para. 38.

⁴³ Conference of the Committee on Disarmament, Document CCD/325, 30 March 1971, Article VII, 1.

CCD/255/Rev.2 for appropriate assistance to any party against which, in the view of the Security Council, biological warfare had been used'.⁴⁴

Addressing the CCD on 22 April, Minister of State Lord Lothian also drew the members's attention to the two provisions in the UK's draft. In contrast to Hainworth, he framed both draft Article III, 1 and draft Article IV in terms of deterrence. On the former, he argued that it would not be 'an exaggeration to say that this is the most important *deterrent* against non-observance that has been put forward in any proposal on biological warfare'. Recognising the difficulties some CCD members had with the envisaged role of the UNSG and recalling similar opposition during the negotiations of the Sea-bed Treaty (which the UNGA had adopted in December 1970), he did not wish to make the UNSG's role an issue of principle.⁴⁵ Yet, he emphasised the virtual automaticity of the proposed investigative procedure and explicitly argued its complementarity to, if not reinforcement of the Socialist draft treaty:

The fact that such complaints would be investigated automatically, impartially and quickly, and a report submitted to the Security Council, would be a major *deterrent against production and, stockpiling* of biological weapons in contravention of a future ban, since the State concerned could not seriously hope that use of the prohibited agents would go undetected.⁴⁶

Moving on to draft Article IV, he also recast the assistance provision as a deterrent:

By the same token, I think that there would be value in including in any biological-warfare convention something on the lines of article IV of CCD/255/Rev.2. Under this, parties would confirm their intention to provide assistance to another party if the Security Council concluded that biological methods of warfare, including toxins, had been used against that party. This would be *a further deterrent against use* of the prohibited agents and, in consequence, *a real deterrent against violation of a treaty prohibiting production and possession* of biological weapons.⁴⁷

He then invited other delegations to offer views and comments at an early stage so as to be able to move negotiations forward quickly.

⁴⁴ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Seventh Meeting, CCD/PV.507, 6 April 1971, p. 14, paras. 36 and 37.

⁴⁵ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Tenth Meeting, CCD/PV.510, 22 April 1971, p. 7, para. 7.

⁴⁶ *Ibidem*, p. 7, para. 8.

⁴⁷ *Ibidem*, p. 8, para. 9.

Responses

The British and Socialist drafts diverged in significant ways on how the international community, represented by the United Nations, should respond to treaty breaches. The UK envisaged quick and automatic investigation of alleged BW use by the UNSG followed by UNSC consideration of the UNSG's report resulting in possible further (but as yet unspecified) action. It also tasked the UNSC with addressing other types of treaty violations. In contrast, the Socialist treaty proposal focussed on the backward and forward-looking dimensions of disarmament (i.e. capacity elimination and prevention of future armament). Its complaint procedures foresaw consultations among states parties and the possibility for a state party to refer the matter to the UNSC. However, the referral procedure lacked automaticity and urgency of UNSC actions, which heightened the possibility of vetoes halting the process. Both drafts were not inherently incompatible, but between them they allowed for divergent opinions and solutions.

With respect to the Socialist idea of a consultative procedure and cooperation among states parties to solve any problems related to treaty implementation, the United Arab Republic (a short-lived political union of Egypt and Syria between February 1958 and September 1961, but Egypt retained the name until September 1971) noted that the provisions of draft Article VI 'should take into account the fact that there are instances when relations between some States are of a nature as not to allow of its normal implementation'.⁴⁸ Pakistan concurred and called for its amelioration, noting that 'the need to act quickly is of the essence on such occasions'. It indicated its willingness to support 'a procedure which ensured credible and effective measures for the Security Council to take action'.⁴⁹

Nigeria too shared the concern expressed by the United Arab Republic, but went much farther than Pakistan in embracing the UK's draft Article III:

Regarding the complaint procedure in case of breach, as now formulated in the two drafts, the procedure contained in article III of the United Kingdom draft, I will say, seems to make a greater appeal to my delegation. It is generally felt that, as long as each of the permanent members of the Security Council retains its veto power, there remains the danger that that power might be used in certain circumstances to delay or prevent investigation. The United Kingdom

⁴⁸ Conference of the Committee on Disarmament, 'Working Paper with suggestions in regard to the draft convention on the prohibition of the development, production, and stockpiling of bacteriological (biological) weapons and toxins and on their destruction (CCD/325/Rev.1*)' by the United Arab Republic, Document CCD/328, 29 June 1971.

⁴⁹ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Nineteenth Meeting, CCD/PV.519, 8 July 1971, p. 13, para. 27.

draft seems better to ensure an automatic and impartial investigation of the use of biological methods of warfare and toxins without any danger of delay.⁵⁰

The Nigerian delegate also picked up on the UK's draft Article IV on assistance, basically reiterating Lord Lothian's deterrence rationale for it.⁵¹ During the process of commenting on both draft treaties, five countries would eventually strongly endorse the assistance clause: Argentina, Italy, Morocco, The Netherlands and Nigeria.⁵²

The Netherlands reflected in some depth on the two-stage complaints procedure, thereby taking the UK's draft Article III as departure point. Avoiding politicisation of a complaint (and hence a veto in the UNSC) was a key consideration in the Dutch argument:

The first stage of dealing with a complaint should consist of a factual investigation by a body of experts or some other international organ. Only thereafter, at the discretion of the complaining party, could the Security Council be addressed on the strength of the findings of the international organ or body of experts. Under such a procedure one could avoid complaints becoming political and perhaps incriminating at an early stage. In other words, we made a plea for separation of the functions of investigation and political judgement.⁵³

Besides The Netherlands and Nigeria, Argentina, Brazil, Italy and Sweden were by then already on record as favouring the separation between preliminary fact-finding and political judgement.⁵⁴ (Japan would also endorse this position at the end of August following a legal review of all proposals.⁵⁵) However, as the Dutch delegate's intervention indicates, the thinking was shifting away from a specific role for the UNSG and towards an international organ or body of experts. From the UN negotiation records consulted it is not clear whether the reference to an international body implied the WHO and under what arrangement the body of experts would be set up and how it would relate to the community of states parties or the UNSC. Given the already mentioned reluctance to involve the WHO (which is why the UK dismissed the idea in its original proposal), the legitimacy of a body of experts could become highly contested in the context of the UNSC's consideration of the fact-finding report or if an expert were to be a national from a country with which one of the parties involved in the BW allegation has an antagonistic relationship.

⁵⁰ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Twenty-Second Meeting, CCD/PV.522, 20 July 1971, p. 10, para. 20.

⁵¹ *Ibidem*, p. 10, para. 21.

⁵² Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Twenty-Fifth Meeting, CCD/PV.525, 29 July 1971, p. 8, para. 14.

⁵³ *Ibidem*, p. 7, para. 9.

⁵⁴ *Ibidem*, p. 7, para. 10.

⁵⁵ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Twenty-Second Meeting, CCD/PV.522, 20 July 1971, p. 11, para. 22.

Clarifying 'assistance'

When Nigeria argued in favour of inserting the UK's draft Article III into the Socialist draft treaty on 20 July, it also sought clarification of the phrase 'appropriate assistance' from the British delegation:

Beyond what limit should 'appropriate' begin to be considered 'inappropriate'? The use of that word, therefore, without any adequate clarification of its actual meaning, is likely to raise some problems in the future on the issue of interpretation.⁵⁶

On 10 August, the UK replied:

In our view this term should be understood primarily as meaning action of a medical or relief nature to assist the victim. Furthermore, in order to make the purpose quite clear, we should be ready, if this is the general wish, to consider amending the wording of the article on this matter to make it clear that such assistance would be at the request of the offended party.⁵⁷

While 'assistance' might have been in humanitarian in nature in the minds of many delegates, this clarification was an unequivocal statement to this effect. It also made clear that such assistance would not be automatic.

Reinsertion of 'assistance' into the draft convention

A clear sign that negotiation of the future BTWC was accelerating came on 5 August when the Socialist countries introduced a revised draft convention⁵⁸ and the United States circulated a separate, but identical version of the text.⁵⁹ Using the Socialist template, the Cold War adversaries had aligned themselves on the basic provisions, thereby all but ensuring a successful conclusion of the discussions in the near future. Emphasis remained on the backward and forward-looking disarmament dimensions. Neither text considered 'biological

⁵⁶ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Thirty-Second Meeting, CCD/PV.532, 24 August 1971, p. 14, para. 35.

⁵⁷ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Twenty-Eighth Meeting, CCD/PV.528, 10 August 1971, p. 27, para. 90.

⁵⁸ Conference of the Committee on Disarmament, 'Revised draft Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) weapons and toxins and on their destruction' by Bulgaria, Czechoslovakia, Hungary, Mongolia, Poland, Romania and the Union of Soviet Socialist Republics, Document CCD/337, 5 August 1971.

⁵⁹ Conference of the Committee on Disarmament, 'Draft Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) weapons and toxins and on their destruction' by the United States of America, Document CCD/338, 5 August 1971 and Document CCD/338/Corr.1, 5 August 1971.

methods of warfare', leading to Hainworth's claim that 'this is a less ambitious objective'.⁶⁰ As was the case with first version of the Socialist draft BTWC, the disarmament focus meant that the endgame kicked off without draft procedures to verify allegations of BW use or provide assistance to a victim of such use.

The parallel drafts thus retained without any textual changes the ability for states parties to consult and cooperate with each to solve problems relating to treaty implementation (now draft Article V) and file complaints with the UNSC for its consideration (now draft Article VI). They did not address the ambiguity of the phrase 'for its consideration'. Concerns that a veto might thwart UNSC action following a complaint lingered. Three Socialist states — Hungary, Mongolia and Poland — proposed a draft resolution to be adopted by the UNSC that would declare this organ's readiness:

- to consider immediately any complaints lodged under article ... of the Convention,
- to take all necessary measures for the investigation of a complaint,
- to inform the States Parties to the Convention of the result of the investigation.⁶¹

Despite this effort having been inspired by the earlier UK draft UNSC resolution, to the British Head of Delegation the continued absence of separation between fact-finding and political judgement was all but unacceptable. Recalling earlier statements on the deterrent function of the verification of use on BW acquisition and stockpiling, Hainworth stated:

[...] It seems to me that it is only by investigation of complaints of use that we can be certain of establishing a procedure that will be both speedy and relatively easy to carry out.

The reason for this is that a complaint of use would be lodged by a State that considered it had been the victim of an attack. The evidence it would offer would in all probability include direct examination on its own territory. Allegations of a breach of the other bans would almost certainly have to be based on extra-territorial evidence. But evidence of use — I repeat, by direct examination on the territory of the complaining State, not on that of the State complained against — would provide very strong evidence that another State had violated the ban on the production and possession of biological weapons in order to be able to use them.

⁶⁰ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Twenty-Eighth Meeting, CCD/PV.528, 10 August 1971, p. 22, para. 71.

⁶¹ Conference of the Committee on Disarmament, 'Working paper: Draft Security Council Resolution in connexion with the draft Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) weapons and toxins and on their destruction' by Hungary, Mongolia and Poland, Document CCD/339, 10 August 1971.

Yet a further advantage of such a procedure would lie in the reduced opportunities for false accusations backed by insufficient evidence. It is not too difficult to imagine a situation in which a State might accuse another of breaking, for example, the ban on production but without being able to produce evidence to justify such an accusation. In such circumstances recriminations and a hostile atmosphere might easily be engendered. We ought to be negotiating to eliminate the risk of this sort of thing.⁶²

During the previous weeks, several delegations belonging to the Western European and Others Group (WEOG) and the Non-Aligned Movement had already expressed their interest or desire in having some verification mechanisms included in the emerging BTWC. Hainworth appealed directly to them as well as to those countries that had earlier stated their support for the assistance mechanism. However, much of the initial discussion after the introduction of the parallel drafts focussed on the relationship between the nascent treaty and the Geneva Protocol and the risks to the latter prohibition if a direct reference to BW use were to be included in the BTWC. The reservations by several states to the Geneva Protocol remained another source of concern if the future convention were to explicitly ban use.

If progress on investigative mechanisms and addressing compliance concerns proved elusive, assistance — now formally clarified as being humanitarian in nature by the UK — remained attractive to delegations who had already supported the idea before. Thus Morocco stated to the CCD:

I should like also to draw the attention of the Committee to a pertinent proposal which has its origin in article IV of the United Kingdom draft convention. My delegation believes that the convention on the total prohibition of bacteriological weapons and toxins must provide for the furnishing of the *appropriate humanitarian assistance* to a State party which so requests and is exposed by another State, in violation of the provisions of the convention, to danger resulting from deliberate use or *accidental or chance dissemination* of bacteriological agents or toxins intended for military purposes.⁶³

The intervention not only explicitly cited the UK's clarification, thereby emphasising acceptance of that interpretation, but it also sought to expand the provision of assistance to inadvertent release of biological agents or toxins. Five days later, on 24 August, Morocco

⁶² Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Twenty-Eighth Meeting, CCD/PV.528, 10 August 1971, p. 26, paras. 86–88.

⁶³ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Thirty-First Meeting, CCD/PV.531, 19 August 1971, p. 16, para. 44.

formally submitted a working paper with language and suggestions to amend the draft treaty. More specifically, it requested the insertion of a new article:

Each State Party to this Convention declares its intention to supply, within the limits of its ability, appropriate humanitarian assistance to another State Party which so requests and is exposed by another State, in violation of the provisions of the Convention, to danger resulting from deliberate use or accidental or chance dissemination of biological agents or toxins intended for military purposes.⁶⁴

Lacking in the working paper, however, was a mechanism to investigate the alleged use or, in the case of accidental release, to ascertain that the source of the incident was an illicit military BW programme. Argentina also intervened to reinsert the UK's original draft Article IV in the treaty text. In doing so, it linked the assistance provision to the 'system proposed in Article VI of the parallel texts'⁶⁵.

In a certain way, the discussions were coming full circle. Originally the separation of chemical and biological weapons had been argued based on military relevancy of CW and the need for effective verification of their destruction, on the one hand, and the limited military utility of BW and the inherent impossibility to verify biological disarmament. The need to independently ascertain a claim of BW use hides a call for verification tools, as well as an acknowledgement that BW may pose a greater military threat than the CCD was initially led to believe. (In the context of discussions on future Article X on international cooperation, US Ambassador James Leonard had outlined the great economic and technological promises for mankind from recent advances in the biological sciences, but also warned of the need to interdict the application these powerful tools for hostile purposes.⁶⁶) As some delegates noted not without irony, why did the two weapon categories have to be separated?⁶⁷

⁶⁴ Conference of the Committee on Disarmament, 'Working paper on drafts CCD/337* and CCD/338* on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction' by Morocco, Document CCD/347, 24 August 1971, para. 3.

⁶⁵ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Thirty-Third Meeting, CCD/PV.533, 26 August 1971, p. 18, para. 50.

⁶⁶ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Twenty-Seventh Meeting, CCD/PV.527, 5 August 1971, p. 17, paras. 43–44.

⁶⁷ For example, intervention by Mexican Ambassador García Robles. Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Thirty-Second Meeting, CCD/PV.532, 24 August 1971, p. 21, para. 57.

Divergent interpretations

On 28 September, several Socialist and WEOG members submitted a revised draft treaty that incorporated many of the suggestions made through July and August. The assistance provision reappeared as Article VII.⁶⁸ The United States, the Soviet Union, the United Kingdom and Morocco made statements on Article VII to the CCD after circulation of the next text.

US Ambassador Leonard stated as follows:

Article VII, the new article on assistance, is responsive to the suggestions of a number of delegations, including those of Argentina, Italy, Morocco, Nigeria, the Netherlands and the United Kingdom. While the article does not, of course, affect the obligations or the exercise of the rights of the parties under the United Nations Charter, it reaffirms those rights and obligations in the specific context of a possible violation of the present convention. It thus stresses the importance attached by all States parties to the strict observance of the convention by placing the question of a possible violation, resulting in danger to any State which has agreed to abide by its prohibition, *on the highest plane of international concern*. The nature of the assistance to be provided following a request by the endangered State party would of course be in accordance with the Charter. However, in the light of the danger which would be most likely to exist in such a situation, we consider that *medical or other humanitarian or relief assistance would be suitable*.

We would like to note further that, while the article by its terms, would not apply until a decision by the Security Council that a party had been exposed to danger as a result of violation of the convention, States parties would of course remain free to provide *assistance they deem appropriate in the interim*. As in other situations where a country is in need of *humanitarian assistance, we expect that many countries would wish to offer assistance as soon as possible in any event*.⁶⁹

The US statement implicitly reinforced the British deterrence argument and follows the British clarification of 'appropriate assistance'. The second sentence of the second paragraph allows for states parties to offer any humanitarian assistance as soon as possible pending a UNSC decision. Review conferences have later backed this position. As such it reinforces or clarifies the meaning of the first sentence. However, the final clause of the first

⁶⁸ Conference of the Committee on Disarmament, 'Draft Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) weapons and toxins and on their destruction' by Bulgaria, Canada, Czechoslovakia, Hungary, Italy, Mongolia, Netherlands, Poland, Romania, Union of the Socialist Republics, United Kingdom, and United States of America, Document CCD/353, 28 September 1971.

⁶⁹ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Forty-Second Meeting, CCD/PV.542, 28 September 1971, pp. 9–10, paras. 23–24.

sentence in that paragraph also seems to allow for the possibility of other than humanitarian assistance. As already mentioned before, a BW attack is an act of war and the UN Charter foresees a range of responses other than humanitarian assistance pending a UNSC decision. This reintroduces a degree of ambiguity that accompanied the original UK proposals for UNSC resolutions.

Soviet Ambassador Mr Roshchin also welcomed the insertion of the new provision, but interpreted it within a totally different framework:

In accordance with proposals made by many States — Morocco, Nigeria, Argentina, Italy, the Netherlands and others — a new article, article VII, has been included in the convention. This deals with assistance 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*. This wording of the article appears to us to be more correct than the formulation which referred to assistance only in the case of the use of bacteriological and toxin weapons, *since the convention deals with the prohibition of the production and development of those weapons and not their use, which is already prohibited by the Geneva Protocol. The formulation adopted has a wider sense and is directly connected with the content of the convention as a whole*. Under article VII, not only the use of the prohibited weapons, *but also a violation of the convention by producing or acquiring the prohibited types of weapons, may serve as grounds for a decision by the Security Council declaring that a danger exists as a result of violation of the convention*.

The question was also raised as to what is understood by the word 'assistance'. Views were expressed that the term meant medical or relief measures. We agree that for the purposes of the convention it means medical and other humanitarian assistance. *At the same time, other measures may be taken in accordance with the Charter of the United Nations for the protection of the security of the party attacked and for the maintenance of peace, as provided for in Chapter VII of the United Nations Charter*. It should be noted also that article VII of the convention does not, of course, exclude the provision of assistance on the basis of other agreements and obligations in keeping with the United Nations Charter.⁷⁰

As noted before, the Socialist states always emphasised the disarmament dimension over that of the laws of war. They systematically advanced arguments against the inclusion of BW use in the draft convention. The phrase '*has been exposed to danger as a result of violation of the convention*' likely represented the compromise language between the WEOG members and the Socialist countries. According to the Soviet interpretation, any type of violation connected with the acquisition and stockpiling of the proscribed weapons

⁷⁰ CCD/PV.542, *op cit.*, 28 September 1971, pp. 17–18, paras. 57–58.

could give grounds to invoke Article VII. While the Soviet representative accepted medical or relief measures as interpretation for 'assistance', he was very explicit that the BTWC in general, and draft Article VII in particular shall not diminish other possible measures under the UN Charter, including Chapter VII. He also reserved the right to provide assistance based on other agreements and obligations conform to the UN Charter.

Mr Hainworth seemed to agree with the distinction between aid under draft Article VII and the possibility of other forms of assistance, which might be of military nature:

The United Kingdom delegation has from the outset emphasized the value of including an assistance article in any convention dealing with biological warfare. In the form in which it appears in CCU/353, article VII, which owes much to the ingenuity of the wording proposed by the Moroccan delegation (CCD/347), will be of considerable value. When I spoke on 10 August I indicated my delegation's views on the form this assistance would take. It will surely be a major factor, to be taken into account by any State which might, in contravention of the new convention, be planning to produce and use biological weapons and toxins, if it knows that the effect of such a contravention will immediately be countered by the most appropriate quantity and type of vaccines, relief and other humanitarian aids that the world can deploy. It is also in my view right to make provision for a physical manifestation of the sort of response the world community would wish to make to show its repugnance at such use.

Naturally there might be occasions, for example when a State's ally was attacked, when additional assistance possibly of a military nature in accordance with the United Nations Charter would be appropriate. Obviously, however, military assistance would only be given *at the specific request of the injured party*. Equally, any other State party *would not be obliged to give military support* if it did not wish to. The form of assistance desired would be decided in the first place by the requesting party, but it would also be for the assisting State to decide whether the assistance requested was something which it could or was prepared to supply.⁷¹

In the first paragraph, the British Ambassador reiterates the provision's deterrent effect on use, and hence on acquisition and stockpiling. The second one distinguishes draft Article VII from other possible forms of assistance. The party exposed to biological means of warfare would have to issue a specific request; other states too would have to make an explicit decision as to whether they would provide such assistance. The UK strove for automaticity of action following a claim of BW use to the UNSC and confirmation of validity of the claim by the UNSC, but unambiguously ruled this out with regard to forms of aid unrelated to the humanitarian consequences of a deliberate disease outbreak.

⁷¹ *Ibidem*, 28 September 1971, p. 22, paras. 77–75.

Morocco, the fourth country to speak on the topic of draft Article VII, appreciated its inclusion, but still felt 'that such assistance should be prompt and spontaneous, without having to await the conclusions of the Security Council and without prejudice to its conclusions'.⁷² Its representative, Mr M. Khattabi, did not return to his position expressed on 24 August that Article VII should besides use also apply to 'accidental or chance dissemination of biological agents or toxins intended for military purposes', even though it aligned well with the Soviet interpretation of the provision.

Nigeria noted its satisfaction with the assurances that assistance under Article VII is humanitarian:

With the explanations advanced by the two co-Chairmen in their presentation of the new draft my delegation may not have any difficulties in going along with the present text of articles V, VI and VII. Besides, we are relieved to note that, as stated by Mr. Leonard and Mr. Roshchin, the type of assistance envisaged in the convention should be primarily medical or other humanitarian or relief assistance.⁷³

The final country to express a view on Article VII was Egypt (formerly United Arab Republic):

Article VII is a new addition couched in carefully formulated terms. It deals with the issue of assistance to be provided in case of a violation of the convention. My delegation takes a broad view of the term 'assistance' which should be delimited according to the particular circumstances of each case and the nature of the danger, as established by the Security Council, to which a country has been exposed.⁷⁴

The comment seemed to suggest that the UNSC should not merely decide on whether a state was exposed to a biological attack, but also determine the nature of the danger in each case. The 'broad view' might imply more than humanitarian assistance. As Egypt is until today not a party to the BTWC, its position was never further elaborated.

In summary, the negotiations ended with a seemingly broad consensus on the nature of assistance to be provided under Article VII. Less clear are the mechanisms that would be deployed to ascertain the nature of the outbreak (i.e. deliberate, as opposed to natural) and the consequences for the alleged perpetrator. Or whether, given the current emphasis on disarmament, the provisions would apply to treaty violations other than BW use.

⁷² *Ibidem*, 28 September 1971, p. 38, para. 149.

⁷³ Conference of the Committee on Disarmament, Final Verbatim Record of the Five Hundred and Forty-Third Meeting, CCD/PV.543, 29 September 1971, p. 10, para. 24.

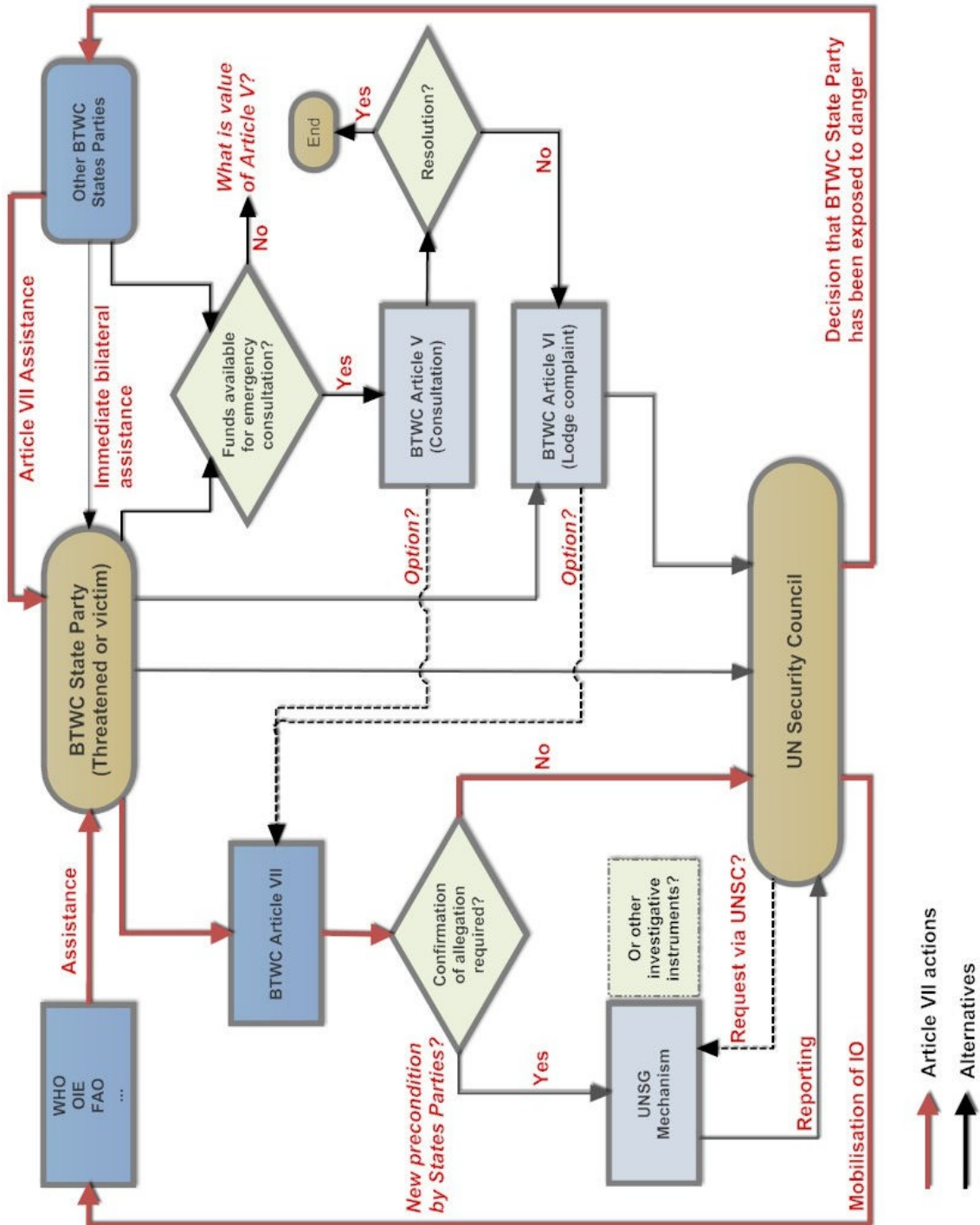
⁷⁴ *Ibidem*, 29 September 1971, p. 16, para. 48.

Triggering Article VII: Some concluding comments

It is interesting to note that in the original British concept, Article IV in the draft treaty, there existed clarity in the purpose of the assistance provision. Moreover, draft Article III in combination with suggested language for a resolution to be adopted by the UNSC laid out a process for action and identified the roles of key protagonists, including the victim state, the UNSG and the UNSC.

When the adoption of a Moroccan amendment reinserted some of the language taken from the original proposal, the context had changed completely. Today, despite affirmations by individual states parties of Article VII's humanitarian imperative and common agreements and understandings achieved by the review conferences, from the perspective of triggering the assistance provision there remain many uncertainties about process, actor roles and instruments. Integration of organisational units (such as the BTWC ISU) or tools created since the 1970s (e.g. the UNSG's investigative mechanism, other international organisations, or the consultative meeting under Article V) has not yet happened. Statements as to their potential roles have thus far essentially remained unilateral declarations by the BTWC community without any formal negotiation of accords with the respective partners laying out roles and responsibilities. While over the past decade major advances have been made in the organisation and coordination of emergency assistance in case of major outbreaks, the lines of communication and authority should ever there be an epidemic resulting from a breach of the BTWC are virtually non-existent. An individual state party triggering Article VII may actually equal a jump into empty space and exacerbate the types of tensions that provoked the BW attack in the first place. Furthermore, given the threats posed by terrorism and crime, the BW attack may be non-international in origin. Relying on responses developed for crises resulting from natural outbreaks raises questions of how the BTWC community might react if an outbreak resulting from deliberate release of a pathogen does not turn into a regional or global emergency.

The chart on the following page traces the various possible response options to a BW attack. The mismatch between the negotiators' original intentions and the present situation is big. Moreover, the status of several possible options will remain unclear as long as states parties do not answer a series of questions (see below) and assess the implications of each option.



Issues for clarification

- *Coordination of the response*
 - Each route gives lead to different bodies with different mandates
 - Raises questions about overall coordination of the response, potentially involving:
 - UN Security Council and UN Secretary-General
 - International organisations (e.g. WHO)
 - Bilateral assistance
 - International non-governmental organisations
 - Donor entities (states, inter-governmental organisations, charities and foundations, etc.)
 - International military units (both for logistics assistance or peace keeping), policing and law enforcement assistance, etc.
 - Local health care and logistics

- *Uncertainty about the Article VII process informed preferences in function of national assessment of situation based on then available information*
 - Nowhere has the process for triggering Article VII been spelt out
 - To whom should the request be addressed? (BTWC ISU, BTWC Depositories, UNSC, etc.)

- *What is 'sufficient' proof?*
 - Who decides what proof is sufficient?
 - Proof is not a question of criminal culpability, but grounds for triggering Article VII
 - Concern about the political implications of triggering Article VII (UNSC, allegation, etc.)

- *Consideration has to be given to the internal decision-making process of a State Party thinking of invoking Article VII*
 - Which factors may contribute to invoking Article VII?
 - Which (political) factors may mitigate against an Article VII request?
 - Domestic
 - International
 - Situation-specific

- *Are there other cost-benefit factors to be considered?*
 - Relative to other procedures foreseen under the BTWC
 - Relative submitting the concern directly to the UNSC
 - Relative to seeking assistance directly from international organisations such as WHO, OIE, FAO, etc.

- *Domestic implementing Article VII*
 - Two dimensions of implementation
 - Contingency planning for international assistance
 - Domestic preparations for receiving assistance
 - Preparedness: Where BTWC States Parties can act
 - Different areas for enhancing resilience and contingency planning
 - Detection and surveillance capacities
 - Analytical capacities
 - Health infrastructure
 - Biorisk management (biosecurity & - safety)
 - Important for transfer of samples to or across neighbouring states in case of an epidemic
 - Infrastructure development to be able to receive large-scale assistance
 - E.g. ports or airports and procedures for logistics management
 - Possibilities of assistance under BTWC Article X to be explored