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ARTICLE X: NATIONAL IMPLEMENTATION MEASURES

by Graham S. Pearson* & 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. It is evident that the implementation of a legally binding instrument will require States Parties to take appropriate national measures. Consequently, Article X *National Implementation Measures* of the draft Protocol is of vital importance in ensuring that the future Protocol achieves its objective of strengthening the BTWC. Previous Briefing Papers No 4 and No 14 have considered national implementation measures¹ and recommended strengthening these in a number of ways.

2. The Ad Hoc Group has made good progress in its consideration of Article X *National Implementation Measures* and the current rolling text contains language which is relatively mature and has only 10 pairs of square brackets. It is therefore timely to evaluate the current state of this Article.

Article X

3. The latest text² is that which appeared following the April 1999 AHG session and is as follows:

ARTICLE X

NATIONAL IMPLEMENTATION MEASURES

1. Each State Party shall, in accordance with its constitutional processes, take any necessary measures to implement its obligations under this Protocol. [In particular, it shall:

[(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited [to a State Party] under the Convention [, including enacting penal legislation with respect to such activity];]

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¹Graham S Pearson & Nicholas A Sims, *National Implementation Measures*, Briefing Paper No. 4, University of Bradford, January 1998. Graham S Pearson & Nicholas A Sims, *National Implementation Measures: An Update*, Briefing Paper No. 14, University of Bradford, October 1998. 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/45, 14 April 1999, Geneva.

[(b) Prohibit natural and legal persons from undertaking any such activity anywhere under its control; and]

[(c) Prohibit, in conformity with international law, natural persons possessing its nationality from undertaking any activity anywhere prohibited under the Convention.]]

2. Each State Party may, where requested, cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.

3. In order to fulfill its obligations under this Protocol, each State Party shall designate or set up a [National Authority] and shall so inform the Organization upon entry into force of this Protocol for it. The [National Authority] shall serve as the national focal point for liaison with the Organization and with other States Parties.

4. Each State Party shall inform the Organization of the legislative and administrative measures taken pursuant to this Article.

5. Each State Party, during the implementation of its obligations under this Protocol, shall take all necessary steps to ensure the safety of people and to protect the environment, and may cooperate as appropriate with other States Parties in this regard.

6. Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical [Secretariat] [Body].

Evaluation

4. This language closely parallels, as might be expected, that in Article VII of the Chemical Weapons Convention (CWC)³:

ARTICLE VII NATIONAL IMPLEMENTATION MEASURES

General undertakings

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

³Organization 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>

(b)Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

(c)Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

2. *Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.*

3. *Each State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other States Parties in this regard.*

Relations between the State Party and the Organization

4. *In order to fulfil its obligations under this Convention, each State Party shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other States Parties. Each State Party shall notify the Organization of its National Authority at the time that this Convention enters into force for it.*

5. *Each State Party shall inform the Organization of the legislative and administrative measures taken to implement this Convention.*

6. *Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Convention. It shall treat such information and data exclusively in connection with its rights and obligations under this Convention and in accordance with the provisions set forth in the Confidentiality Annex.*

7. *Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.*

5. There are, however, differences. The most significant of these relates to the requirement to enact penal legislation. Article X in paragraph 1 currently has the language relating to enacting penal legislation within square brackets although it is clear, as we have argued in Briefing Papers No 4 and 14, that penal legislation is required to ensure that there is uniform strengthening of the Convention by all States Parties to the Protocol.

6. The experience of the Organization for the Prohibition of Chemical Weapons (OPCW) in its monitoring of the implementation of Article VII of the CWC is instructive and informative. At the third session of the Conference of States Parties on 16 - 20 November

1998, the Director- General of the OPCW noted⁴ that *"The Chemical Weapons Convention is not self-executing. Each State Party's international obligations under the Convention must be given direct internal legal effect."* He went on to state that *"more than 18 months after entry into force of the Convention, out of 119 States Parties, only 40, i.e. only 33%, have informed the technical Secretariat of the legal and administrative measures they have taken to implement the Convention....of those texts submitted and reviewed, only 26 appear to be comprehensive enough for the State Party to be able to implement the Convention effectively in its jurisdiction. In only 18 of those texts has the penal legislation been extended to nationals extraterritorially, as required by Article VII, subparagraph 1 (c)."* Details are provided in a survey⁵ of national implementing legislation prepared by the Office of the Legal Adviser of the OPCW.

7. The lesson to be derived from this experience is that the enactment of national penal legislation to implement the CWC is a gradual process, which some States Parties have completed faster than others. However, because the obligation to enact penal legislation is clearly required by the CWC it is possible for the OPCW to measure national performance against the requirements of the Convention and to draw the attention of States Parties to what remains to be done in the implementation on Article VII of the CWC.

8. Our view is that Article X of the Protocol needs to contain the requirement for enactment of penal legislation. As we have pointed out previously, this recommendation is based on the past 25 years' experience with the Biological and Toxin Weapons Convention which in Article IV requires that:

Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.

However, it is apparent from the successive Review Conferences that there is considerable variation in the measures taken by individual States Parties and it is far from clear that all States Parties have indeed taken necessary measures. As the mandate of the Ad Hoc Group is to devise a regime to *"strengthen the effectiveness and improve the implementation of the Convention"* the opportunity should be taken to ensure that States Parties do indeed enact appropriate legislation. Such legislation, vigorously implemented by police and by the security and other agencies of governments, is also required nationally to deter terrorists from seeking to acquire biological weapons and to prosecute any infringements.

9. The requirement for penal legislation in this Protocol does not intrude upon national sovereignty any more than does the equivalent language in Article VII paragraph 1 (a) of the CWC. In neither case is a penalty specified. The text does not even *"mention the kind of*

⁴Organization for the Prohibition of Chemical Weapons, *Note by the Director-General: Compliance with Article VII: Legislation, Cooperation and Legal Assistance*, Conference of States Parties, C-III/DG.1/Rev.1, 17 November 1998. Available on the web at <http://www.opcw.nl/ciii/>

⁵Organization for the Prohibition of Chemical Weapons, *Survey of National Implementing Legislation*, Technical Secretariat, Office of the Legal Adviser, S/85/98, 17 November 1998. Available on the web at <http://www.opcw.nl/>

penal sanctions required." ⁶ States Parties are free to decide that and other elements of their national legislation for themselves.

10. In this regard the Protocol follows the pattern of the varied national legislation which has been enacted in accordance with Article IV of the BTWC. Two of the earliest responses to the obligation flowing from Article IV exemplify this diversity, in specifying very different maximum penalties. The United Kingdom's *Biological Weapons Act* of 8 February 1974 allows offenders convicted under the Act⁷ to be sentenced to life imprisonment -- that is, a sentence of indefinite duration which at the extreme becomes imprisonment for the prisoner's whole life -- in addition to an unlimited fine. Belgium's equivalent law⁸, of 10 July 1978, provides for a term of imprisonment with a minimum of eight days and a maximum of one year, and limits any fine imposed to a maximum of 100,000 francs. It was explained⁹ that this wide range in the permissible range of penalties, which is usual in the criminal law of Belgium, is intended to allow the greatest possible discretion to the court in sentencing an offender. Nevertheless, the permissible range is rather narrow in comparison with that available to a British court under the 1974 legislation. On the other hand, Belgium's law provides explicitly for confiscation of the prohibited objects, on which the United Kingdom's law is silent. So it is emphatically not a case of dividing national legislation into 'strong' and 'weak'. Each of the States Parties in this example has fulfilled the requirement of Article IV, but each reflects its national practice and legal tradition in the substance of penal legislation.

11. The penal legislation to be adopted in accordance with Article X of the Protocol -- assuming that the square brackets are removed -- can equally vary between national contexts for the imposition of penalties. Article IV, with its recognition that constitutional processes differ from one country to another, is consistent with this approach in the Protocol. Both are fully respectful of sovereignty, while insistent on effective implementation. The history of the BTWC shows, through successive Review Conferences and now the work of the AHG, a steadily deepening entrenchment of Article IV as the importance of national implementation regulating the behaviour of individuals comes to be more fully recognized even if not sufficiently acted upon¹⁰.

12. What matters is that the person committing "*any activity prohibited to a State Party under this Convention*" is liable to punishment under the laws of States Parties. It is difficult to see how national implementation could still be effective if it fails to include such provision for punishment.

13. The idea of requiring national penal legislation to reinforce international treaty constraints is not a new one in the field of chemical and biological weapons. Leaving aside the history of Article IV of the BTWC, which as outlined above generated penal legislation as

⁶Walter Krutzsch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, Dordrecht, Martinus Nijhoff, 1994, p. 111.

⁷United Kingdom, *Biological Weapons Act 1974*, Section 1.

⁸Belgium, *Law of 10 July 1978*, Article 2; the law is reproduced in a United Nations Secretariat report for the BTWC First Review Conference (BWC/CONF. I/4, pp 17 -18, at paragraph 30, 20 February 1980).

⁹Nicholas A. Sims, *The Diplomacy of Biological Disarmament: Vicissitudes of a Treaty in Force, 1975 - 85*, London, Macmillan, 1988, p 83 drawing upon 1977-78 information from the Belgian Embassy, London.

¹⁰Nicholas A Sims, *Article IV: National Implementation*, in Graham S Pearson & Malcolm R Dando (eds), *Strengthening the Biological Weapons Convention, Key Points for the Fourth Review Conference*, Department of Peace Studies, University of Bradford, November 1996. Available on <http://www.brad.ac.uk/acad/sbtwc>

early as the 1970s, the idea was taken forward into the negotiation of the CWC in the 1980s, long before it was opened for signature in 1993 with the penal legislation clause in Article VII.

14. A working paper¹¹ in 1985 by the German Democratic Republic contained a section entitled '*Guidelines for a National System for the Implementation of a Chemical Weapons Convention*' which included the statement that "*Each State Party should establish directly binding norms with sanctions or penalties for non-compliance.*" It was considered by the authors of this proposal that only if States Parties took such action could the chemical weapons activities of individuals be universally proscribed as criminal, in support of the treaty obligations binding upon their Governments.¹² CD/620 is significant as the working paper out of which the main elements of the eventual Article VII emerged.

15. By the time of the Government-Industry Conference against Chemical Weapons which took place in September 1989 in Canberra, Australia, there was a widespread acceptance¹³ of the need for all persons under the jurisdiction and control of a State Party to be obliged by a generally binding norm to fulfil the main obligations of the CWC as contained in Article I and that this included the requirement "*to enact also law enforcement measures, among them criminal penalties.*" It was further noted that "*[It should be acknowledged that the purview of these norms needs to be extended to all citizens of a State Party, irrespective of their country of residence. This will be an element conducive to achieving the global implementation of the Convention.]*"

16. Penal legislation explicitly entered the rolling text of the CWC during negotiations in the Ad Hoc Committee on Chemical Weapons, as expressed in its report¹⁴ to the Conference on Disarmament in January 1991:

Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention, and, in particular:

(a) to prohibit natural and legal persons anywhere on its territory or in other places under its jurisdiction as recognized by international law from undertaking any activity that a State Party to this Convention is prohibited from undertaking by this Convention;

(b) not to permit any activity as referred to under (a) in any place under its control; and

¹¹Conference on Disarmament, German Democratic Republic, *National Verification Measures to Implement the Convention on the Prohibition of Chemical Weapons*, CD/620, CD/CW/WP. 119, 25 July 1985, p. 4.

¹²Walter Krutzsch, Personal communication, May 1999.

¹³Walter Krutzsch, *Principles and Procedures: Compatibility with existing national arrangements*, Government - Industry Conference Against Chemical Weapons, Canberra, Australia, Document No. GICCW/WSII/4, 19 September 1989, p. 3.

¹⁴Conference on Disarmament, *Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament on its work during the period 8 -18 January 1991*, CD/1046, 18 January 1991, Appendix I, p. 29.

(c) to enact penal legislation, which shall extend to any such activities as referred to under (a) undertaken anywhere by natural persons, possessing its nationality, in conformity with international law. [Emphasis added]

17. All the elements are there which eventually ended up, in almost identical language, as paragraph 1 of Article VII of the CWC (reproduced in paragraph 4 above of this Evaluation Paper), although it is to be noted that in the final text of the CWC the **enactment** obligation -- "*including enacting penal legislation with respect to such activity*" -- was added at the end of subparagraph (a), with the **extension** of that enacted penal legislation retained in subparagraph (c).

18. Finally, it should be noted that if the words "*including enacting penal legislation with respect to such activity*" are excluded from Article X of the Protocol, which in the rest of its language quite closely follows the wording of Article VII of the CWC, there would be scope for invidious comparison. It will all too readily be concluded that the prevention of illegal activity involving biological and toxin weapons demands a less stringent and punitive approach than the prevention of illegal activity involving chemical weapons. This would be a most regrettable misapprehension as there is little doubt that biological weapons present an even greater potential threat. This misperception can easily be prevented by removing the square brackets and thereby ensuring that penal legislation is required to implement the Protocol -- or in other words, that a failure by an individual of the State Party to comply with the Protocol is a punishable offence.

19. Although our earlier recommendations¹⁵ for strengthening Article X are still valid, it appears that the AHG does not wish to incorporate the modest amendments which would significantly improve the effectiveness of the Protocol. The other differences between the Article X language and the CWC language are relatively minor. It is, however, important that the square brackets surrounding subparagraphs 1 (a), (b) and (c) are removed.

Strike-through text for Article X

20. Our view is that Article X should be further developed by the removal of the remaining square brackets as shown in a strike-through text version of Article X below so as to produce clean text:

ARTICLE X

NATIONAL IMPLEMENTATION MEASURES

1. Each State Party shall, in accordance with its constitutional processes, take any necessary measures to implement its obligations under this Protocol. ~~In particular, it shall:~~

¹⁵Graham S Pearson & Nicholas A Sims, *National Implementation Measures*, Briefing Paper No. 4, University of Bradford, January 1998. Graham S Pearson & Nicholas A Sims, *National Implementation Measures: An Update*, Briefing Paper No. 14, University of Bradford, October 1998. Available on <http://www.brad.ac.uk/acad/sbtwc>

~~{(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited [to a State Party]-under the Convention [; including enacting penal legislation with respect to such activity];~~ }

~~{(b) Prohibit natural and legal persons from undertaking any such activity anywhere under its control; and }~~

~~{(c) Prohibit, in conformity with international law, natural persons possessing its nationality from undertaking any activity anywhere prohibited under the Convention.}}~~

2. Each State Party may, where requested, cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.

3. In order to fulfill its obligations under this Protocol, each State Party shall designate or set up a ~~{National Authority}~~ and shall so inform the Organization upon entry into force of this Protocol for it. The ~~{National Authority }~~ shall serve as the national focal point for liaison with the Organization and with other States Parties.

4. Each State Party shall inform the Organization of the legislative and administrative measures taken pursuant to this Article.

5. Each State Party, during the implementation of its obligations under this Protocol, shall take all necessary steps to ensure the safety of people and to protect the environment, and may cooperate as appropriate with other States Parties in this regard.

6. Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical ~~{Secretariat}~~ ~~{Body}~~.