BTWC IMPLEMENTING AND PENAL LEGISLATION: CORE ELEMENTS

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Introduction

1. The first follow-up expert and State Party meetings from the Fifth Review Conference will focus on the adoption of necessary national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation. The meetings must recognise in this respect the central importance of Article IV, which obliges States Parties to take any necessary measures to implement Article I of the Convention. Although the enactment and content of legislation and other regulatory controls depends in large part on the particular constitutional processes in each State Party, it is still possible to identify core elements that should be included if the legislation is to be effective in meeting the Convention’s objectives. In this regard it should be stressed that enacting legislation is not enough: there have to be the institutional mechanisms in place to ensure that legislation is implemented effectively.

2. This paper sets out core elements that ideally need to be incorporated in any legislation. It draws on UK experience, which is not to say that approaches adopted in the UK have universal applicability. Instead, the UK can suggest that the national experience can provide useful guidance on the content and framing of the sorts of penal and regulatory legislation that would meet the requirement of agenda item (i) in the BWC Review Conference follow-up work programme.

(i) Necessary national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation.

3. The core prohibitions in the BTWC reside in Article I, II and III. Primary legislation is required in some constitutional systems to translate these provisions into domestic law. This can be done in a single dedicated legal instrument, or by incorporating these requirements into either

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1 The relevant UK legislation here is the Biological Weapons Act 1974 as amended by The Anti-Terrorism, Crime and Security Act 2001.
existing legislation, or broadly framed legislation that might also deal with biosafety for example. The route chosen is one for each State Party to make. In other systems mere ratification of a treaty translates its contents into domestic law, but often there are no accompanying penal provisions, which means that additional legislation is needed.

4. Core elements for implementing and penal legislation should include:
   • prohibitions criminalising the development, production, stockpiling, acquisition, retention and transfer of microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification or prophylactic, protective or other peaceful purposes; and weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.
   • extraterritorial application of these prohibitions if undertaken outside the State Party, but only if they are done by a State Party person (individual or corporate).
   • specifying penalties on conviction for contraventions of these core prohibitions.
   • provisions for offences by corporate bodies as well as individuals.
   • powers of search and for obtaining evidence in cases of suspected breaches of the legislation.
   • corresponding changes in military law to reflect the introduction of these prohibitions and to govern the conduct of the armed forces.
   • prohibition of assisting others, whether in the State Party or overseas, to breach any of the Convention’s prohibitions.

5. Article III requires each State Party 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 organisations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I. The risk of acquisition by terrorists adds to the importance of addressing the transfer issue. To give full effect to this requirement, provisions may need to be made for a mandatory licensing system to help ensure that central authorities can track the movement of specified materials, such as lists of agents and toxins, and items of equipment – certain types of fermenters and downstream processing equipment for instance. This should certainly cover exports and may need to cover imports and internal domestic transfers as well, if it can be shown that the resulting burden is justified by the potential benefits sought.

6. Transfer monitoring and export control regulations would need to:
   • be defined by lists of biological agents and toxins, and of related genetic material, and of equipment subject to licensing prior to export, and possibly other transfer.
   • contain a “catch all” clause that would require any person transferring such items to another to seek a licence where he/she suspected or had been informed by government that the item concerned may be for use in an offensive BW programme.
   • place controls on the transfer of sensitive technology by intangible means – such as by e-mail or fax.
   • provide for penalties for transfer offences to be imposed, increased or varied to reflect the seriousness of the offences.
   • prescribe licensing procedures in respect of any of the controls imposed. (Consideration would need to be given as to whether a permissive system would be required or whether prior or retrospective notifications to government would suffice.)
• enable changes to be made to the list of licensable items: additions and deletions in light of changing circumstances.  

7. These licensing tasks could be made less daunting by creating an expedited licensing option for example, for laboratories with particular internationally recognised expertise that regularly exchange cultures with specified laboratories on other States Parties.