

Fourth Meeting

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Item 6 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**

LEGAL IMPLEMENTATION AND ENFORCEMENT

Submitted by Germany on behalf of the European Union

Status of implementation

1. The implementation of BTWC obligations in national law is a requirement of the Convention that, without doubt, is beyond any controversial debate between States Parties to the BTWC. The Meeting of Experts 2003 and 2007 as well as the Sixth Review Conference have demonstrated common understanding for the need of national legal implementation, including law enforcement measures. In addition, the threat of misuse of biological materials by terrorists or other criminals has created awareness for the need to implement national measures prohibiting and controlling unauthorized access to pathogens and toxins. Notwithstanding earlier controversies over export control regulations, an increasing number of States Parties now understand the need for national legislation to prevent uncontrolled proliferation of biological materials, equipment and technologies. An additional obligation to implement national legislation and enforcement measures was set out by UN Security Council Resolution 1540.

2. Nevertheless, when assessing the forms E (Declaration of legislation, regulations and other measures) of the annual CBM declarations, as well as the reports provided by States to the 1540 Committee, we must conclude that national implementation in a greater number of States Parties still falls behind the minimum standards required for proper implementation of BTWC obligations.

BTWC obligations

3. When approaching national legal implementation of the BTWC three key areas have to be taken into account:

- (i) Article I establishes a broad definition of biological weapons (BW) on the basis of the general purpose criterion and - in prohibiting development, production, stockpiling and acquisition - seeking to prevent States Parties from obtaining BW.
- (ii) Article III expands the ban on BW in addressing any active role that States Parties need to take in the proliferation of BW. It prohibits direct and indirect transfers of banned items "to any recipient whatsoever" and covers international and domestic transfers of materials and includes non-State recipients.
- (iii) Article IV is the core provision relating to national implementation. It stipulates that each State Party shall "take any necessary measures to prohibit and prevent" banned activities within its territory, "under its jurisdiction or under its control anywhere".

4. BTWC obligations are comprehensive in scope. They do not specify the actor, the recipient or the beneficiary of any of the prohibited activities. Thus, national legislation must be constructed in such a way as to cover effectively all potential actors involved in BW activities. It is insufficient to introduce mere prohibitions into national law to meet the BTWC obligations. States Parties need to take measures to prohibit and prevent based on a broad concept of jurisdiction and control that is not limited to the territory of States Parties but include the application of measures to their nationals wherever they might be.

5. When implementing BTWC obligations, the Convention takes into account the national legal order ("in accordance with its constitutional processes") of each State Party. The clause "necessary measures can also be read as a recognition that States Parties, should not be overburdened as it introduces an element of proportionality into national implementation. However, States Parties can not argue that any form of national implementation is in line with Article IV. Article IV includes an obligation of result insofar as States Parties have to 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". In order to take the "necessary measures" required, States Parties must adopt measures which are legally binding.

Penal enforcement of prohibitions

6. As for national implementation of the prohibitions under Article I it is not sufficient for States Parties to refer to clauses in their constitutions which state that international treaties by ratification gain the status of national law, or that national ratification laws repeat the text of the Convention, only. Full implementation of Article I requires enforcement by penalisation of any breach of prohibited BW activities. There is no need to adopt a single piece of comprehensive implementing legislation that covers the prohibitions as well as enforcement measures for violation. Rather, one option might be to amend or adapt existing legislation, as long as the national legislation in total covers treaty obligations, adequate penal enforcement measures and all types of constituencies, i.e. States and non-State actors. In this context, it is necessary to realise that national anti-terrorism legislation penalising prohibited WMD activities may miss the fact that non-State actors may not always be motivated by terrorist purposes only.

Control of transfers

7. According to the BTWC, the use of biological agents and toxins is justified for prophylactic, protective and other peaceful purposes. Handling and transfer of agents and toxins is day-to-day business for scientific, diagnostic and commercial purposes. The obligation under Article III requires States to execute some type of control to ensure that transfers of material fulfil the criterion of justified use. Article I does not specify distinctive agents, toxins, weapons or means of delivery. It prohibits weapons related activities to such materials, only. However, for practical reasons of domestic and international control of transfers States Parties should specify relevant items that require first and foremost surveillance by public health, export control, customs and other relevant agencies as well as to keep legitimate users alerted when considering transfer of such materials. Needless to say, that due to the developments in life sciences any list of specified biological items can only be indicative, but not comprehensive.

8. In the context of international transfers, even without possessing any agents and toxins of concern within a State's territory, any State should implement legislation and measures in order to meet the obligations under Article III not to transfer "indirectly", and "not in any way to assist" illegal transport or trans-shipment through national territory as well as illegal brokering. In case that such State Party even fails to implement legislation that prohibits and penalizes biological weapons activities, non-State actors may use the territory as a safe haven for BW activities.

9. In addition to control of transfer of dual-use biological material, preventing the development, production, stockpiling and acquisition of biological weapons includes limiting access to potential BW materials and to establish management procedures and physical protection measures which forestall diversion or theft of such material.

Administrative enforcement

10. The discussion of administrative enforcement leads to a debate about how to carry out measures, practically. In this respect, the identification of relevant authorities and the extent of political and administrative discretion are of concern. Without any explicit provision inside the BTWC on either a national authority or other authorities in charge of the enforcement of implementing laws and regulations, the only relevant point of reference is Article IV. Bearing in mind the need to take "necessary measures", it is quite clear that for effective implementation legislation alone is not sufficient, but requires administrative enforcement.

11. Legislation should name empowered authorities, which must be equipped with sufficient capacities and resources. Further, there must be a degree of specialisation ensuring the proper application of laws and regulations. This amounts to good governance in the administration of any legislation that serves the handling, including transfers, and control of agents and toxins of concern.

Flexible adaptation

12. The call for establishing a national BTWC authority that takes care for all obligations under the BTWC, including the provision of annual CBM declarations, is not unreasonable. However, States Parties have demonstrated that adequate national coordination of involved agencies by national focal points may equally work. Thus, the flexibility offered by the BTWC leaves it to States Parties how to coordinate best national implementation of the BTWC obligations either by installing a national authority or by good governance coordinated by a national focal point.
