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The convening of Review Conferences (hereafter RevCon(s)) within the context of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC) fits within the broader trend of using RevCons to ensure that multilateral agreements remain relevant in light of changing circumstances. After the end of the Second World War and with the growing legalization of the international security sphere, it became increasingly clear that multilateral agreements, and arms control treaties specifically, require such periodic review. As most of the arms control agreements during the 1970s lacked an organizational body to oversee the implementation of the respective treaties, states increasingly agreed to incorporate periodic conferences of review within the written text of the agreements.¹ However, these practices of periodic review differ between the various arms control regimes and have undergone an evolutionary development of how conferences are conducted and how decisions are made. Thus, with the Ninth periodic Review Conference of the BWC scheduled to convene at the end of 2022,² this working paper will address some of the developments within this regime and provide an overview of the legal and practical significance of such RevCons. To do so, we will first show the legal foundation of the RevCon within the BWC, then point out how the practice of holding RevCons has developed over time to then address the question of how decisions are being made at BWC RevCons. Next, we will briefly summarize some of the main decisions within these conferences and discuss their legal and political nature, impact on subsequent RevCons, and effects of these decisions and Final Declarations for the BWC regime as a whole as well as how different decisions interact with each other. Finally, we will briefly introduce their effects on subservient bodies existing within the BWC regime and offer some concluding remarks.

Background of the BWC Review Conferences

The negotiating parties to the BWC enshrined a RevCon to be held in Geneva within five years in Article XII of the Convention “to review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention, [...] are being realized”, and to take into account any new relevant scientific and technological developments. Article XII does not give any guidance on the Rules of Procedure for the Conference and, in contrast to other arms control conventions of that time, does not provide for any subsequent Conferences beyond the first one.³

Even though the initial treaty text set the BWC apart from other contemporary provisions for RevCons by only referring to a single Review Conference, in practice states parties adjusted to holding RevCons roughly every five years. While the Final Document of the First BWC Review Conference in 1980 still notes pushback from some states against establishing an automatism for having such Conferences periodically,⁴ the Third Review Conference in 1991 already included a recommendation to hold Conferences in a reoccurring fashion every five years without a temporal limitation to the next Conference.⁵ Since then, with exception of deferments due to a lack of consensus in 2001 and the Covid-19 pandemic in 2021, states parties adhered to the rhythm of meeting every five years. This policy was formally adopted as a decision at the Seventh RevCon in 2011.⁶

¹ Burrus M. Carnahan, ‘Treaty Review Conferences’ (1987) 81 American Journal of International Law 226, 227.

² See: <meetings.unoda.org/bwc-revcon/biological-weapons-convention-ninth-review-conference-2022>

³ See: Carnahan (n 1) 228.

⁴ ‘Final Document - First BWC Review Conference 1980’ (BWC/CONF.I/10) 16, available at <[unoda-documents-library.s3.amazonaws.com/Biological_Weapons_Convention_-_First_Review_Conference_\(1980\)/BWC_CONF.I_10.pdf](https://unoda-documents-library.s3.amazonaws.com/Biological_Weapons_Convention_-_First_Review_Conference_(1980)/BWC_CONF.I_10.pdf)>.

⁵ ‘Final Document - Third BWC Review Conference 1991’ (BWC/CONF.III/23) art. 12, available at <[unoda-documents-library.s3.amazonaws.com/Biological_Weapons_Convention_-_Third_Review_Conference_\(1991\)/BWC_CONF.III_23.pdf](https://unoda-documents-library.s3.amazonaws.com/Biological_Weapons_Convention_-_Third_Review_Conference_(1991)/BWC_CONF.III_23.pdf)>.

⁶ ‘Final Document - Seventh BWC Review Conference 2011’ (BWC/CONF.VII/7) 18 available at <documents-dds-ny.un.org/doc/UNDOC/GEN/G12/600/60/PDF/G1260060.pdf?OpenElement>.

Decision-making at the Review Conferences

As previously pointed out, Article XII BWC lacks any indication of how the BWC RevCons shall reach their decisions. Consequently, it was up to the first preparatory committee, established by UN General Assembly resolution,⁷ to present a draft set of Rules of Procedure for the Conference. Rule 28 of the first BWC Rules of Procedure, which has remained substantively unchanged throughout all RevCons to this day, provides a clear preference for reaching decisions by consensus.⁸ This preference and, even further, a requirement to exhaust all efforts to achieve a consensus is reiterated throughout Rule 28 and within numerous statements by delegations in favour of consensus.⁹ Yet, if consensus cannot be reached and the set deferment period of 48 hours, during which the President of the Conference is tasked with trying to foster consensus, has passed, the rule allows for decisions to be taken by a two-thirds majority of the delegates present and voting.¹⁰ This mechanism is similar to the Rules of Procedure of other contemporary arms control RevCons.¹¹ However, in practice, delegations have never forced a vote on substantive matters,¹² which *de facto* provides every opposing state with a veto.

This practice of not forcing a vote is rooted in states' desire, at least in the field of older arms control agreements, to protect the principle of sovereign equality.¹³ Indeed, setting a precedent for a majority vote decision on matters of national security, a field seen at the heart of a state's sovereignty, seems so undesirable that most states rather aim at minimal consensus decisions in order to not alienate potentially opposing parties or find themselves at the losing end of a future vote. In addition to this strong preference of states to take decisions by consensus, the deferment period of 48 hours creates a practical obstacle to majority decisions. States are likely to introduce controversial proposals on the very last day of the Conference, thereby making a vote in time before the closing of the RevCon impossible and consequently ensuring that the BWC Final Document remains a product of minimal consensus.¹⁴ This reality has led some commentators to even describe the Conferences as having a *de facto* consensus requirement.¹⁵ It remains to be seen whether a push for a vote on a minimal set of decisions might emerge in a scenario where an overwhelming agreement by a majority of states is opposed by one lone objector.¹⁶ Such an outcome could entail decisions to continue the intersessional process or to maintain funding for the Implementation Support Unit (ISU).¹⁷ Such majority decisions would be politically binding, even upon those states that opposed the decision.

⁷ UNGA Resolution A/33/59B para 1 (1978).

⁸ 'Rules of Procedure - First BWC Review Conference 1980' (BWC/Conf.1/PC/2) r 28 (2).

⁹ See exemplary: 'UK Statement for Eighth Biological and Toxin Weapons Convention Review Conference' (2016) 4 <doc-library.unoda.org/Biological_Weapons_Convention_-_Eighth_Review_Conference_Eighth_session_(2016)/UK.pdf> and 'General Statement On behalf of the Non-Aligned Movement and Other States Parties to the BWC by Venezuela' (2016) r 33 <doc-library.unoda.org/Biological_Weapons_Convention_-_Eighth_Review_Conference_Eighth_session_(2016)/NAM-BWC-Statement%2BGeneral%2BDebate-VIII%2BBREV%2BCONF%2BBWC-FINAL%2BVERSION%2B07NOV16.pdf>.

¹⁰ 'Rules of Procedure - First BWC Review Conference 1980' (BWC/Conf.1/PC/2) r 28 (3 and 4).

¹¹ Compare: Carnahan (n 1) 228 and exemplary: 'Final Report Preparatory Committee for the 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons' (NPT/CONF.2020/1) p 33 Rule 28. and 'CWC – Conference of States Parties – Standing Rules of Procedure' Rule 69 <www.opcw.org/rules-procedure-conference-states-parties>. but note here the required time for deferment is set to 24 hours instead of 48 hours as within the BWC and the NPT.

¹² James Revill, John Borrie, Emma Saunders & Richard Lennane, 'Preparing for Success at the Ninth Biological and Toxin Weapons Convention Review' (The United Nations Institute for Disarmament Research 2021) 16.

¹³ This view seems to be changing in other regimes, especially in the field of Environmental and Climate Change Law, where states move away from the requirement of consensus. See generally on this: Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 *Leiden Journal of International Law* 1.

¹⁴ As happened with a highly controversial proposal by the United States at the Fifth Review Conference in 2001. Compare: Revill and others (n 12) 17; Alexander Kelle, *Prohibiting Chemical and Biological Weapons: Multilateral Regimes and Their Evolution* (2014) 54.

¹⁵ Compare Jez Littlewood, 'Potential Outcomes of the Ninth BWC Review Conference' (UNIDIR 2022) 11 <unidir.org/publication/potential-outcomes-ninth-bwc-review-conference>; Carlton Stoiber, 'The Review Conference Mechanism in Nuclear Law: Issues and Opportunities' 25, 19.

¹⁶ This can be reflected with the situation within the context of the Chemical Weapons Convention, where until recently consensus-building had been the standard, but due to the situation in Syria needed to rely on voting for multiple important decisions. See Peter van Ham, Peter, Sico Van Der Meer, and Malik Ellahi. 'Chemical Weapons Challenges Ahead: The Past and Future of the OPCW With a Case Study on Syria.' (The Clingendael Institute 2017).

¹⁷ The NPT Review Conference earlier this year closed without a Final Document due to the inability to gain consensus because of a single objector.

While historically there have been strong expressions against the binding nature of such majority decisions at conferences,¹⁸ this view has changed over time and the fact that the drafters of the Rules of Procedure for consecutive RevCons repeatedly decided by consensus to include the possibility of a majority vote shows that there is an intention to allow such votes. Through retaining this option states clearly express their conviction to also be politically bound by decisions through voting.¹⁹

Decisions Made by the Review Conferences

Over the past decades, the BWC RevCons reached agreements on the interpretation and definitions of the BWC. For example, the Fourth Review Conference (1996) affirmed that the use of biological weapons “*in any way and under any circumstances*” violates the prohibition stated in Article I of the BWC, even though this is not explicitly contained therein, and made other important specifications of the interpretation of the scope of Article I.²⁰

The RevCons did, in addition to reviewing and reaffirming the Convention and its purpose, reach several important decisions and declarations to strengthen the BWC regime. These decisions have often interpreted specific treaty provisions, specified actions required from states parties to strengthen the Convention, promoted its universalization, established different additional bodies and mechanisms, and set the direction and actions to be taken for the next five years in between the RevCons.

One additional element that was added through a RevCon to the framework of the BWC are the Confidence Building Measures (CBMs), information exchanges between states parties. The first CBMs were established by the Second Review Conference in 1986 when the states parties agreed to report on high biosafety level research laboratories or laboratories involved in biodefense, unusual infectious disease outbreaks, and relevant research, as well as to promote contacts between biological research scientists.²¹ The Third Review Conference in 1991 expanded the CBMs by adding annual declarations of vaccine production facilities, national legislation, and regulations, as well as past offensive and defensive biological research development programs, and made other improvements regarding the exchange of information.²² Worth mentioning is also the decision by the Sixth Review Conference in 2006 to enhance states parties’ participation in CBMs which included the creation of an electronic format of the CBM forms.²³

Another important development in strengthening the BWC regime was the decision of the Sixth Review Conference (2006) to establish the ISU for the BWC, consisting of three full-time staff members. The mandate of the ISU consists, among others, of administrative support and support relating to CBMs and it reports to states parties annually.²⁴ Since its establishment, the subsequent RevCons have renewed and added new tasks to the ISU’s mandate.²⁵ The mandate of the ISU has to be renewed again by each RevCon. In addition, the funding of the ISU is entirely dependent on voluntary contributions from states parties.

¹⁸ Nobman L. Hill, ‘Unanimous Consent in International Organization’ (1928) 22 American Journal of International Law 319, 320.

¹⁹ The potentially legally or politically binding nature of these decisions is discussed further below.

²⁰ See for example: ‘Final Document - Fourth BWC Review Conference 1996’ (BWC/CONF.IV/9), part II, 15.

²¹ ‘Final Document - Second BWC Review Conference 1986’ (BWC/CONF.II/13/II), 6 available at <unoda-documents-library.s3.amazonaws.com/Biological_Weapons_Convention_-_Second_Review_Conference_(1986)/BWC_CONF.II_13.pdf>.

²² ‘Final Document - Third BWC Review Conference 1991’ (BWC/CONF.III/23), part II, 14-15.

²³ ‘Final Document - Sixth BWC Review Conference 2006’ (BWC/CONF.VI/6), 8, 22 available at <documents-dds-ny.un.org/doc/UNDOC/GEN/G07/600/30/PDF/G0760030.pdf?OpenElement>.

²⁴ ‘Final Document - Sixth BWC Review Conference 2006’ (BWC/CONF.VI/6, III), 5-6, 19-20.

²⁵ See for example: ‘Final Document - Seventh BWC Review Conference 2011’ (BWC/CONF.VII/7 III H 32), 25 available at <documents-dds-ny.un.org/doc/UNDOC/GEN/G12/600/60/PDF/G1260060.pdf?OpenElement>; More information about the tasks of the ISU can be found for example from: United Nations, Office for Disarmament Affairs, “Implementation Support Unit” <www.un.org/disarmament/biological-weapons/implementation-support-unit/>.

The Binding Nature of Review Conference Decisions

BWC RevCons have taken several important decisions and played a significant role in developing the interpretation of the BWC as well as several implementing measures. However, there remains a question about the legal effects that the outcomes of the RevCons generate.

The first thing that needs to be considered is whether decisions made by the RevCon are legally binding and therefore create legal obligations or rights. The BWC itself does not state that the RevCon would be capable of making decisions, rather it only states that it will meet “*to review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention are being realised.*”²⁶

Bodies of treaty regimes normally only hold those powers that are explicitly given to them in the underlying treaty. As the BWC has not authorized the RevCons to take legally binding decisions, they, therefore, are generally unable to do so. It could be nevertheless considered that the practical effect of the consensus-decision making may lead to the adoption of legally binding measures if the states parties were willing to do so. In that case, the decision could be considered as a subsequent treaty, as treaties are not bound by form, and adopting a document creating legal rights or obligations by the states parties would be within their sovereign power as long as they all agree to create legal rights and obligations.²⁷ Especially in case of uncertainty about the status of the document, it generally needs to be determined whether the document provides for legally binding obligations or rights on the basis of the context, language used, and especially the parties’ intent.²⁸ Within the context of the decisions and Final Declarations of the RevCons, the language used, the context, and the intent of the states parties make clear that these should not be considered as constituting documents granting legal rights or creating legal obligations through new treaties, but should rather be strictly viewed as political commitments which can therefore not be considered as the source of independent legal rights and duties.

However, within international law it is generally accepted that treaty bodies do have certain implied powers provided to them on the basis of necessity for the functioning of the treaty body, even if these powers are not explicitly granted. The reasoning is that these powers are not going beyond the treaty, but rather give effect to what was agreed by the states parties.²⁹ For implied powers to exist, they need to be necessary, essential, or indispensable for the body to perform its functions.³⁰ The RevCon has been given a very restricted mandate, to review the functioning of the treaty without granting it any further powers. It should, however, be considered that a RevCon cannot function without internal procedural rules and therefore, it can be viewed as having the implied power to set procedural rules for itself. The RevCon can hence on the basis of implied powers be considered to have the power to take legally binding decisions at least in so far as it concerns the procedural aspects of its own functioning and organisation.³¹

In addition, treaty bodies are also understood to have some implied powers in setting up subsidiary organs and subsequently having decision-making power over their procedures.³² The decisions setting up these organs and setting out the procedures within these subsidiary organs would be internally binding upon such organs. This concept has, for example, allowed the RevCons to set up the intersessional program as well as the ISU and laid down some procedural rules for these bodies.

²⁶ Biological Weapons Convention (adopted 10. April 1972, entered into force on 26. March 1975) art XII.

²⁷ Vienna Convention on the Law of Treaties (adopted 23. May 1969, entered into force on 27. January 1980) art 2(1)(a).

²⁸ Maritime Delimitation and territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 1994 *I.C.J. 112 (July 1)* and Yusuke Nakanishi, 'Defining the Boundaries of Legally Binding Treaties - Some Aspects of Japan's Practice in Treaty-Making in Light of State Practice' (2018) 20 *Int'l Comm L Rev* 169 173-179.

²⁹ Niels Blokker, 'International Organizations or Institutions, Implied Powers' (2021) Max Planck Encyclopedia of Public International Law <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e467?prd=EPIL>.

³⁰ Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174; Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion) [1954] ICJ Rep 47; Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66.

³¹ Geir Ulfstein, 'Treaty Bodies and Regimes' in Duncan B. Hollis, *The Oxford Guide to Treaties* (Oxford University Press 2020) 418-420.

³² *Ibid.* 419-420.

Yet, it is incapable of creating legal obligations for states parties to participate or support mechanisms such as the CBMs or the ISU.

The fact that the decisions and declarations do not generally have the potential to create specific legal rights or obligations for the states parties does not mean that there is not any kind of effect or that there is no intention for states parties to follow the decisions made. On the contrary, there is a clear indication of the intention to politically bind the states parties to follow these decisions and declarations.

The politically binding nature can normally be evidenced through, for example, the language of the agreement, inclusion of certain final clauses, subsequent practice of states parties as well as circumstances surrounding the conclusion of the agreement thereby allowing to deduce the intent of the agreeing parties.³³ Thus, the use of terms such as “*shall*” or “*should*” indicate a politically binding nature while the use of terms such as “*urges*” indicates that the states parties did not intend this to be a politically binding obligation. In this context, looking at the CBMs, the phrase “*states parties are to implement*” can be considered as a clear indication that the implementation of the CBMs is politically binding on the states parties.

The main difference between politically and legally binding commitments is the capability of legally binding commitments to create legal obligations, while the nature of the effects of the politically binding agreements is mainly political or moral. Non-legally binding agreements do not generate direct legal effects, and states are therefore not legally required to follow these commitments. This means that the principle of *pacta sunt servanda* (agreements must be kept) is therefore not applicable from a legal perspective to politically binding agreements, meaning that there is no legal requirement that the obligation should be fulfilled in good faith. Therefore, many effects that normally follow from treaties are not applicable to politically binding decisions, and violations of the commitment cannot, for example, invoke state responsibility.³⁴

Although there is no legally binding obligation to follow politically binding commitments, political commitments should be honoured and applied in order to fulfil other agreeing parties’ expectations. Even though no legal tools are available in a case of non-performance, not following political commitments may also cause reputational costs and other states may respond with acts allowed by international law, such as retorsion.³⁵ In the context of the BWC, the lack of legal obligations has led to lacklustre participation within mechanisms set up as politically binding, such as the CBMs,³⁶ which has been stated to have severely hampered these mechanisms. Nevertheless, while the decisions are not legally binding, this does not mean that they are entirely without (indirect) legal effects.

Indirect Legal Effects

Even documents that can only be considered politically binding can have some indirect legal effects. In the context of the BWC RevCons it is especially important to look at the Final Declarations. These Final Declarations provide information and a framework with regard to the manner in which states parties approach the BWC. In these the states parties seek to provide consensus concerning the interpretation and scope of the BWC. This begs the question of what effect such statements have and whether non-legally binding documents can alter the scope and nature of the underlying treaty.

Treaties are normally only capable of being changed through the adoption of an amendment. The BWC provides for an amendment procedure in Article XI.³⁷ This is the only procedure through which the treaty can be amended. This does not directly refer to the RevCon, but it is certainly possible for

³³ Duncan Hollis, ‘Binding and Non-Binding Agreements - Final Report (OEA/Ser. Q - CJI/Doc. 614/20 Rev.1 Corr.1)’, 97th Regular Session (2020) <rm.coe.int/2-1-iduncan-b-hollis-binding-and-non-binding-guidelines/1680a23587>.

³⁴ Ibid. 61

³⁵ Ibid. 14, 61.

³⁶ In 2021, only 92 of the 183 states parties submitted CBM reports. See Research Group for Biological Arms Control ‘2021 Reader on Publicly available CBMs’ (2021) 2.

³⁷ Article XI states that any State Party can propose an amendment, which will enter into force for States Parties accepting them after a majority of States Parties to the Convention has accepted them. Thus far there has been no amendment has been accepted.

these amendments to be proposed and even accepted at a RevCon. However, neither the decisions nor the Final Declaration can be considered amendments in themselves, as they do not follow the procedure of Article XI nor are they referred to as amendments. Consequently, it is not possible for RevCon decisions or Final Declarations to alter the BWC in the sense of amendments.

RevCon decisions and Final Declarations reflect attempts to address changes in circumstances or questions of the BWC's scope. An important example of how a Final Declaration was used to determine the scope of the BWC is the previously discussed inclusion of the prohibition of the use of biological weapons within Article I. While this was originally sought to be included through the adoption of an amendment, there was insufficient support for this solution and states parties stated in the Final Declaration that use was already considered to be included within the scope of Article I.³⁸

The question therefore is, if RevCon agreements are not amendments, what effect do they create on the underlying treaty, and on what basis? Final Declarations generate influence on the basis that they express the agreed view of the states parties to the BWC since the Final Declarations are adopted through consensus decision-making. As such, they are influential considerations detailing how the states parties view their obligations with regard to the BWC and are therefore important for determining the interpretation of the treaty.

The interpretation of treaties is described in articles 31-33 Vienna Convention on the Law of Treaties (VCLT), which reflect customary international law.³⁹ Especially Article 31 is of interest as it contains the general rule that a treaty should be interpreted in light of the ordinary meaning of terms, the context, and the purpose. Paragraph 3 also states that any interpretation is to take into account any subsequent agreement of the states parties regarding such interpretation. Subsequent agreements of states are to be seen as objective evidence of the parties' understanding of the treaty's meaning and are therefore important means of interpretation.⁴⁰ For something to be considered as a subsequent agreement for the purpose of interpreting the underlying treaty, it must be intended by the states parties to clarify the meaning of the treaty or its application.⁴¹ The BWC Final Declarations should be considered as subsequent agreements because their specific wording states that they should be considered as such.⁴² It has also been clearly recognized by the International Law Commission (ILC) that these statements are subsequent agreements and they are used as examples of such in the ILC draft Conclusions on Subsequent Practice and Agreement.⁴³ As discussed, the decisions made by the RevCon are not legally binding but this does not influence the extent to which a subsequent agreement can affect the interpretation of a treaty. In this manner even decisions that are not legally binding can have significant legal effects.⁴⁴ They can inform the interpretation, but the extent to which they do so depends on their clarity and specificity.⁴⁵ In the context of the RevCon Final Declarations, it can therefore be difficult to determine the exact weight of specific statements in the abstract. Yet, very clear and specific declarations, such as the definition discussed earlier concerning the inclusion of use within Article I, will have more weight in determining the interpretation of the BWC than less specific and less clear statements, such as those generally made

³⁸ 'Report of the Committee of the Whole - Fourth Review Conference 1996', (BWC/CONF.IV/6), 12, available at <unoda-documents-library.s3.amazonaws.com/Biological_Weapons_Convention_-_Fourth_Review_Conference_(1996)/BWC_CONF.IV_06.pdf>.

³⁹ International Law Commission (ILC), 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries' (2018) 3-5.

⁴⁰ Ibid. 9.

⁴¹ Ibid. 16, 27-28.

⁴² For example the statement "*Their reaffirmation of their understanding that the Convention forms a composite whole, and as such requires the Convention to be implemented in a comprehensive manner as well as of their firm commitment to the purposes of the Preamble and all the provisions of the Convention*" at the start of the 'Final Declaration – Eight Review Conference 2016' (BWC/CONF.VIII/4) available at <unoda-documents-library.s3.amazonaws.com/Biological_Weapons_Convention_-_Eighth_Review_Conference_Eighth_session_(2016)/BWCONF.VIII4%2BEnglish%2B.pdf>.

⁴³ ILC (n 39) 69-71.

⁴⁴ Ibid. 62-63.

⁴⁵ Ibid. 55-56.

with regard to more procedural articles, such as Article VII on assistance in case of biological weapons attacks, where more general language is used in the Final Declaration.

The fact that it is possible to use the agreement captured in the Final Declarations in the interpretation of the treaty does not indicate to what extent it influences the treaty itself and how impactful such an interpretative agreement can be. Article 31 VCLT does not state whether any specific interpretative tool is of higher importance than another and, therefore, a subsequent agreement would not be more or less important for determining the meaning of the BWC than the ordinary meaning of terms or the object and purpose of the treaty would be.⁴⁶ Indeed, all three should be considered as elements in interpretation and their respective relevance needs to be identified and given appropriate comparative weight.⁴⁷ This does not mean that subsequent agreement can easily contradict the original ordinary meaning or object or purpose of the treaty, but rather if there is ambiguity in the original text, a subsequent agreement provides for more detailed guidance in interpretation,⁴⁸ and can help in identifying, limiting or expanding the ordinary meaning, the exact context or the object and purpose.⁴⁹ The subsequent agreement cannot be contrary to the ordinary meaning or the object and purpose of the treaty as this would unduly modify the treaty rather than interpret the actual text.⁵⁰ However, when looking at Articles 31 and 32 VCLT it is clear that the Final Declarations would be more important than the *travaux préparatoires* (the drafting documents of a treaty) as these are considered as only supplementary means of interpretation.⁵¹ Therefore, if the subsequent agreement would not contradict the actual treaty but would potentially contradict the original intent of the treaty that can be gleaned from the *travaux préparatoires*, the subsequent agreement would be the primary source for interpretation.

Consequently, it is possible for the RevCons to make adjustments concerning the exact obligations in the BWC by giving an authoritative interpretation and allowing for continuous updating of the Convention.⁵² Perhaps the most noteworthy example of a RevCon doing so is by agreeing to the abovementioned interpretation that the prohibition of use is incorporated within the comprehensive prohibition in Article I. This was not included in the original wording of the Article, however due to the subsequent agreement, it could be considered to now be part of its interpretation. Another example is the determination by the Sixth Review Conference in 2006 that national measures taken under Article IV to translate BWC provisions into national laws should include penal legislation.⁵³

Another effect these declarations can have that goes beyond mere politically binding nature towards having legal effects, is the fact that these declarations can be viewed as evidence of *opinio iuris*, (evidence of the belief of states that this is the correct interpretation of the law) influencing the existence of internationally customary standards. While this certainly will not be the case for all parts of the declarations, there are, at times, clear indications in the Final Declarations as to what the states parties view as being part of the customary international legal prohibition of biological weapons. An example of this is the continued inclusion of reaffirming the condemnation of any potential use of biological weapons, even by those not party to the BWC, showing states parties' *opinio iuris* that the use of biological weapons is prohibited under customary international law.⁵⁴

Lastly, it remains questionable if in the case of majority voting there are any indirect legally binding obligations through customary law that emerges out of RevCon decisions that adjust the

⁴⁶ Rahim Moloo, 'Changing Obligations? The Interpretation of Treaties over Time' (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 261,262-263.

⁴⁷ ILC (n 39) 7.

⁴⁸ Moloo (n 46) 262.

⁴⁹ ILC (n 39) 37-38.

⁵⁰ Moloo (n 44)264.

⁵¹ Carnahan (n 1) 230, ILC (n 37) 3.

⁵² Burrus M. Carnahan & Katherine L. Starr, 'Law and Policy in the Amendment of Arms Control Agreements' (1998) 20 *Loy LA Int'l & Comp LJ* 615,632-633.

⁵³ 'Final Document - Sixth BWC Review Conference 2006' (BWC/CONF.VI/6) 10.

⁵⁴ Such as in the 'Final Declaration – Eight Review Conference 2016' (BWC/CONF.VIII/4) 9.

interpretation of existing obligations. If a decision is made through voting by an overwhelming majority, its effects can very well, over time, create customary international law obligations as it can be a pronounced indicator of *opinio iuris* of a majority of states. These would however not be legally binding on the objecting state, which could thereby opt-out of such progressive customary law developments.⁵⁵ This does, on the one side, allow for taking explicit stock of the *opinio iuris* of states, presenting an alternative to not passing any decision, even though there might be a majority opinion. On the other side such votes bear the threat of creating a fragmentation of legally binding obligations under customary law. The persistent objector would nevertheless still be politically bound by such majority decisions as pointed out above.

Influence on Subsequent Review Conferences

The Final Declarations of RevCons also have a more structural effect on the treaty and the development of the entire treaty system, as they can put forth working agendas for the time period towards the next Conference, which steers the treaty regime in a political manner.⁵⁶ This has generally circumvented the question of whether subsequent RevCons would be bound by decisions made by previous ones, as there have been no attempts to extend the effect of decisions beyond the next RevCon. Therefore, the question remains whether subsequent RevCons can make decisions contradicting decisions made by previous Conferences. The starting point is, that the BWC does not indicate in its text that RevCon decisions generate a binding precedent for subsequent conferences.

Also, the RevCon Final Declarations have at no instance indicated that states parties themselves felt bound by declarations made by previous Conferences. It can also be seen from practice that the majority of Final Declarations and decisions only address the time period from one RevCon to the next. Consequently, the majority of Final Declarations would not be binding upon subsequent RevCons. Yet, the more important question is to what extent more general statements bind subsequent RevCons. Due to the lack of any indication of their effect on subsequent RevCons in the treaty, we need to rely on general concepts. Here, the fact that these decisions and Final Declarations are not legally but rather politically binding has a significant impact. Namely, due to their non-legally binding nature it is impossible for these declarations to legally constrain subsequent RevCons in a specific manner. This also means that RevCons could potentially adopt a Final Declaration that includes an interpretation of the original treaty contrary to what previously has been adopted. This would then raise the question of which agreement on interpretation should be seen as the more authoritative version.

With regard to decisions, especially with regard to procedural questions, any present RevCon may decide differently. The only manner in which previous RevCons tend to attempt to influence subsequent ones is by setting a year when the next RevCon should take place and stating that decisions and recommendations reached at the previous Conference should be taken into account, but only as far as this would be appropriate. In practice, the Final Documents of previous RevCons do play a visible role, especially as a foundation of common understanding and previous agreed language and in this manner are important points of reference and minimum consensus. However, while this is the practical approach, the RevCon is not inherently bound to follow this practice.

Effect on Subservient Bodies

As discussed before, the RevCon as a body established by the BWC has some implied powers that allow it to take certain decisions that are at least internally legally binding, such as establishing working procedures. This also concerns the establishment of subservient bodies as well as the rules laying out the functioning of these bodies.

⁵⁵ Ted L Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 Harvard International Law Journal 457, 475; Yet a critical assessment of such arguments and at least the need for further and persistent articulation of the objection as in: Patrick Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 The International and Comparative Law Quarterly 779.

⁵⁶ Nicholas Sims, 'A simple treaty, a complex fulfillment: A short history of the Biological Weapons Convention Review Conferences' (2011) 67(3) *Bulletin of the Atomic Scientists* 8, 11.

In the first decades of the BWC, commentators criticised states parties for not reviewing new scientific or technological developments at Review Conferences and for not reviewing individual states parties' compliance with the Convention.⁵⁷ Out of a need to continue working beyond the very limited timeframes of the RevCons, the practice emerged to create fora and meetings outside of the Conference Schedule. None of these fora or meetings has the mandate to reach any conclusive decisions but they have to be seen rather as aides in taking away the burden of work from the delegates at RevCons, who notoriously struggle with a lack of time. In the following paragraphs a list of other fora will be briefly presented to complement the overview of the work done by the Conference itself.

The Preparatory Committees for the RevCons are mandated by the previous RevCon and confirmed by UN General Assembly resolution. They consist of the states parties to the Convention, prepare the agenda, take care of the logistical organization of the Conference, draft the Rules of Procedure, provide or request background documentation, and nominate a President-designate for the Conference.⁵⁸ The Preparatory Committees take their decisions by consensus and the results are approved at the beginning of the respective RevCon.⁵⁹

In addition, different meetings of ad hoc groups with specific mandates have also taken place in the BWC framework. The first ad hoc group (Ad Hoc Group Meeting of Scientific and Technical Experts from States Parties to Finalize the Modalities for the Exchange of Information and Data) was established by the Second Review Conference (1986) with a mandate "to finalize the decision of States parties to begin an exchange of information."⁶⁰ A more long-lasting arrangement established by the Third Review Conference (1991) was an Ad Hoc Group of Governmental Experts (VEREX) which held meetings in 1992 and 1993 and had a task "to identify and examine potential verification measures from a scientific and technical standpoint".⁶¹ In 1994 a Special Conference of the state parties was held to examine the VEREX report and this Conference decided to establish a new Ad Hoc Group (AHG) with an aim to negotiate a legally binding protocol to the BWC in order to strengthen the Convention with verification and CBMs, among other things.⁶² The AHG held its first session in 1995, but after the states parties' inability to reach a consensus on a draft protocol, it ended its work in 2001 without an agreement or final report. Since the Fifth Review Conference the states parties have not been able to decide on the continuation of the negotiations within the AHG framework, but its mandate has not been terminated either.

The deferred Fifth Review Conference in 2001/2002 decided to convene three annual intersessional meetings of states parties to continue working on specific issues of work in the period between the Fifth and Sixth RevCon.⁶³ These meetings of states parties were to be prepared by preceding meetings of experts which provided factual reports and were to be respectively chaired by regional groups. All meetings were to reach their decisions by consensus and their work was to be considered by the Sixth RevCon which could take further action if it so decided.⁶⁴ While this mode of working was borne out of a failure of the Fifth Review Conference to reach substantive decisions on a compliance mechanism, subsequent RevCons continued making use of intersessional meetings until today.

In addition to regular meetings and *ad hoc* groups established by the RevCons, the BWC framework also includes a mechanism for states parties to address potential concerns regarding compliance with the Convention in form of Formal Consultative meetings, as foreseen in Article V BWC. While Article V itself does not contain specific procedures or mentions formal consultative meetings,

⁵⁷ Ibid. 14.

⁵⁸ See for example: 'Final Document - Eight BWC Review Conference 2016' (BWC/Conf.VIII/4) para A (10).

⁵⁹ Ibid. A (6).

⁶⁰ 'Final Document – Second BWC Review Conference 1986' (BWC/CONF.II/13/II), 6.

⁶¹ 'Final Document – Third BWC Review Conference 1991' (BWC/CONF.III/23), part II, 16-18.

⁶² 'Final Report – Special BWC Conference 1994' (BWC/SPCONF/1), part II, 10-11.

⁶³ 'Final Document - Fifth BWC Review Conference 2001/2002' (BWC/Conf.V/L.1) para 18 (a) available at <unoda-documents-library.s3.amazonaws.com/Biological_Weapons_Convention_-_Fifth_Review_Conference_(2001)/BWC_CONF.V_17.pdf>.

⁶⁴ Ibid. 18 (b-f).

procedures for holding such meetings have been created by the Second (1986) and Third (1991) RevCons.⁶⁵

These formal multilateral consultative meetings have convened only twice in the history of the BWC. The first time this procedure was initiated was in 1997 at the request of the Government of Cuba, which accused the US of releasing crop pests over Cuban territory. Through the BWC procedure, three meetings to address the issue took place, and a final report, which concluded that no definitive conclusion could be reached, was issued.⁶⁶ A formal consultative meeting was held for a second time in August 2022 at the request of the Russian Federation. The request came after Russia received no replies in bilateral consultations regarding its claims of BWC violations by the US and Ukraine.⁶⁷ Eight meetings to address the issue were held, but no consensus could be reached.⁶⁸

There are different views whether RevCons can delegate decision-making powers to subordinate bodies. This has not been foreseen in the BWC, therefore the question needs to be considered on the basis of general public international law. There are two main ways in which a body can receive decision-making powers, the first being direct authorization and the second through implied powers. As the RevCon itself is not generally authorized to take legally binding decisions, it cannot delegate these powers to subordinate bodies. This is different for politically binding decisions. In this context the RevCon is free to act as they do not create legal rights or obligations. The RevCon can therefore issue a mandate for a subordinate body which authorizes it to take politically binding decisions. Outside of the powers a subordinate body receives from its mandate it is possible for such a body to have implied powers where it can have limited decision-making capabilities for as much as is necessary for its proper functioning.

Current Challenges

The Ninth Review Conference, taking place between 28 November and 16 December 2022, is approaching. While there is some hope that the Review Conference could make some progress regarding the issue of compliance and verification, or agree on some other measures to strengthen the Convention, the Conference is also overshadowed by the ongoing war in Ukraine and allegations by the Russian Federation that Ukraine has been working on biological weapons with the assistance of the US, a depository state, and other Western countries.⁶⁹ The Formal Consultative meeting under Article V of the BWC held in 2022 ended without consensus, and the allegations have also led Russia to attempt to invoke Article VI by filing an official complaint to the Security Council. This was followed by a rejected Russian proposal to set up an investigatory commission.⁷⁰

It remains to be seen whether the Ninth Review Conference succeeds in reaching decisions, or whether there will be attempts to block its decision-making as happened at the NPT Review Conference earlier this year.⁷¹ In any case, the adoption of a Final Document is of paramount importance, for without an adopted Final Document the infrastructure surrounding the BWC could suffer irreparable harm due to a lack of authorization for continued functioning of the intersessional program nor the ISU. Every attempt must be made to ensure that at least these procedural aspects are agreed upon, even if the substantive issues are circumvented in an effort to adopt a Final Document.

⁶⁵ See for example 'Final Document – Fifth BWC Review Conference 2001/2002' (BWC/CONF.V/17), 3-4, 'Final Document – Second BWC Review Conference 1986' (BWC/CONF.II/13/II), p. 5-6 and 'Final Document – Third BWC Review Conference 1991' (BWC/CONF.III/23), part II, 15-16, Compare generally: Kelle (n 13) 61.

⁶⁶ See: James Revill, 'The Past, Present and Future of BWC Article V Consultations' (2022) and Jean Pascal Zanders, 'Treaties are like roses', *CBRNe World*, (2022) 62-63.

⁶⁷ Zanders (n 66) 61.

⁶⁸ See: 'Final Report - BWC Formal Consultative Meeting 26 August and 5-9 September 2022' accessible at <documents.unoda.org/wp-content/uploads/2022/09/FCM-final-report-ADVANCE-VERSION.pdf>.

⁶⁹ See for example: <blog.prif.org/2022/03/22/russian-allegations-of-biological-weapons-activities-in-ukraine/>

⁷⁰ UN Security Council Meeting 9180 (2. November 2022) (SC/15095).

⁷¹ Possible outcomes of the 9th Review Conference are analysed for example in Littlewood (n15).

The CBW network for a comprehensive reinforcement of norms against chemical and biological weapons (CBWNet)

The research project CBWNet is carried out jointly by the Berlin office of the Institute for Peace Research and Security Policy at the University of Hamburg (IFSH), the Chair for Public Law and International Law at the University of Gießen, the Peace Research Institute Frankfurt (PRIF) and the Carl Friedrich Weizsäcker-Centre for Science and Peace Research (ZNF) at the University of Hamburg. The joint project aims to identify options to comprehensively strengthen the norms against chemical and biological weapons (CBW).

These norms have increasingly been challenged in recent years, inter alia by the repeated use of chemical weapons in Syria. The project scrutinizes the forms and consequences of norm contestations within the CBW prohibition regimes from an interdisciplinary perspective. This includes a comprehensive analysis of the normative order of the regimes as well as an investigation of the possible consequences which technological developments, international security dynamics or terrorist threats might yield for the CBW prohibition regimes. Wherever research results point to challenges for or a weakening of CBW norms, the project partners will develop options and proposals to uphold or strengthen these norms and to enhance their resilience.

The joint research project is being funded by the Federal Ministry of Education and Research for four years (April 2022 until March 2026).

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