

This is one of a series of complementary papers submitted by the EU Member States for the consideration of States Parties. [A reference to the outcome of third country alignment procedure will be added.]

## **EU Paper on Assessment of National Implementation of the BTWC**

### **I. Obligations of the BTWC Relevant for National Implementation**

1. 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 BW on the basis of the general purpose criterion and – in prohibiting development, production, stockpiling and acquisition – seeks to prevent States Parties from getting hold of BW. It outlaws vertical proliferation.
2. Article III expands the ban on BW in addressing any active role that States Parties may take in the horizontal proliferation of BW: Firstly, it proscribes assistance, encouragement and inducement of other States, groups of States and international organisations in activities prohibited under Article I. Secondly, it bans direct and indirect transfers of prohibited items “to any recipient whatsoever”. This covers international and domestic transfers of substances and includes non-State recipients.
3. Finally, Article IV may be considered as the core provision relating to national implementation. It stipulates that each State Party shall “take any necessary measures to prohibit and prevent” prohibited activities within its territory, “under its jurisdiction or under its control anywhere”. A close reading of Article IV demonstrates that it includes a significant obligation on States Parties:
4. Firstly, 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 BW based on the general purpose criterion.
5. Secondly, since it does not specify the actor, the recipient or the beneficiary of any of the prohibited activities, national legislation must be constructed in such a way as to effectively cover all potential actors involved in such BW activities.
6. Thirdly, 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”.

7. Fourthly, 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 genuine links other than territorial sovereignty.

8. Apart from these elements illustrating the strictness of the obligation, two other elements included in Article IV give some leeway to States Parties when implementing the Convention. Firstly, Article IV pays respect to the national legal order (“in accordance with its constitutional processes”) of each State Party. Secondly, “*necessary measures*” can also be read as an attempt not to over-burden States Parties, introducing an element of proportionality into national implementation.

## **II. Legislation – Obligatory in Substance, But Flexible in Format**

9. 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 requires States Parties to “*take ... necessary measures*”. States Parties could thus argue that any form of national implementation is in line with Article IV. However, this would miss the point. As explained, 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. This generally means making use of legislation.

10. State practice as of today – and this is relevant when interpreting the provisions of the BTWC – demonstrates that legislation exists covering a broad field of topics as well as various levels. At the 2003 BTWC Meeting of Experts 23 States Parties presented working papers explaining the scope of national BTWC implementation legislation and measures to prevent unimpeded access to dangerous biological materials. The Secretariat of the 2003 meetings distributed background information on legislative and other measures taken by 84 States Parties to implement the prohibitions set forth in the Convention, including enactment of penal legislation as well as national mechanisms to establish and maintain the security and oversight of pathogenic micro-organisms and toxins. A limited number of States Parties participating in the annual exchange of BTWC Confidence-Building Measures provided updated information on national legislative measures under CBM Measure E: Declaration of legislation, regulations and other measures including exports and/or imports of pathogenic micro-organisms in accordance with the Convention.

11. Comprehensive data on legislative and other measures to implement the prohibitions set forth in the Convention, including enactment of penal legislation as well as national mechanisms to establish and maintain the security and oversight of pathogenic micro-organisms and toxins are provided by the Legislative Database of the UNSCR 1540 Committee. This database is now openly accessible on the 1540 Committee website and contains information provided by States (BTWC States Parties, BTWC Signatories and other States) relating to national legislative and other implementation measures to prevent the proliferation of BW, their means of delivery and related materials.

12. Since 2004 only a few countries have enacted and implemented new legislation or measures to adjust national laws and regulations to obligations under UNSCR 1540 (2004). Thus the 1540 database provides an up-to-date status of national implementation of the BTWC. The database at present contains a list of legislative documents submitted by 124 UN Member States, including 112 BTWC States Parties and 7 BTWC Signatories. Most of the documents contained in the

database are accessible in their original language or as English versions by web-links. The inclusion of the documents in the database is authorised by the States.

### **III. What can be taken from this in respect of implementing legislation?**

13. Notwithstanding the fact that Article IV of the BTWC does not explicitly refer to implementing legislation, the database documents show that most of the States Parties follow the *bona fide* interpretation of the Convention that necessitates legally binding implementing measures. Use is made of a variety of national legislative approaches, which lead to different results in the number of regulated areas. This variety also becomes apparent in the different sanctions to enforce legislative measures in order to “prohibit and prevent” activities outlawed by the BTWC.

14. With regard to prohibited activities under Article I, according to the 1540 database documents, five general patterns can be identified in national implementation legislation:

- constitutional processes that directly enact international treaties as national law, often without any enforcement measures in national penal codes for breaching treaty obligations;
- legislation that covers nuclear, chemical and biological prohibited activities jointly or separately combining framework legislation with penal sanction measures;
- legislation that commonly regulates and controls peaceful use of BW-related materials by licensing permitted activities. The underlying reasoning presumably is that since the activities relating to BW and their means of delivery will not be licensed, the obligations under the BTWC will be met. In-depth examination of such legislation reveals that enforcement measures are usually based on administrative penalties for breaching licensing requirements only.
- addressing the prohibited activities under Article I of the BTWC only in the context of their national criminal codes by including penalties for violation of the prohibitions; and
- national anti-terrorism legislation that covers sets of prohibited activities associated with WMD, their means of delivery and related materials, including the penalisation of violations by terrorists. States with such legislation may miss the fact that non-State actors may not always be motivated by terrorist purposes only.

15. The BTWC does not include an explicit obligation to adopt penal legislation. However, the previously discussed interpretation of Article IV BTWC at least suggests that penal provisions form part of BTWC obligations. Taking into account State practice under the BTWC, as demonstrated by the 1540 database documents, the adoption of penal provisions in order to effectively prevent prohibited activities seems to be generally accepted. Despite this lack of explicit provisions on penal legislation, the Convention does impose an obligation to enact criminal law or rely upon existing criminal law in implementing its obligations.

16. There is no need to adopt a single piece of comprehensive implementing legislation to cover the prohibitions of Article I as well as enforcement measures for violations of the prohibited activities. Rather, it seems to make sense to introduce the obligations where those affected will best become aware of them, 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.

### **IV. Administrative Enforcement – Relevant Authorities, Discretionary Powers**

17. With regard to Article III the situation of national implementation becomes even more complex. Article III bans direct and indirect transfers of “any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of this Convention” “to any recipient whatsoever”. This covers international and domestic transfers and includes non-State recipients.

18. Article III confronts States with several issues of which three seem to be of major importance. Firstly, 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 in combination with Article I requires States to execute some type of control to ensure that transfers of material fulfil the criterion of justified use. Secondly, Article I does not specify distinctive agents, toxins, weapons or means of delivery, but instead prohibits activities relating to such materials. For this reason it is at the discretion of States Parties to specify relevant items. Thirdly, in the context of international transfers, even without possessing any agents and toxins of concern within a State's territory, a State may need to 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 its national territory as well as illegal brokering.

19. According to the information provided by 1540 database documents, States try to solve the problems mentioned by both legislative regulations and administrative enforcement.

20. The discussion of administrative enforcement in the context of national implementation opens a practical dimension. It leads to a debate about how to carry out measures "on the ground". Two issues are of concern in this respect: the determination of relevant authorities and the extent of political and administrative discretion. Firstly the BTWC does not include a provision on national authorities. 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 Article IV. When 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.

21. Ideally 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 the law. 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. 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 BW is based upon the general purpose criterion necessitates a degree of flexibility.

22. In the national legislation included in the UNSCR 1540 database, administrative responsibility for international transfers (export controls) is usually split between ministries which are in charge of the general policy, and governmental agencies, which handle licensing and have directive responsibility. In cases where no governmental agencies exist, the responsibility for policy-making and licensing is usually split between different ministries. As far as the handling of and work with biological agents is concerned, this lies within the responsibility of the respective ministries and governmental agencies – which means that it is handled in a decentralised way according to the types of agents, whether they are human, animal or plant pathogens, naturally occurring or genetically modified. The reason for separate responsibilities is linked to long-standing national practices of public health, animal health and phytosanitary licence and control mechanisms. While these organisational structures are far from comprehensive, they illustrate the fact that the administrative enforcement of implementing laws and regulations is handled according to the country's legal and constitutional arrangements, as Article IV stipulates: "in accordance with its constitutional processes". Any national arrangement as such is adequate as long as it is governed by considerations of effectiveness, which usually include regulations to

control domestic transfers of agents that only permit transfers between licensed facilities.

23. As far as the regulatory techniques are concerned, States' legislation builds upon licensing systems leaving an amount of discretion to the authorities in charge. Licensing procedures for international transfers rely on lists of agents and toxins and related technologies with an inherent BW proliferation risk. These lists, as for instance developed by the Australia Group, are widely used as a basis for enacting States' national licensing systems. However, there has to be a balance between the prohibitions included in any national legislation and the constitutional requirement of 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.

24. In conclusion, one might argue that the BTWC gives a fair degree of leeway to States Parties in organising administrative enforcement as long as effective implementation is guaranteed. The establishment of licensing systems as part of the implementation process is fully in line with the Convention, potentially fulfilling the obligation to take measures to both prohibit and prevent the proliferation of biological weapons.

## **VI. Beyond National Jurisdiction**

25. Finally, we should address the issue of jurisdiction explicitly referred to in Article IV 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 a 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. However, in extending the responsibility of States Parties beyond their territory, Article IV 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". Notwithstanding the lack of international consensus on extraterritorial legislation, an increasing number of States Parties follow the interpretation that Article IV provides a basis for extraterritorial legislation.

26. Taking into account the 1540 database documents, pertinent provisions of criminal law are included in national legislation relating to Article I prohibitions, penal codes and national export control legislation. They rely upon both the territoriality principle and the active personality principle – which means that nationals of a State abroad are subject to criminal sanctions should they violate pertinent domestic provisions of that State.

## **VII. Conclusions: The Need for Coherence: Horizontal and Vertical**

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

28. Firstly, national implementing legislation is obligatory, but flexible in format.

29. Secondly, administrative enforcement must be effective, but can be set up according to each States Parties' individual legal system.

30. Thirdly, national implementation legislation of the BTWC necessitates the inclusion of penal sanctions.

31. Fourthly, the formula “jurisdiction ... (and) control” does not only permit extraterritorial application of implementing legislation but establishes an obligation to extend such implementing laws beyond the territory of a State Party, in particular in the light of terrorist and proliferation threats.

32. An additional 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 with respect to the broad range of topics concerned. While a single implementing statute might not necessarily be useful, a catalogue of already implemented and proven practices by States Parties could be worked out on the basis of existing national legislation available from the 1540 database and other source documents. This catalogue could serve as a useful tool for all States Parties. States which need to develop their laws, regulations and measures to implement the obligations under the BTWC would find it a useful source document and States Parties which have already implemented national legislation can use it to check if gaps exist and as a guideline to fill possible lacunae. The European Union proposes that States Parties develop and keep up to date such a catalogue as part of the intersessional BTWC process from 2007 to 2010.

33. As mentioned, national implementation of all BTWC obligations touches on a broad range of topics. Some States Parties might have considered in the past that they do not need to enact specific BTWC implementation legislation since they do not have - or they believe that they do not have - relevant materials within their territory. But, in as much as the BTWC contains binding obligations, all BTWC States Parties must enact and enforce appropriate national legislative measures. Although some States Parties may not possess relevant materials, their territories may be used as a safe haven by non-State actors and become a part of proliferation pathways. This does not mean that at any given time all States Parties will have the same degree of national implementation requirements. However, each State Party should develop a national action plan, to identify its gaps and to enact and implement adequate laws, regulations and measures that cover its obligations under the BTWC.

34. States Parties that are in a situation to assist other States in developing such national action plans should offer and provide assistance, if invited to do so. In this respect reference is also made to the European Union Council Joint Action of 27 February 2006 in support of the Biological and Toxin Weapons Convention, in the framework of the EU Strategy against the Proliferation of Weapons of Mass Destruction, that aims *inter alia* at “assistance to States Parties for the national implementation of the BTWC, in order to ensure that States Parties transpose the international obligations of the BTWC into their national legislation and administrative measures”. A catalogue of already implemented and proven practices by States Parties worked out on the basis of existing national legislation would facilitate any assistance activity on both the provider and recipient side.