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ARTICLE V: MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE

by Nicholas A Sims[†]

Introduction

1. The Ad Hoc Group (AHG) is considering measures to strengthen the Biological and Toxin Weapons Convention (BTWC) through a legally binding instrument. The pace of the AHG negotiations has quickened during the past year and there is now a clear political will to see the negotiation of the Protocol completed as soon as possible before the Fifth Review Conference in 2001. It is now evident that several Articles in the draft Protocol are now largely agreed and will not develop significantly from their current form although a certain amount of restructuring may be agreed at a later stage.

2. In Evaluation Paper No 1 it was concluded¹ that *"the majority of the Articles in the draft Protocol have now reached the stage when they have had multiple readings and are unlikely to change significantly during the coming months as the negotiations enter the end-game. It is therefore timely to commence the production of a series of Evaluation Papers which will consider Article by Article the current state of each Article of the Protocol."* This Evaluation Paper continues this series by considering Article V *Measures to Redress a Situation and to Ensure Compliance* on which the AHG has made good progress with the current rolling text containing three sets of square brackets.

Article V

3. In October 1999, the text² for Article V was unchanged from its earlier version and was as follows:

ARTICLE V

MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE

1. The Conference shall take the necessary measures, in accordance with paragraphs 2, 3 and 4, to ensure compliance with the Convention and this Protocol and to redress and remedy any situation which contravenes their provisions. In considering action pursuant to this paragraph, the Conference shall take into account all information and recommendations on the issues submitted by the Executive Council.

2. In cases where a State Party has been requested by the Conference or by the Executive Council, taking into account their respective powers and functions, to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfil the request within the specified time, the

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¹Graham S. Pearson, *The Strengthened BTWC Protocol: An Overall Evaluation*, Evaluation Paper No. 1, University of Bradford, July 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

²United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/47 (Part I), 15 October 1999, Geneva.

Conference may, upon the recommendation of the Executive Council, inter alia, restrict or suspend the State Party's rights and privileges under this Protocol until the Conference decides it has undertaken the necessary action to conform with its obligations under the Convention and this Protocol.

3. In cases where serious damage to the object and purpose of the Convention may result from non-compliance with the provisions of the Convention or this Protocol, in particular Article I of the Convention, the Conference may recommend to States Parties [collective] [joint] measures which are in conformity with international law and designed to ensure the fulfilment of the object and purpose of the Convention.

4. The Conference or, alternatively, if the case is particularly grave and urgent, the Executive Council, may bring the issue, including relevant information and conclusions, to the attention of the [General Assembly [and] [or] the Security Council of the] [relevant organs of the] United Nations.

4. The ~~striketrough~~ version of Article V provided³ by the FOC on Legal Issues for further consideration proposes removal of the square brackets together with a streamlining of the reference to the Convention as follows:

ARTICLE V

MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE

1. The Conference shall take the necessary measures, in accordance with paragraphs 2, 3 and 4, to ensure compliance with the Convention and this Protocol and to redress and remedy any situation which contravenes their provisions. In considering action pursuant to this paragraph, the Conference shall take into account all information and recommendations on the issues submitted by the Executive Council.

2. In cases where a State Party has been requested by the Conference or by the Executive Council, taking into account their respective powers and functions, to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfil the request within the specified time, the Conference may, upon the recommendation of the Executive Council, inter alia, restrict or suspend the State Party's rights and privileges under this Protocol until the Conference decides it has undertaken the necessary action to conform with its obligations under the Convention and this Protocol.

*3. In cases where serious damage to the object and purpose of the Convention may result from non-compliance with the provisions of the Convention or this Protocol, in particular Article I of the Convention, the Conference may recommend to States Parties **cooperative** ~~[collective]~~ ~~[joint]~~ measures which are in conformity with international law and designed to ensure the fulfilment of the object and purpose of the Convention.*

³United Nations, *Proposals for further consideration by the Friend of the Chair on Legal Issues*, BWC/AD HOC GROUP/FOC/28 in Annex IV of *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/47 (Part II), 20 October 1999, Geneva.

4. *The Conference or, alternatively, if the case is particularly grave and urgent, the Executive Council, may bring the issue, including relevant information and conclusions, to the attention of the ~~[General Assembly [and] [or] the Security Council of the]~~ ~~[relevant organs of the]~~ United Nations.*

Evaluation

5. The BTWC itself contains no specific Article on measures to redress a situation and to ensure compliance. States Parties to the BTWC do not constitute an organization of which they are members, unlike the Organization for the Prohibition of Chemical Weapons (OPCW), the Comprehensive Test Ban treaty Organization (CTBTO) and the new Organization envisaged by Article IX of the BTWC Protocol. It is therefore left by implication to the UN Security Council to take measures, since under the Convention there is no BTWC Organization to do so.

6. Under Article VI of the BTWC, States Parties *"may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council."* The States Parties are under an obligation *"to cooperate in carrying out any investigation which the Security Council may initiate, in accordance with the provisions of the Charter of the United Nations, on the basis of the complaint received by the Council."* Under Article VII of the BTWC, they are also under an obligation *"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."*

7. Measures to redress a situation and to ensure compliance would presumably be taken by the Security Council, utilizing the obligations which all States Parties have assumed under Articles VI and VII, after it had fulfilled its responsibility under the final sentence of Article VI: *"The Security Council shall inform the States Parties to the Convention of the results of the investigation."*

8. The provisions in the BTWC are not identical with an Article on measures to redress a situation and to ensure compliance. At most, it can be claimed that they are the nearest approximations to such an Article in the absence of a treaty Organization of which the BTWC States Parties constitute the membership.

9. The Protocol Article V corresponds to Article XII of the Chemical Weapons Convention (CWC)⁴:

⁴Organization for the Prohibition of Chemical Weapons, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Available on the web at <http://www.opcw.nl>

ARTICLE XII

MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE, INCLUDING SANCTIONS

1. *The Conference shall take the necessary measures, as set forth in paragraphs 2, 3 and 4, to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention. In considering action pursuant to this paragraph, the Conference shall take into account all information and recommendations on the issues submitted by the Executive Council.*
2. *In cases where a State Party has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfil the request within the specified time, the Conference may, inter alia, upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under this Convention until it undertakes the necessary action to conform with its obligations under this Convention.*
3. *In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I, the Conference may recommend collective measures to States Parties in conformity with international law.*
4. *The Conference shall in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.*

and to Article V of the Comprehensive Test Ban Treaty (CTBT)⁵:

ARTICLE V

MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE, INCLUDING SANCTIONS

1. *The Conference, taking into account, inter alia, the recommendations of the Executive Council, shall take the necessary measures, as set forth in paragraphs 2 and 3, to ensure compliance with this Treaty and to redress and remedy any situation which contravenes the provisions of this Treaty.*
2. *In cases where a State Party has been requested by the Conference or the Executive Council to redress a situation raising problems with regard to its compliance and fails to fulfil the request within the specified time, the Conference may, inter alia, decide to restrict or suspend the State Party from the exercise of its rights and privileges under this Treaty until the Conference decides otherwise.*

⁵*Comprehensive Nuclear-Test-Ban Treaty.* Available at <http://www.ctbto.org/ctbto/pdf/cbten.pdf>

3. *In cases where damage to the object and purpose of this Treaty may result from non-compliance with the basic obligations of this Treaty, the Conference may recommend to States Parties collective measures which are in conformity with international law.*

4. *The Conference, or alternatively, if the case is urgent, the Executive Council, may bring the issue, including relevant information and conclusions, to the attention of the United Nations.*

10. However, Article V of the Protocol omits the last two words of the titles of the CWC and CTBT Articles "*including sanctions*". It may be noted that the word *sanctions* occurs only in the titles of those Articles and not in their provisions. In the negotiation of both of those treaties, there was general agreement that the sanctions open to the respective Organizations they were in the process of establishing were severely limited. Specifically excluded is the sanction of expulsion -- paragraph 2 of *Article IX The Organization* of the draft Protocol states that *2. All States Parties shall be members of the Organization. A State Party shall not be deprived of its membership in the Organization.* which is identical language to that in CTBT Article II paragraph 1 and closely similar to CWC Article VIII paragraph 2 which states that *2. All States Parties to this Convention shall be members of the Organization. A State Party shall not be deprived of its membership in the Organization..* It would have been unrealistic to provide in advance for the automatic imposition of particular measures, when States historically have found it so difficult to agree on measures to be imposed after the event. Not surprisingly, in both the CWC and the CTBT in Article XII and Article V respectively end by passing the problem over to the United Nations.

11. In Article V of the Protocol the remaining square brackets both relate to the United Nations, directly in paragraph 4 and indirectly in paragraph 3.

Article V Paragraph 1

12. This paragraph corresponds to paragraph 1 of Article XII of the CWC and to paragraph 1 of Article V of the CTBT. It is noted that in the CTBT the reference to the Executive Council is abbreviated, and what remains of it is included in the first and only sentence.

Article V Paragraph 2

13. This paragraph corresponds to paragraph 2 of Article XII of the CWC and to paragraph 2 of Article V of the CTBT, but with several additions.

14. One of these is the additions of the words "*taking into account their respective powers and functions*" to balance the concession in paragraph 4 of a power granted to the Executive Council which is not found at the same point in the CWC. This point is discussed further below under paragraph 4.

15. In the CTBT, the Conference does not require an Executive Council recommendation in order to exercise its powers of restriction or suspension of the exercise by a State Party of its rights and privileges. The Protocol language follows more closely the example of the CWC thereby reflecting the experience gained thus far from the operation of the Executive Council and the Conference of the OPCW.

16. A further addition is near the end of this paragraph where "*the Conference decides*" that the State Party has undertaken the necessary action. In the CTBT the decision of the Conference concerns the restriction or suspension; in the CWC no decision is explicitly provided for, although the condition for such measures to be lifted is the same -- "*undertakes the necessary action to conform with its obligations*" -- as that on which the Conference is called to take a decision in the Protocol.

Article V Paragraph 3

17. This paragraph corresponds to paragraph 3 of Article XII of the CWC and to paragraph 3 of Article V of the CTBT. It prefers the "*serious damage*" of the CWC to the mere "*damage*" of the CTBT but follows the CTBT in using the word "*non-compliance*" instead of the CWC's "*activities prohibited under this Convention.*" The final words of this paragraph -- "*and designed to ensure the fulfilment of the object and purpose of the Convention.*" -- are not in the CWC or the CTBT. They usefully serve to emphasise the centrality of the Convention, which the Protocol is designed to strengthen.

18. The phrase "*in particular Article I of the Convention*" is also found in paragraph 3 of Article XIII of the CWC but has no equivalent in the CTBT. The parallel with the CWC at this point is important. Although the BTWC does not have titled Articles, the content of its Article I corresponds to the "*General Obligations*" Article I of the CWC. The gravest breaches of either Convention are likely to consist of a failure to comply with one or other of the general obligations set out in Article I. These general obligations, in the case of the BTWC, have been clarified and interpreted in the Final Declarations of successive Review Conferences; in particular, since the Fourth Review Conference in 1996 when the Final Declaration⁶ in respect of Article I stated that:

The Conference reaffirms that the use by the States Parties, in any way and under any circumstances, of microbial or other biological agents or toxins, that is not consistent with prophylactic, protective or other peaceful purposes, is effectively a violation of Article I of the Convention. [Emphasis added],

there can have been no remaining doubt that any use of biological or toxin weapons would involve a breach of Article I.

19. Square brackets currently remain in this paragraph in respect of the choice of adjective [*collective*] [*joint*] to qualify the "*measures*" which the Conference may recommend to States Parties. *Collective* is the adjective to be found in the CWC and the CTBT. It is favoured as signalling severity: that the measures are to be no less severe than those which might be recommended by the respective Conferences under the CWC and the CTBT. It indicates that the measures are the product of collective counsel: that they are organised. To substitute a different adjective might be taken as an indication of a weakening of severity and organisation by comparison with the treaties of 1993 and of 1996.

20. However, *collective* also has a certain resonance for those States which have become unhappy with the collective measures taken by, or under the authority of, resolutions of the UN Security Council. Such States prefer the adjective *joint*. They would like this Article to

⁶United Nations, *Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/CONF.IV/9, 25 November - 6 December 1996, Geneva, 1996. Part II, p. 15.

envisage "*joint measures*", a phrase which would be more acceptable to some for being free of the Security Council associations of "*collective measures*", but which for that very reason is unacceptable to others.

21. "*Cooperative measures*" was proposed by the Friend of the Chair in the ~~strike through~~ text in Part II⁷ as a compromise formulation. This has much merit. It bridges the gap between *collective* and *joint* and is politically neutral.

22. Should, however, even the word *cooperative* prove unacceptable, consideration might be given to the radical possibility of having no adjective to qualify "*measures*" at all. States Parties could then choose for themselves whether to regard the measures recommended to them by the Conference in any particular case as *collective*, *joint* or *cooperative*.

23. In this regard, it is noted that the UN Charter⁸ uses "*measures*" without any adjective in the powers of recommendation conferred on the General Assembly in Article 14 as well as those conferred on the Security Council in Article 39.

Article V Paragraph 4

24. This paragraph corresponds to paragraph 4 of Article XII of the CWC and to paragraph 4 of Article V of the CTBT, but with significant differences. The CWC has "*The Conference shall in cases of particular gravity bring the issue*" but the CTBT prefers "*The Conference, or alternatively, if the case is urgent, the Executive Council, may bring the issue*". The Protocol here follows the CTBT in its drafting, although restoring the concept of gravity from the CWC. For a case to have to be "*particularly grave and urgent*" means that two criteria have to be satisfied before the Executive Council can act under this provision. In the absence of both gravity and urgency in combination, the Executive Council cannot act but the Conference still can.

25. Although the empowerment of the Executive Council at this point marks a departure from the equivalent provision of the CWC, it should be borne in mind that there was a reason for the absence of any mention of the OPCW Executive Council in paragraph 4 of Article XII of the CWC⁹. This is because the CWC in Article VIII paragraph 36 which provides *inter alia* that:

The Executive Council shall, in cases of particular gravity and urgency, bring the issue or matter, including relevant information and conclusions, directly to the attention of the United Nations General Assembly and the United Nations Security Council.

does already empower the Executive Council to refer matters directly to the United Nations. The exercise of this power requires the same 'trigger' event, satisfying the criteria of gravity and urgency in combination.

⁷United Nations, *Proposals for further consideration by the Friend of the Chair on Legal Issues*, BWC/AD HOC GROUP/FOC/28 in Annex IV of *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/47 (Part II), 20 October 1999, Geneva.

⁸United Nations, *Charter of the United Nations*, 26 June 1945. Available at <http://www.un.org/aboutun/charter>

⁹Walter Krutzsch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, Dordrecht, Martinus Nijhoff, 1994, p.227.

26. The Protocol in paragraph 34 of *Article IX The Organization* contains closely similar language that:

The Executive Council may, in cases of particular gravity and urgency, bring the issue or matter, including relevant information and conclusions, directly to the attention of the United Nations General Assembly and the United Nations Security Council.

27. The difference between the draft Protocol and the CWC is accordingly less sharp than a comparison of the *Measures to Redress* Articles alone might suggest.

28. The remaining square brackets in paragraph 4 concern the question of whether -- and, if so, how -- to specify the UN organs which are to have "*the issue, including relevant information and conclusions*" brought to their attention.

29. There is a case for specifying the Security Council, as the organ on which Member States of the United Nations confer "*primary responsibility for the maintenance of international peace and security*" (Article 24 of the UN Charter), and the organ to which States Parties to the BTWC¹⁰ entrust responsibilities both for the initiation of investigations into complaints (Article VI of the BTWC) and for the organization of assistance by States Parties in solidarity with victims (Article VII of the BTWC). Since the Protocol is concerned explicitly here with incidents of non-compliance with BTWC obligations, and not just Protocol obligations, it would be strange if there were no mention here of the Security Council.

30. On the other hand, the General Assembly is the plenary organ of the United Nations and has had a long involvement with the history of the BTWC. It presents a more attractive aspect to many BTWC States Parties anxious to protect the attributes of sovereignty from the relatively interventionist Security Council, and critical of the Council's restricted membership including the role of the Permanent Members.

31. One solution would be to adopt the formulation in paragraph 4 of Article XII of the CWC, also found in paragraph 36 of that Convention's Article VIII as noted above:

"to the attention of the United Nations General Assembly and the United Nations Security Council."

This would be consistent with the provision already incorporated into paragraph 34 of Article IX of the Protocol.

32. Another solution would be to follow paragraph 4 of Article V of the CTBT:

"to the attention of the United Nations."

which is the option adopted by the Friend of the Chair in the ~~striketrough~~ text version in Part II. At present the square brackets in Article V of the Protocol include two other variants:

¹⁰United Nations, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, General Assembly Resolution 2826 (XXVI), 16 December 1971.

"to the attention of the United Nations General Assembly or the United Nations Security Council."

and

"to the attention of relevant organs of the United Nations."

In evaluating these variants, it is assumed that it would be political unacceptable, at this stage in the negotiation of the Protocol, to include the Security Council explicitly without an equally explicit mention of the General Assembly, and *vice versa*. It would be desirable to look to the future, and to find a formulation which can survive into an era, after the Protocol has entered into force, when the particular strains and stresses in relations between the Security Council and the General Assembly which characterised the United Nations of the 1990s are receding into the past. This suggests that, in order to build in the necessary flexibility, the most inclusive formulation is to be preferred, as in the CWC and in Article IX of the Protocol:

"to the attention of the United Nations General Assembly and the United Nations Security Council."

or, failing that, the CTBT alternative recommended by the Friend of the Chair in the ~~striketrough~~ text:

"to the attention of the United Nations."

Strikethrough Text for Article V

33. Our view is that the language in Article V should be consistent with Article IX of the Protocol and thus that Article V should read:

ARTICLE V

MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE

1. The Conference shall take the necessary measures, in accordance with paragraphs 2, 3 and 4, to ensure compliance with the Convention and this Protocol and to redress and remedy any situation which contravenes their provisions. In considering action pursuant to this paragraph, the Conference shall take into account all information and recommendations on the issues submitted by the Executive Council.

2. In cases where a State Party has been requested by the Conference or by the Executive Council, taking into account their respective powers and functions, to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfil the request within the specified time, the Conference may, upon the recommendation of the Executive Council, inter alia, restrict or suspend the State Party's rights and privileges under this Protocol until the Conference decides it has undertaken the necessary action to conform with its obligations under the Convention and this Protocol.

3. In cases where serious damage to the object and purpose of the Convention may result from non-compliance with the provisions of the Convention or this Protocol, in

*particular Article I of the Convention, the Conference may recommend to States Parties **cooperative** ~~collective~~ ~~joint~~ measures which are in conformity with international law and designed to ensure the fulfilment of the object and purpose of the Convention.*

4. The Conference or, alternatively, if the case is particularly grave and urgent, the Executive Council, may bring the issue, including relevant information and conclusions, to the attention of the ~~General Assembly~~ and ~~or~~ the Security Council of the ~~relevant organs of the~~ United Nations.