

**Fourth Meeting
Geneva, 10-14 December 2007**

**Meeting of Experts
Geneva, 20-24 August 2007**

Items 5 of the provisional agenda

**Consideration of ways and means to enhance
national implementation, including enforcement
of national legislation, strengthening of
national institutions and coordination among
national law enforcement institutions**

**EXTRATERRITORIAL APPLICATION OF GERMAN
PENAL LEGISLATION REGARDING ACTIVITIES
RELATED TO BIOLOGICAL WEAPONS**

Submitted by the Federal Republic of Germany

Introduction

1. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BTWC) does not include an explicit obligation to adopt penal legislation. Article IV BTWC stipulates that each State Party shall “take any necessary measures to prohibit and prevent” activities related to biological weapons within its territory, “under its jurisdiction or under its control anywhere”. Taking into account state practice in implementing the BTWC, the adoption of penal provisions in order to effectively prevent prohibited activities seems to be generally accepted. The obligation to adopt penal provisions can also be derived from a *bona fide* interpretation of the Convention, which necessitates legally binding implementing measures including penalties for violation of the prohibitions.

2. Germany has implemented the prohibitions and obligations laid down in the BTWC in various national acts, ordinances and regulations. With regard to penal sanctions for violations of the prohibitions of the BTWC, the German Act on the BTWC of 21 February 1983, which led to the ratification of the BTWC by Germany, refers to other existing acts which penalize prohibited activities related to biological weapons. Those acts are the War Weapons Control Act (Kriegswaffenkontrollgesetz) of 20 April 1961, as amended on 6 July 1998; the Foreign Trade and Payment Act (Außenwirtschaftsgesetz) of 28 April 1961, as amended on 28 March 2006 and the Code of Crimes Against International Law (Völkerstrafgesetzbuch) of 26 June 2002.

3. All three German acts stated above contain provisions about the extraterritorial application of the penal sanctions under certain circumstances and without prejudice to the laws applicable at the site of the offence. This constitutes an exception from a general principle of German criminal law and is justified by the relevance of prohibited activities regarding biological weapons for the German foreign and security policy. However, the prerequisite for the application of German penal provisions is that the offence committed in principle needs to bear a relation to Germany. This prerequisite concurs with the notion of genuine link which the International Court of Justice developed as a condition for extraterritorial jurisdiction in international law. A deviation from this principle of genuine link is stipulated only for offences considered as war crimes due to the universal impact and significance of such crimes. These so-called “crimes against international law” can be sanctioned under German law and by German courts regardless of the existence of a genuine link to Germany.

4. The War Weapons Control Act implements in its section 18 the prohibitions of Art. I BTWC by prohibiting the development, production, acquisition and trade of biological weapons and extends the prohibition also to the exercise of actual control over biological weapons. In the case of a violation of section 18, section 20 provides the basis for penal punishment of up to not less than two years of imprisonment. Section 21 finally states that “notwithstanding the *lex loci delicti*”, the above mentioned prohibitions “shall also apply to acts committed outside the area of application of these provisions if the offender is a German.” The aim of this provision is to sanction any involvement of a German national in prohibited activities regarding biological weapons, regardless of the location of such an activity.

5. A similar approach, extraterritorial application if the offence is committed by a German national, can be found in the provisions of the Foreign Trade and Payment Act. This act contains specific export control provisions for the transfer of dual-use agents and toxins for peaceful purposes. The export of such dual-use goods without a licence is penalized in section 34 of this act with imprisonment of up to five years. Section 35 states that “Section 34 shall apply independently of the *lex loci delicti commissi*, also abroad if the perpetrator is a German national.”

6. Penal provisions for offences committed without a genuine link to Germany are stipulated by the German Code of Crimes Against International Law when the offence is considered to be a crime against humanity, genocide or a war crime. Section 12 of the Code of Crimes Against International Law defines the employment of prohibited means of warfare, *inter alia* the employment of biological weapons, to be a war crime and sanctions it with imprisonment for not less than three years. Furthermore, the German Penal Code sanctions the formation of a group with the aim to commit, *inter alia*, war crimes (terrorist groups) with imprisonment of up to ten years, even if this group is formed abroad.

7. In Germany’s view, extraterritorial application of penal legislation contributes to international peace and security by preventing gaps in the enforcement of the prohibitions related to biological weapons. This is essential at least as long as the prohibitions related to biological weapons are not yet implemented on a global scale in an equally restrictive manner. The database of the UNSCR 1540 Committee demonstrates that more than 20 states share this view and have incorporated provisions regarding extraterritorial application in their national non-proliferation legislation.
