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National Measures or Legislation to Implement the BTWC:
A Conceptual Analysis

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Basis for National Measures or Legislation

1. Article I and III are among the key provisions of the Convention (BTWC) that put primary obligations on the States Parties in relation to the Convention’s objectives. They provide that:

(Article I) “Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:
(1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
(2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict”.

(Article III) “Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in article I of the Convention”.

2. In the process of developing and extending common understandings on the Articles of the Convention, the Fourth Review Conference, building upon the results of the previous Review Conferences, developed further and expanded to some extent these Articles I and III by saying in each section of the Final Declaration, inter alia, that:

(Article I) ..... “3. The Conference reaffirms that the use by the States Parties, in any way and under any circumstances, of microbial or other biological agents or toxins, that is not consistent with prophylactic, protective or other peaceful purposes, is effectively a violation of Article I of the Convention”.

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(Article III) “I. The Conference affirms that Article III is sufficiently comprehensive to cover any recipient whatsoever at international, national or subnational level”s.

3. While these two Articles, as basic and core commitments by the States Parties, need to be implemented by whatever necessary means by the States Parties, they are basically directed towards the States Parties themselves, not towards natural or legal persons within the States Parties. In other words, they provide for the States Parties’ undertaking not to develop, produce, stockpile or otherwise acquire or retain, or transfer relevant agents, toxins and equipment, and specify the activities prohibited to each “State Party” under the Convention.

4. Article IV complements Article I, III and other Articles in the Convention and provides the real basis for national measures or legislation. It tells States Parties what they should do to implement domestically their obligations under the Convention or to ensure domestic compliance with the Convention. The States Parties should take any necessary measures to “prohibit and prevent” their natural or legal persons from undertaking any activity prohibited to themselves within their territory or jurisdiction. Article IV provides 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”.

5. Therefore, it is not enough for the compliance with Article IV, and thus with the Convention that a State Party itself does not try to develop, produce, stockpile or otherwise acquire or retain, or transfer relevant agents, toxins and equipment. It should take any “necessary” measures to prohibit and prevent its natural or legal persons from undertaking certain activities.

6. The Fourth Review Conference, again building upon the previous results, made a clearer and expanded understanding on Article IV by stating in the relevant section of the Final Declaration that:

> “1. The Conference underlines the importance of Article IV. It reaffirms the commitment of States Parties to take the necessary national measures under this Article, in accordance with their constitutional processes. These measures are to ensure the prohibition and prevention of the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention anywhere within their territory, under their jurisdiction or under their control, in order to prevent their use for purposes contrary to the Convention. The States Parties recognize the need to ensure, through the review and/or adoption of national measures, the effective fulfillment of their obligations under the Convention in order, inter alia, to exclude use of biological and toxin weapons in terrorist or criminal activity”.

> “3. The Conference notes the importance of:
   Legislative, administrative and other measures designed to enhance domestic compliance with the Convention;”
Different Types of National Measures or Legislation

7. The States Parties differ as to whether international law is automatically incorporated into domestic law and forms a part of the “law of the land” (whether the judiciary can give effect to treaty provisions without some kind of implementing legislation). In some countries (so-called *dualism* countries), international law and domestic law are perceived as separate systems that operate at different levels. To give effect to international agreements or to implement them, the legislature should enact a separate law and thus transform or incorporate the international agreements into the domestic legal system. Other countries (so-called *monism* countries), on the other hand, regard international law and domestic law as parts of a single legal system. Therefore, mere ratification or acceptance of international agreements translates them into domestic law. Because the BTWC lacks specific provisions for domestic enforcement (for example, penal punishment in case of violation), however, there should be some kind of implementing legislation even in the *monism* countries.

8. National measures or legislation which may have some bearing on the BTWC can be categorized into three broad categories according to their nature or intensity of burden on the persons or entities concerned:
   (i) Prohibitions;
   (ii) Regulatory Measures; and
   (iii) Guidelines.

9. In terms of formalities or procedures for enactment, national measures or legislation can also be classified into various categories. The basic distinction would be between (i) law passed by the legislative body and (ii) measures or legislation adopted by the executive branch of the government, perhaps with delegation from the legislative body. Among the three categories listed in the previous paragraph according to the nature of national measures, the prohibitions and accompanying penalties will be, by nature and because of the generally accepted principle of “rule of law”, in the form of legislation passed by the legislative body. Regulatory measures will be either in the form of a law adopted by the legislative or measures or legislation enacted by the executive. On the other hand, the guidelines will be in most cases those adopted by the executive branch of the government.

Prohibitions

10. National measures or legislation that provide for prohibitions are what Article IV of the Convention is mainly intended for among the many necessary measures to prohibit and prevent certain activities as provided for in this Article, and by nature, must entail some kind of penalties against violation. Depending on the practices and circumstances of each country, these measures or legislation for prohibition of certain kinds of activities might expressly include in the scope of their application the transfer, research or use of relevant agents, toxins and equipment.

11. In general, the way in which each State Party implements its obligation to prohibit the activities as stipulated in Article IV of the Convention may take the following various forms:
   (i) it may determine that its existing laws are sufficient to cover the prohibitions in the Convention and that no further specific legislation is necessary;
   (ii) it may amend the existing laws and incorporate into them the requirements provided for in the Convention;
(iii) it may enact a single act mainly focused on the implementation of the prohibitions in the Convention; or
(iv) it may enact a more broadly framed legislation, for example an anti-terrorism act, that includes in its scope of application the prohibitions of certain activities as stipulated in Article IV of the Convention.

12. When a State Party determines that its existing laws are sufficient to implement the prohibitions in the Convention, it might refer to the provisions of its penal legislation on crimes related to hazardous substances or agents in general, or more remotely to those penal provisions that are not directly related to the activities prohibited by the Convention but only to the results of those activities (for example, homicide, mayhem or assault). After all, the provisions themselves in the Article IV of the Convention are quite general while incorporating the so-called “general purpose” criteria of Article I, and thus provide room for interpretation. It is not easy to judge whether a State Party’s determination on the status of its domestic laws is a right one and whether further legislation is really not necessary. It might be easier, however, for the States Parties with the tradition of civil law than for those of common law to apply the existing general laws to the cases related to the BTWC, since the civil-law countries are generally accustomed to deriving certain principles from the general codes and applying them to the specific cases.

13. In any case, it should be noted that even if a State Party can punish the activities prohibited in the Convention in one way or another, with the name of certain crimes in its existing penal legislation, this might not automatically mean that any “necessary” measures to prohibit those specific activities have been taken in accordance with its constitutional processes.

14. In relation to the penal provisions implementing the prohibitions as stipulated in Article IV of the Convention, the following issues should be taken into consideration when reviewing existing legislation or adopting new measures, noting that approaches to such issues might vary to a certain extent among the States Parties:

(i) the scope of activities covered by the legislation or measures (whether use, research, or transfer to certain recipients of relevant agents, toxins and equipment, in addition to their development, production, stockpiling, acquisition or retention, is also punished as a crime or not);
(ii) the scope of personnel covered by the legislation or measures (whether public officials or military personnel can be punished or not); and
(iii) the scope of geographic area covered by the legislation or measures (whether the acts by its nationals in foreign countries are also covered or not, that is, whether the principle of extraterritoriality applies or not).

Regulatory Measures and Guidelines

15. Some States Parties might have adopted regulatory measures and guidelines for the effective implementation of the Convention. In most cases, however, the States Parties may have adopted those measures and guidelines for different reasons, for example, health or public safety reasons. Even in the latter case, they provide mechanisms and means for strengthening and implementing the Convention in one way or another. These measures and guidelines might be classified into the following three broad, and somewhat overlapping areas. Although there can be
other areas that might have some impact on the implementation of the Convention, these three areas would be the most important among them.

(i) Security and Safety of Certain Agents, Toxins and Equipments;
(ii) Export Control; and
(iii) Genetic Modification.

16. In general, regulatory measures may resort to two kinds of means for their enforcement:

(i) Administrative Acts or Sanctions (for example, annulling of license or permission, issuing administrative orders or other enforcement measures); and
(ii) Penal Punishment (fine or imprisonment).

17. When penal provisions in relation to the implementation of the Convention are discussed, it is therefore necessary for the benefit of clearer thinking and analysis to distinguish between these regulatory measures with penal punishment as a means of enforcement and those provisions mentioned above for implementing the prohibitions of the Convention.

18. Guidelines, by nature, will not have penal punishment for their enforcement. In some cases, they might provide best practices for the entities concerned to follow and not have any enforcement measures at all. They could serve, however, as criteria for judgment in civil suit between private persons. In some other cases, they might invoke administrative acts or sanctions, although these acts or sanctions may be weaker than those being applied in the case of regulatory measures.