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Coherent National Implementation as a Means to Improve the Effectiveness of the BTWC

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I. Introduction

1. Notwithstanding the need to negotiate an effective verification regime for the BTWC, national implementation of the Convention is an important element in developing an effective BTW regime. In light of the failure to agree upon a Verification Protocol, national implementation must be a prime concern of States Parties and Convention organs – at least for the immediate future, pending agreement on a new approach towards verification. While national implementation can not replace verification it is a necessary pre-requisite for any international supervisory regime.

2. For national implementation to contribute to the development of an effective BTW regime, it is not sufficient to merely introduce the provisions of the BTWC into national law. Rather, a variety of measures has to be taken at various levels – legislative, administrative and penal – and across a broad spectrum of regulatory issues – extending from armaments to dual use items, from monitoring infectious diseases to genetic engineering. While it is true that some of the problems differ according to the various national legal systems, the basic issues have to be addressed by all States Parties to the BTWC. They emanate from the Convention itself and from the obligation both under treaty law and under customary international law to abide by conventional obligations \textit{bona fide}, i.e. in good faith. First and foremost this means full and effective implementation. However, the complexity of national implementation that may result therefrom should not detract from the more or less clear-cut obligations included in the BTWC itself. Rather, \textit{bona fide} compliance includes a second dimension, i.e. coherent implementation.

3. Taking German implementing legislation as an example, the paper will address both dimensions of national implementation: completeness and coherence. The obligations of the BTWC relevant for national implementation will be taken as a starting point. Subsequently, legislation, administrative enforcement, criminal law and extraterritorial jurisdiction will be discussed before submitting a plea for coherence, both horizontal and vertical.
II. Obligations of the BTWC Relevant for National Implementation

4. According to Article I of the BTWC, each State Party “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 I thus establishes a broad definition of BTW on the basis of the general purpose criterion and – in prohibiting development, production, stockpiling and acquisition – seeks to prevent States Parties from becoming hold of BTW. It outlaws vertical proliferation.

5. Article III expands the ban on BTW in addressing any active role that States Parties may take in the horizontal proliferation of BTW: First, it proscribes assistance, encouragement and inducement of other States, groups of States and international organizations in activities prohibited under Article I. Second, it bars direct and indirect transfers of prohibited items “to any recipient whatsoever”. This covers international and domestic transfers of substances and includes non-State recipients.

6. Finally, Article IV may be considered as the core provision related to national implementation. It stipulates that each State Party shall “take any necessary measures to prohibit and prevent” incriminated activities within its territory, “under its jurisdiction or under its control anywhere”. A close reading of Article IV demonstrates that it includes quite a heavy burden for States Parties:

7. First, the obligation is comprehensive in scope. It covers all activities prohibited under the preceding Articles I, II and III and it refers to the comprehensive definition of BTW based on the general purpose criterion.

8. Second, since it does not specify the actor, the recipient nor the beneficiary of any of the incriminated activities, national legislation must be construed in a way as to effectively cover all potential actors involved in prohibited BTW activities. This is particularly important today when confronted with a bio-terrorist threat.

9. Third, Article IV is not simply an obligation of conduct but amounts to an obligation of result. It will not be sufficient to introduce mere prohibitions into national law to meet the obligations included in Article IV since States Parties have to take measures “to prohibit and prevent”. One may also refer to the need to adopt the “necessary measures”.

10. Fourth, Article IV introduces a broad concept of jurisdiction and control. It is not limited to the territory of States Parties but includes de jure jurisdiction and de facto control relying upon other genuine links than territorial sovereignty.

11. Apart from these elements illustrating the strictness of the obligation, there are two other elements included in Article IV giving some leeway to States Parties when implementing the Convention. First, Article IV pays respect to the national legal order (“in accordance with its constitutional processes”) of each State Party. Second, “necessary measures” can also be read as not to over-burden States Parties, introducing an element of proportionality into national implementation.
III. Implementing Legislation – Obligatory in Substance, But Flexible in Format

12. *Prima facie*, national implementation first and foremost means national legislation. However, the Convention itself does not explicitly specify whether the prohibitions included therein have to be implemented by legislation, regulation, administrative measures, or a combination of these. Article IV only necessitates that States Parties “take ... necessary measures”, in contrast to Article VII of the CWC which requires the adoption of legislation. States Parties could thus argue that any form of national implementation is in line with Article IV BTWC. However, this would miss the point. As explained above, Article IV includes an obligation of result in as far 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. This generally means making use of legislation – whether adopting new provisions or relying upon existing ones.

13. Interesting enough, most States Parties – at the time of ratification – only adopted a minimum of implementing legislation. For many States Parties this only meant parliamentary consent to the BTWC in statutory form, irrespective of whether following a monist or dualist conception of the relationship between international and domestic law. Referring to German legislation by way of example, the Act to the BTWC of 21 February 1983 only included a single additional provision to parliamentary consent, namely Article 2 introducing the Convention’s BTW definition based on the general purpose criterion. Other than in the case of the CWC, ratification of which was paralleled by an Act on the Implementation of the CWC of 2 August 1994, no such implementing act was adopted in the case of the BTWC. Rather, there was reliance upon existing legislation, which is referred to in the BTWC Act of 1983.

14. State Practice as of today – and this is relevant when interpreting the provisions of the BTWC – demonstrates that there exists legislation across a broad field of topics as well as across various levels. Due to the introductory character of my paper I will only refer to German legislation, by way of example. Apart from the Act to the BTWC of 1983, already referred to, Section 18 of the War Weapons Control Act, as amended, prohibits development, production, and acquisition of BTW, thus implementing the prohibitions included in Article I of the BTWC. The use of BTW is prohibited and subject to criminal sanctions according to Section 12 of the newly adopted Code on International Crimes of 26 June 2002. As far as international horizontal proliferation is concerned, there is a broad spectrum of legislation, the most important – apart from the above-mentioned War Weapons Control Act – being Section 7 of the Foreign Trade and Payments Act, of 28 April 1961 as amended, Sections 5 to 5c of the Foreign Trade and Payments Ordinance, of 18 December 1986 as amended, and Council Regulation (EC) No 1334/2000 of 22 June 2000 establishing a Community regime for the control of exports of dual-use items and technology, amended and updated by Council Regulation (EC) No 149/2003 of 27 January 2003. Turning to domestic transfers and provisions addressing the handling of agents, toxins, and other items covered by the comprehensive BTW definition, various areas of legislation are relevant, ranging from statutory provisions against infectious diseases to animal and plant protection. Details can be taken from the questionnaire available to delegations.

What can be taken from this in respect of implementing legislation?
15. First, notwithstanding the fact that Article IV BTWC does not explicitly refer to implementing legislation, bona fide interpretation of the Convention necessitates legally binding implementing measures. Thus, use must be made either of existing legislation or new pieces of legislation must be adopted in order to “prohibit and prevent” activities outlawed by the BTWC. For other reasons – such as international human rights law – this should be self-evident when providing for criminal sanctions. Anyway, the warning function of generally applicable laws should not be underestimated. It is part of bona fide compliance with the BTWC.

16. Second, while delegated legislation is compatible with such requirements mere internal administrative measures, lacking legally binding effect, will not be sufficient. Such measures which can be revoked at any time without any publicity remain below what is required as “necessary”.

17. Third, the Convention does not require all legislative measures in federal States Parties to be adopted at the federal level. Sub-national legislation is in line with the BTWC. However, should such legislation fail to meet the standards set by the Convention, the State Party as such is in breach of the Convention. As the Vienna Convention on the Law of Treaties stipulates – in line with existing customary international law – internal arrangements of States Parties can not be invoked to justify a violation of a treaty obligation.

18. Fourth, participation in regional economic arrangements with legislative powers may lead to regional implementing legislation, as in the case of the European Community (EU legislation exists in the areas of export controls, handling of dangerous agents for occupational health reasons, transfers of agents for animal and plant health reasons, genetic work, disease surveillance and reporting, etc.). However, since the Community is not a party to the Convention, responsibility under international law for compliance with the BTWC remains with States Parties.

19. Fifth, there is no need to adopt a single piece of comprehensive BTWC implementing legislation. Rather, it seems to make sense to introduce the obligations where the potential addressee will best become aware of them.

20. In conclusion, national implementing legislation is indispensable, but flexible in format.

IV. Administrative Enforcement – Relevant Authorities, Discretionary Powers

21. When discussing administrative enforcement in the context of national implementation this opens a practical dimension. It leads to a debate about the “nuts and bolts” of how to carry out measures “on the ground”. Two issues are of concern in so far: the determination of relevant authorities and the extent of political and administrative discretion. Taking the BTWC as a starting point, we have to note an important difference in respect of the CWC: the BTWC does not include a provision on national authorities, which is a topic addressed in Article VII of the CWC. Without any explicit provision on either a national authority or other authorities in charge of the administrative enforcement of implementing laws and regulations the only relevant point of reference is again Article IV BTWC. Read as an obligation of result and bearing in mind the need to take “necessary measures” it is quite clear that legislation alone is not sufficient to meet the requirements of the Convention. Effective implementation necessitates competent administrative enforcement.
22. Legislation must name authorities. They must be equipped with sufficient capacities. Further, there must be a degree of specialisation ensuring the proper application of the law. *In toto*, this amounts to good governance in the administration of anti-BTW legislation – a requirement that amounts to a matter of course in present international law.

23. Turning to the second aspect of administrative enforcement, namely the extent of discretion in applying pertinent laws and regulations, this depends upon the nature of obligations included in the BTWC. The very fact that the definition of BTW is based upon the general purpose criterion necessitates a degree of discretion. Also, as far as horizontal proliferation is concerned, the balancing between Articles III and X can not be effectively handled without the inclusion of discretionary powers in national implementing legislation.

24. Taking once again German legislation as an example, administrative responsibility for export controls is split between the Federal Ministry for Economics and Technology which is in charge of the general policy and the Federal Office of Economics and Export Control which handles licensing and enjoys directive responsibility. As far as the handling of and work with biological agents is concerned, this is within the responsibility of the respective Laender ministries and agencies – which means that it is handled in a decentralized way. Even more complex is the organization of government control of genetic engineering and biosafety standards: while directive responsibilities for contained use rest with the competent authorities of the Laender, directive responsibilities for deliberate release is in the hands of a federal agency, the Robert Koch Institute. While these references are far from comprehensive, they illustrate that the administrative enforcement of implementing laws and regulations is handled according to the country’s legal and constitutional arrangements, in line with what Article IV BTWC stipulates: “in accordance with its constitutional processes”. On the other hand, there can be no doubt, that the arrangements as such are governed by considerations of effectiveness.

25. As far as the regulatory technique is concerned, German legislation builds upon licensing systems leaving an amount of discretion to the authorities in charge. Apart from the War Weapons Control Act there are hardly any strict prohibitions included in legislation concerning horizontal proliferation. This again is due to constitutional requirements, since the German Basic Law includes freedom of foreign trade. In many other areas of the law, similar considerations of fundamental rights have to be respected which means that administrative authorities play a decisive role in implementing the obligations of the BTWC.

26. I may also be pointed out that legislative acts of the European Community are either applied directly by EU member states or implemented by national legislation, depending on whether they qualify as regulations or directives under the EC Treaty.

27. In conclusion, one might argue that the BTWC gives a fair degree of leeway to States Parties in organizing administrative enforcement as long as effective implementation is guaranteed. The establishment of a licensing system is fully in line with the Convention. It even seems to be the mechanism coming closest to the requirements of the BTWC.

V. Penal Provisions – Scope and Effectiveness

28. In contrast to the CWC, the BTWC does not include an explicit obligation to adopt penal legislation. However, the already discussed reading of Article IV BTWC at least suggests that penal provisions form part of conventional obligations. Taking into account state practice under
the BTWC the adoption of penal provisions in order to effectively prevent incriminated activities seems to be generally accepted as supportive if not necessary under Article IV.

29. Briefly referring to German legislation by way of example, the Act to the BTWC of 21 February 1983 did not introduce new penal provisions but explicitly stipulates that penal provisions in existing legislation remain untouched. As of today there is a full range of criminal law provisions addressing the BTW threat, extending from Section 20 of the War Weapons Control Act to numerous pieces of specialised legislation such as Sections 33 and 34 of the Foreign Trade and Payments Act or various sections from plant and animal protection legislation and even the Infection Protection Act. As long as the European Community is not entitled to enact pertinent penal law, this is done by Member States in their own area of responsibility.

30. There can be no doubt that lack of explicit provisions on penal legislation in the BTWC notwithstanding the Convention does impose an obligation to enact criminal law or rely upon existing criminal law in implementing its obligations.

VI. Beyond National Jurisdiction strictu senso

31. Finally addressing the problem of jurisdiction which is explicitly referred to in Article IV BTWC which speaks of “the territory of such State, ... its jurisdiction or ... its control anywhere”. This formula has been introduced in various other arms control and disarmament agreements and can be considered a standard formula today. While this seems to be promising, there still is no consensus as to the interpretation of such clause. This lack of consensus is due to the fact that there is no agreement in international law on the extent to which any particular State may adopt extraterritorial legislation.

32. It may suffice at this point to refer to accepted so-called “genuine links” that may be applied in establishing extraterritorial jurisdiction: the territoriality principle, the active personality principle, the universality principle, and – to a limited extent – the passive personality principle. In extending the responsibility of States Parties beyond their territory, Article IV BTWC not only provides a basis for extraterritorial jurisdiction but even obliges States Parties to extend their implementing legislation to the extent of their “jurisdiction ... (and) control”. This covers both, the active personality principle and (with a slight grain of doubt) the universality principle – a conclusion that is relevant when addressing international terrorism.

33. Taking German legislation once again as an example, pertinent provisions of criminal law are included in the War Weapons Control Act, the Foreign Trade and Payments Act, the Penal Code and the newly adopted Act on International Crimes. They rely upon both, the territoriality principle and the active personality principle – which means that Germans abroad are subject to criminal sanctions should they violate pertinent provisions. In line with the Rome Statute for the establishment of the International Criminal Court, criminalization of the use of BTW is not limited in any way.

34. In light of the BTW terrorist threat States Parties are confronted with, two elements are of primary importance: First, Article IV takes account of non-State actors, in particular, private individuals and transnational networks (which include terrorist networks). Second, since at least “hardcore” terrorist activities can be considered an international crime (in particular, the use of BTW) entailing universal jurisdiction, Article IV may be read as including an obligation to take measures, including the threat and imposition of penal sanctions, against bio-terrorism.
VII. The Need for Coherence: Horizontal and Vertical

35. This statement cannot be more than an introduction into discussions. However, the following can be taken from the above analysis:

36. First, national implementing legislation is obligatory, but flexible in format.

37. Second, administrative enforcement must be effective, but can be set up according each Member State’s individual legal system.

38. Third, a *bona fide* interpretation of the BTWC necessitates the inclusion of penal sanctions in national implementation.

39. Fourth, the formula “jurisdiction ... (and) control” does not only permit extraterritorial application of implementing legislation (at least as far as this is generally accepted under public international law) but establishes an obligation to extend such implementing laws beyond a Member State’s territory, in particular in light of the BTW terrorist threat.

40. In conclusion, a second aspect must be underlined: the need for coherence, both as far as the levels of legislation and enforcement are concerned (from supranational to sub-national) and in respect of the broad range of topics concerned. While a single implementing statute might not necessarily be helpful, a catalogue of regulatory necessities could be worked out on the basis of the questionnaire available to participants. In many cases, model laws have been developed within the framework of international agreements in order to facilitate national implementation. One of the more recent examples is the CWC. A similar exercise might improve the effectiveness of the BTWC. However, there is no need to develop a single model law but it might be helpful to develop model provisions as building blocks which States Parties may introduce into their national legislation should they wish so.