

## ARTICLE XI: RELATIONSHIP OF THE PROTOCOL TO THE BTWC AND OTHER INTERNATIONAL AGREEMENTS

by Nicholas A Sims<sup>†</sup>

### 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 concluded<sup>1</sup> 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 XI *Relationship of the Protocol to the BTWC and Other International Agreements* on which the AHG has made progress with the current rolling text containing six sets of square brackets.

### Article XI

3. In October 1999, the text<sup>2</sup> for Article XI had developed from its earlier version and was as follows:

#### ARTICLE XI

##### RELATIONSHIP OF THE PROTOCOL TO THE BTWC AND OTHER INTERNATIONAL AGREEMENTS

*1. [This Protocol, being [supplementary] [and] [additional] to the Convention shall not be interpreted as in any way modifying or amending the Convention, or limiting or detracting from the rights and obligations assumed by any State under the Convention.]*

*1 bis. [This Protocol shall not be interpreted as in any way limiting or detracting from the rights and obligations assumed by any State under other international agreements, including the Protocol for the Prohibition of the Use in War of*

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<sup>1</sup>Graham 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>

<sup>2</sup>United 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.

*Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.]*

2. *[This Protocol shall enter into force for each State Party to the Convention only upon signature and ratification or accession in accordance with Articles XVII and XVIII or XIX of this Protocol. The provisions of this Protocol shall apply only to States Parties to this Protocol.]*

4. The ~~striketrough~~ version of Article XI provided<sup>3</sup> by the FOC on Legal Issues for further consideration proposes:

#### ARTICLE XI

##### RELATIONSHIP OF THE PROTOCOL TO THE BTWC AND OTHER INTERNATIONAL AGREEMENTS

1. ~~*[This Protocol, being [supplementary] [and] [additional] to the Convention shall not be interpreted as in any way modifying or amending the Convention, or limiting or detracting from the rights and obligations assumed by any State under the Convention.]*~~

~~*2. [This Protocol shall not be interpreted as in any way limiting or detracting from the rights and obligations assumed by any State under other international agreements, including the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.]*~~

~~*3. [This Protocol shall enter into force for each State Party to the Convention only upon signature and ratification or accession in accordance with Articles XVII and XVIII or XIX of this Protocol. The provisions of this Protocol shall apply only to States Parties to this Protocol.]*~~

#### Evaluation

5. The function of this Article in strictly legal terms is twofold:

- a. To protect existing treaties unchanged and unimpaired;
- b. To affirm, as a corollary, that the obligations assumed by States under those treaties are unchanged and unimpaired.

6. This was considered particularly important in the BTWC<sup>4</sup>, where the existing treaty which was the subject of Article VIII of the BTWC was the 1925 Geneva Protocol. The BTWC language was:

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<sup>3</sup>United 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.

## ARTICLE VIII

*Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on June 17, 1925.*

7. Almost identical language was incorporated in Article XIII of the Chemical Weapons Convention (CWC)<sup>5</sup> where the BTWC as well as the Geneva Protocol was included:

## ARTICLE XIII

### RELATION TO OTHER INTERNATIONAL AGREEMENTS

*Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and under the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, signed at London, Moscow and Washington on 10 April 1972.*

8. However, Article XI of the Protocol does more than merely add the CWC to the Geneva Protocol and the BTWC. It has a further, unofficial, function which can be expressed in non-legal terms as follows: it picks up and recapitulates the context-forming elements likely to feature in the Preamble, so as to locate the Protocol in the wider framework of treaty constraints on chemical and biological warfare as a whole, and acknowledges the value of those constraints.

9. As such the Article ought to be a non-contentious means of celebrating a further stage in the construction of a body of treaty law against chemical and biological warfare, built on the foundations laid in 1925 and comprising already the Conventions of 1972 and 1993. Nevertheless, the wording of Article XI has proved contentious at several points.

### *Article XI Paragraph 1*

10. The first point to be addressed is the choice of the adjective -- if any -- to describe the Protocol. Both *supplementary* and *additional* are well-established qualifiers so there are precedents for calling this either a supplementary Protocol or an additional Protocol. Unfortunately objections have been raised to both. These objections appear to be based on anxiety lest to call the Protocol *supplementary* might suggest that the Convention as it stands is entirely satisfactory, while to call it *additional* might suggest that the Convention is incomplete and therefore needs something added to it. The disagreement reflects differing assessments of the state of the Convention and of the attitudes of States Parties towards it.

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<sup>4</sup>United 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.

<sup>5</sup>Organization 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>

11. Whether or not the ordinary reader would in fact be likely to read such significance into the usually almost synonymous words *supplementary* and *additional*, at this stage in the negotiations it is probably necessary to choose between having both adjectives or having neither. The position here resembles the dilemma found in the square bracketing in Article V *Measures to Redress a Situation and to Ensure Compliance* where we have recommended<sup>6</sup> that if it is not acceptable to name both the General Assembly and the Security Council then neither should be named.

12. The ~~striketrough~~ text proposed by the Friend of the Chair proposes simplification of paragraph 1 by deletion of the qualifying phrase "~~being [supplementary] [and] [additional] to the Convention~~".

13. If this formulation is not acceptable, the only acceptable alternative would seem to be:

*This Protocol, being supplementary and additional to the Convention, shall not be interpreted...*

which is the same as the current version of the draft Protocol if all square brackets are removed from the first line of paragraph 1.

14. This evaluation recommends "*This Protocol shall not be interpreted...*" as the simplest formulation. *Supplementary* and *additional* have accumulated such an accretion of political overtones and suspicions that they are best discarded altogether.

15. The current draft Protocol also separates, into distinct paragraphs, the reference to the Convention itself (as paragraph 1) and the references to the treaties of 1925 and 1993 (as paragraph 1 *bis*). This separation makes good sense, given the unique relationship of the Protocol to the Convention affirmed notably in Articles XV, XVII and XIX of the Protocol. It does not affect -- except in adding "*other international agreements including*" to the earlier draft text -- the content of Article XI, which, whether in one paragraph or two, provides that the Protocol "*shall not be interpreted as in any way limiting or detracting from the rights or obligations assumed by any State under the Convention.*" and that it "*shall not be interpreted as in any way limiting or detracting from the rights or obligations assumed by any State under other international agreements.*"

16. The words 'States Parties' are wisely avoided, as they were also in the equivalent provisions of Article VIII of the BTWC and Article XIII of the CWC. 'Any State' is preferable, because it is useful to include the less comprehensive but still significant obligation under Article 18 of the Vienna Convention on the Law of Treaties<sup>7</sup> "*to refrain from acts which would defeat the object and purpose of the treaty*" which is incumbent upon signatory-only States so long as they have not ruled out the possibility of future ratification. There remain 18 signatory-only States in the BTWC<sup>8</sup> and rather more, 44 signatory-only

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<sup>6</sup>Nicholas A. Sims, *Article V: Measures to Redress a Situation and to Ensure Compliance*, Evaluation Paper No. 8, University of Bradford, November 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

<sup>7</sup>*Vienna Convention on the Law of Treaties*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH408.txt>

<sup>8</sup>United Nations, *List of Signatories to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction as at July 1999*, BWC/AD HOC GROUP/INF.20, 20 July 1999, p.3.

States in the CWC<sup>9</sup>. This formulation in Article XI serves to remind them of their obligations, as well as recalling the fuller obligations of the States Parties to the instruments of 1925, 1972 and 1993.

17. The addition of *rights* to *obligations* was a controversial proposal in the negotiations for a CWC between 1989 and 1991. It was not pursued to the end, and the word *rights* is not found in Article XIII of the CWC, any more than in Article VIII of the BTWC. In the CWC context it was feared that any reference to *rights* under the 1925 Geneva Protocol might delay the necessary withdrawal of the remaining reservations relating to retaliation as such withdrawal was, at that time, widely expected to occur at an early stage in the life of the CWC and at latest upon entry into force. The proposal was associated with other proposals - also not subsequently pursued -- for retention of 'security stockpiles' of chemical weapons and was consequently viewed with suspicion by delegations hostile to the notion of residual chemical weapons stocks being permitted to any state.

18. In the present context, however, the proposed reference to *rights* is not open to the same objection. It is more likely to be understood as referring to the benefits which may accrue to States Parties under Article X of the BTWC and to States Parties under Articles X and XI of the CWC than to any remaining reservations to the Geneva Protocol. It may also be understood as referring to procedural rights such as, for example, those which the States Parties to the BTWC enjoy to invoke the consultative meeting procedure under Article V and the complaint procedure involving the Security Council under Article VI; or the rights of the States Parties to the CWC to make use of the OPCW, of which they automatically enjoy membership, under Article VIII.

#### *Article XI Paragraph 2*

19. It is not evident why this paragraph is needed. Its provenance appears to be a determination to protect those States Parties to the BTWC which do not favour the Protocol from becoming somehow subject to its provisions notwithstanding their formal non-participation.

20. The first sentence reproduces part of the procedure for entry into force without, however, including the initial entry into force requirement in paragraph 1 of Article XX or the 30 days' interval in paragraph 2 of Article XX for subsequently acceding States. This sentence could be misread as purporting to state a *sufficient* condition for entry into force, when in fact it states only one of the *necessary* conditions, namely that a State has signed and ratified or acceded to the Protocol.

21. The second sentence is unnecessary because a fundamental principle of international law already protects non-parties to the Protocol from being bound by its provisions. The 1969 Vienna Convention on the Law of Treaties<sup>10</sup> expresses the principle thus, in Article 34: "*A treaty does not create obligations or rights for a third State without its consent.*"

22. There is no danger of the Protocol being regarded as creating rights or obligations for Parties to the Convention which are not also Parties to the Protocol, or of its being mistaken

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<sup>9</sup>Organization for the Prohibition of Chemical Weapons, *Signatory States to the Chemical Weapons Convention*, 23 June 1999. Available at <http://www.opcw.nl/memsta/namelist.htm>

<sup>10</sup>The 1969 Vienna Convention on the Law of Treaties ( Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH408.txt>)

for an amendment to the Convention. Paragraph 1 specifically excludes these possibilities in respect of the Convention. It may be noted, moreover, that even amendments proper, introduced through the procedure of Article XI of the Convention, enter into force only for those States Parties which accept them; so the principle that no State can be bound without its consent, however large the majority favouring an amendment, has been built into the BTWC from the outset and needs no reiteration in this Protocol.

### **Strikethrough Text for Article XI**

23. It is recommended that paragraph 2 be deleted as unnecessary. Paragraph 1 *bis* of the current draft Protocol could then become paragraph 2. Article XI, in full, would then read:

#### *ARTICLE XI*

##### *RELATIONSHIP OF THE PROTOCOL TO THE BTWC AND OTHER INTERNATIONAL AGREEMENTS*

*1. ~~[This Protocol, being [supplementary] [and] [additional]] to the Convention shall not be interpreted as in any way modifying or amending the Convention, or limiting or detracting from the rights and obligations assumed by any State under the Convention.]~~*

*2. ~~[bis.]~~~~[This Protocol shall not be interpreted as in any way limiting or detracting from the rights and obligations assumed by any State under other international agreements, including the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.]~~*

*2. ~~[This Protocol shall enter into force for each State Party to the Convention only upon signature and ratification or accession in accordance with Articles XVII and XVIII or XIX of this Protocol. The provisions of this Protocol shall apply only to States Parties to this Protocol.]~~*