

NOTES AND COMMENTS

A Model Law: The Biological and Toxin Weapons Crimes Act

An Act to implement obligations under the 1972 Biological and Toxin Weapons Convention and the 1925 Geneva Protocol

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Introduction

This year marks the 80th anniversary of the 1925 Geneva Protocol¹ and the 30th anniversary of the entry into force in 1975 of the 1972 Biological and Toxin Weapons Convention.² These instruments are relatively widely accepted: 133 States are party to the Protocol and 155 to the Convention. It was thus felt opportune to draft the following model legislation, not only in light of the anniversaries but also in view of the fact that domestic implementation of the Convention has been relatively weak,³ and in response to a growing number of requests to the International Committee of the Red Cross (ICRC) by States Parties for assistance in fulfilling their obligations. Interest in the implementation of these instruments has further increased as a result of the adoption of United Nations Security Council Resolution 1540 in April 2004,⁴ which requires States to adopt certain legislation regarding non-State actors and biological, chemical and nuclear weapons and calls upon States to comply with their commitments under the 1972 Convention.

The ICRC had previously issued an appeal in September 2002 entitled “Biotechnology, Weapons and Humanity.” In particular, this appeal urged all political authorities to adopt stringent national legislation, where it does not yet exist, for implementation of the 1925 Protocol and the 1972 Convention.

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It also called on scientists and industry to assume a range of responsibilities for preventing the hostile use of biological agents.

The proposed model law below is intended for States with a common law legal tradition. Our experience has shown, however, that States with different legal traditions may also find some of the provisions relevant. There are many ways in which the obligations inherent in the above international agreements may be implemented, and this model law provides but one possible approach. Some States may also feel that they do not need all the elements it contains and may wish to choose those appropriate to their needs. Efforts have been made to base it on the current legislation of States party to the 1972 Convention. The model law does not formulate internal regulations, which States may wish to develop themselves and which are necessary to fulfil their obligations as outlined in the 1972 Convention. Separate administrative measures that arise from implementation of the 1972 Convention and Resolution 1540 are likewise not covered by it.

The provisions it contains are largely taken from existing legislation of the following countries: Australia, Canada, Mauritius, New Zealand, South Africa, St. Kitts and Nevis and the United Kingdom. These common law States have enacted national laws for implementation of the 1972 Convention and/or the 1925 Protocol. Legislation by civil law States was also consulted. These instruments are available at <www.icrc.org/ihl-nat> and at <www.vertic.org> (both last visited on 14 September 2005).

The main emphasis in this model law is placed on the prohibition, backed up by penal sanctions, of the weapons and acts defined in the 1972 Convention and the 1925 Protocol. Thus Part II spells out the criminal offence of violating the terms of Article I of the 1972 Convention, including acts committed by State agents. The definitions also encompass the terms of prohibition mentioned in the other two instruments cited above. In addition, Part II sets up an optional licensing scheme.

Part III of the model law provides for measures of domestic enforcement through the powers of inspectors. Some States may already have inspector systems in place, or alternatively may use the police or other law enforcement officials. Related provisions on search and seizure and on warrants are included, as are crimes of non-co-operation with State officials. Provision is also made for possible extra-territorial application of the law.

Part IV provides for an information collection system, which States have indicated is useful in obtaining information for reporting internally and to

- 1 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925.
- 2 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, opened for signature on 10 April 1972, and entered into force in 1975, (1976) UNTS Vol. 1015, p. 164 (No. 14860).
- 3 For example, fewer than 10 of the 53 Commonwealth countries had, at the time of writing, enacted specific legislation covering the obligations in the Convention, although 41 of them were party to it.
- 4 UN Doc. S/RES/1540 (28 April 2004).

other States party to the Convention and/or Protocol, and now to the Committee established under Resolution 1540.

Parts V and VI provide for regulation-making powers and contain the procedural elements normally found in similar common law legislation.

This model legislation has been drawn up jointly by the ICRC and the Verification Research, Training and Information Centre (VERTIC) based in London. Each has taken primary responsibility for elements of the law that fall within its mandate and expertise: criminalization of prohibited acts, in the case of the ICRC; and inspection, verification and reporting regimes, in the case of the Verification Research, Training and Information Centre. It is hoped that the model law will provide States with a tool enabling them to increase respect for and implementation of this area of international humanitarian law. As noted, it is merely the first step in assisting States to comply with their obligations under the 1972 Convention and the 1925 Protocol.

Both the ICRC and the Verification Research, Training and Information Centre encourage States to assess their current legislation and stand ready to assist them in developing appropriate domestic legislation.

The Biological and Toxin Weapons Crimes Act

A Model Law drafted by the International Committee of the Red Cross (ICRC)
and the Verification Research, Training and Information Centre (VERTIC)

Act No. *[INSERT ACT NUMBER AND YEAR]*

Arrangement of Sections

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An Act to prohibit the development, production, manufacture, possession, stockpiling, other acquisition or retention, importation, exportation, re-exportation, transportation, transit, trans-shipment, transfer or use of certain biological agents and toxins and of biological weapons, and to implement in [COUNTRY NAME] the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972 and the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare of 17 June 1925 (the texts of which are set out in Schedules 1 and 2 to this Act) as amended from time to time.

PART I – SHORT TITLE

1 Short title

This Act may be cited as the *Biological and Toxin Weapons Crimes Act* [INSERT YEAR OF ADOPTION]

PART II – IMPLEMENTATION OF THE CONVENTION

2 Interpretation

In this Act

‘Convention’ means the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction;

‘Minister’ means [INSERT MINISTER RESPONSIBLE];

‘Protocol’ means the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

Terms that are not defined in the Act are accorded their Convention meaning.

3 Purpose

The purpose of this Act is to fulfil *[COUNTRY NAME]*'s obligations under the Convention and the Protocol as amended from time to time.

4 Publication of amendment

The Minister shall, as soon as practicable after any amendment to the Convention is made pursuant to the relevant Articles in the Convention, cause a copy of the amendments to be published in the *[INSERT NAME OF OFFICIAL GAZETTE]*.

5 Act to bind the State

This Act is binding on *[COUNTRY NAME]*.

6 Prohibitions

No person shall develop, produce, manufacture, possess, stockpile, otherwise acquire or retain, import, export, re-export, transport, transit, trans-ship, transfer to any recipient directly or indirectly, or use

- (a) any microbial or other biological agent, or any toxin whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or
- (b) any weapon, equipment or means of delivery designed to use such an agent or toxin for hostile purposes or in armed conflict.

7 Assisting and attempting

No person shall aid, abet, encourage, assist, counsel, procure, incite or finance the commission of, or attempt or conspire to commit, an offence under Section 6.

8 Licensing

- (1) Except as authorized under regulation of this or any other Act, no person shall develop, produce, manufacture, possess, stockpile, otherwise acquire or retain, transport, transfer or use any microbial or other biological agent, any toxin or any related equipment identified in the regulations.
- (2) Except as authorised under *[INSERT NAME OF EXPORT CONTROL ACT]* or any other Act, no person shall import, export, transit, trans-ship or re-export a microbial or other biological agent or toxin identified in the regulations made under this Act.
- (3) No person shall aid, abet, encourage, assist, counsel, procure, incite or finance the commission of, or attempt or conspire to commit, an offence under this Section.

PART III – ENFORCEMENT

9 Responsible authority

Designation

- (1) The Minister may designate any person or class of persons to be the responsible authority for the purposes of this Act.

Representatives of responsible authority

- (2) The Minister may designate persons or classes of persons to act as representatives of the responsible authority.

10 Designation of inspectors

The Minister may designate persons or classes of persons as inspectors for the purpose of the enforcement of this Act, and set conditions applicable to the person's inspection activities, after consulting any other Minister who has powers in relation to inspections for biological agents or toxins.

11 Certificates

Certificates of designation

- (1) An inspector or a representative of the responsible authority shall be given a certificate of designation, which must state the privileges and immunities applicable to the person and, in the case of an inspector, any conditions applicable under Section 10.

Production on entry

- (2) An inspector or a representative of the responsible authority shall, on entering any place under this Act, produce the certificate of designation at the request of any individual in charge of that place.

12 Entry and inspection

- (1) Subject to Subsection (5), for the purpose of ensuring compliance with this Act, an inspector may enter and inspect, at any reasonable time, any place in which the inspector believes on reasonable grounds there is
 - (a) any microbial or other biological agent, or any toxin;
 - (b) any weapon, equipment or means of delivery designed to use such an agent or toxin; or
 - (c) any information relevant to the administration of this Act.

Powers of inspectors

- (2) An inspector carrying out an inspection may
- (a) require the attendance of and question any person who the inspector considers will be able to assist in the inspection;
 - (b) examine, take samples of, detain or remove any thing referred to in Subsection (1);
 - (c) require any person to produce for inspection, or to copy, any document that the inspector believes contains any information relevant to the administration of this Act; and
 - (d) require that any individual in charge of the place take any measures that the inspector considers appropriate.

Operation of computer and copying equipment

- (3) An inspector carrying out an inspection may
- (a) use or cause to be used any computer or data processing system to examine any data contained in or available to the computer or system;
 - (b) reproduce or cause to be reproduced any record from the data, in the form of a printout or other intelligible output, and remove the printout or other output for examination or copying; and
 - (c) use or cause to be used any equipment at the place to make copies of any data or any record, book of account or other document.

Inspector may be accompanied

- (4) An inspector carrying out an inspection may be accompanied by any other person chosen by the inspector.

Warrant to enter dwelling-house

- (5) An inspector may not enter a dwelling-house except with the consent of the occupant or under the authority of a warrant issued under Subsection (6).

Authority to issue warrant

- (6) If on *ex parte* application a justice of the peace is satisfied by information on oath that
- (a) the conditions for entry described in Subsection (1) exist in relation to a dwelling-house,
 - (b) entry into the dwelling-house is necessary for any purpose relating to the administration of this Act or the regulations, and
 - (c) entry into the dwelling-house has been refused or there are reasonable grounds to believe that entry will be refused,

the justice may issue a warrant authorizing the inspector named in the warrant to enter the dwelling-house, subject to any conditions that may be specified in the warrant.

Use of force

- (7) The inspector may not use force to execute the warrant unless its use is specifically authorized in the warrant.

13 Search and seizure

Where warrant not necessary

- (1) An inspector may exercise without a warrant any of the powers conferred by virtue of this Act if the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practical to obtain a warrant.

Notice of reason for seizure

- (2) An inspector who seizes and detains anything shall, as soon as practicable, advise its owner or the person having the possession, care or control of it at the time of its seizure of the reason for the seizure.

14 Obstruction and false statements

- (1) No person shall obstruct or hinder, or knowingly make any false or misleading statement either orally or in writing to, an inspector or a representative of the responsible authority engaged in carrying out duties under this Act.

Assistance to inspectors

- (2) The owner or person in charge of a place entered under Section 12 and every person present in that place shall give an inspector all reasonable assistance to enable the inspector to perform his or her duties, and shall furnish the inspector with any information related to the administration of this Act that the inspector reasonably requests.

Interference

- (3) Except with the authority of an inspector, no person shall remove, alter or interfere in any way with any thing seized under this Act.

15 Directions requiring security measures

- (1) An inspector may give directions to the occupier of any relevant premises requiring him to take such measures to ensure the security of any dangerous substance kept or used there as are specified or described in the directions by a time so specified.
- (2) The directions may
 - (a) specify or describe the substances in relation to the security of which the measures relate; and

- (b) require the occupier to give a notice to the chief officer of police before any other dangerous substance specified or described in the directions is kept or used in the premises.

16 Directions requiring disposal of dangerous substances

- (1) Where the Minister has reasonable grounds for believing that adequate measures to ensure the security of any dangerous substance kept or used in any relevant premises are not being taken and are unlikely to be taken, he may give a direction to the occupier of the premises requiring him to dispose of the substance.
- (2) The direction must
 - (a) specify the manner in which, and time by which, the dangerous substance must be disposed of; or
 - (b) require the occupier to produce the dangerous substance to a person specified or described in the notice in a manner and by a time so specified for him to dispose of.

17 Punishment

- (1) Every person who contravenes Section 6 or 7 is guilty of an offence and liable upon conviction to
 - (a) In the case of an individual, imprisonment for a term not exceeding [] years or to a fine not exceeding [] or both;
 - (b) In the case of a body corporate, a fine not exceeding [].
- (2) Where an offence under Subsection (1) which is committed by a body corporate is proved to have been committed with the consent and connivance or, or to be attributable to any negligence on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished in accordance with Subsection (1)(a).
- (3) Every person who contravenes Sections 8, 14, 16, or 20, Subsection 21(2) or Section 22 or any provision of the regulations is guilty of an offence and liable on conviction to
 - (a) In the case of an individual, imprisonment for a term not exceeding [] years or to a fine no exceeding [] or both;
 - (b) In the case of a body corporate, a fine not exceeding [].
- (4) Where an offence under Subsection (3) which is committed by a body corporate is proved to have been committed with the consent and connivance or, or to be attributable to any negligence on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who

was purporting to act in such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished in accordance with Subsection (3)(a).

18 Extra-territorial application

- (1) A person who is alleged to have committed an offence under Sections 6, 7, 8, 14, 16, 20, Subsection 21(2) and Section 22 outside the territory of [COUNTRY NAME], may be prosecuted for that offence if
- (a) at the time the offence is alleged to have been committed,
 - (i) the person was a citizen of [COUNTRY NAME] or was employed in a civilian or military capacity, or
 - (ii) the person was a citizen of a State that engaged in an armed conflict against [COUNTRY NAME], or was employed in a civilian or military capacity by such a State, or
 - (iii) the victim of the alleged offence was a citizen of [COUNTRY NAME], or
 - (iv) the victim of the alleged offence was a citizen of a State that was allied with [COUNTRY NAME] in an armed conflict, or
 - (v) the person is a stateless person whose habitual residence is in [COUNTRY NAME], or
 - (b) after the time of the offence is alleged to have been committed, the person is present in [COUNTRY NAME].
- (2) ‘Person’ in Subsection 1 includes bodies corporate and partnerships registered under the laws of [COUNTRY NAME].

19 Continuing offence

Where an offence under this Act is committed or continued on more than one day, the person who committed the offence is liable to be convicted for a separate offence for each day on which the offence is committed or continued.

PART IV – INFORMATION AND DOCUMENTS

20 Information and documents

Every person who develops, produces, manufactures, possesses, stockpiles, otherwise acquires or retains, transports, transfers, uses, exports or imports any microbial or other biological agent, any toxin or any related equipment identified in the regulations shall

- (a) provide such information, at such times and in such form, as may be specified by the regulations, to the responsible authority or to any other authority specified by regulations; and
- (b) keep and maintain the documents specified by the regulations, at the person’s place of business or at such other place as may be designated by

the Minister, in the manner and for the period that is specified by the regulations and, on request by the Minister or the responsible authority, provide the documents to the responsible authority or to any other authority designated by regulations.

21 Notice for disclosure of information

- (1) The Minister may send a notice to any person who the Minister believes on reasonable grounds has information or documents relevant to the enforcement of this Act, requesting the person to provide the information or documents to the Minister.

Compliance with notice

- (2) A person who receives a notice referred to in Subsection (1) shall provide the requested information and documents that are under the person's care or control to the Minister in the form and within the time specified in the notice.

22 Confidential information

No person who obtains information or documents pursuant to this Act or the Convention from a person who consistently treated them in a confidential manner shall knowingly, without the written consent of that person, communicate them or allow them to be communicated to any person, or allow any person to have access to them, except

- (a) for the purpose of the enforcement or application of this Act or any other Act;
- (b) pursuant to an obligation of [COUNTRY NAME] under the Convention; or
- (c) to the extent that they are required to be disclosed or communicated in the interest of public safety.

23 Evidence of analyst

- (1) The Minister may appoint a person to be an analyst for the purposes of this Act.
- (2) Subject to Subsection (4), a certificate signed by an analyst appointed under Subsection (1) setting out, in relation to a substance, one or more of the following
 - (a) when and from whom the substance was received;
 - (b) what labels or other means of identifying the substance accompanied it when it was received;
 - (c) what container the substance was in when it was received;
 - (d) a description of the substance received;

- (e) that he or she has analysed or examined the substance;
- (f) the date on which the analysis or examination was carried out;
- (g) the method used in conducting the analysis or examination;
- (h) the results of the analysis or examination;

is admissible in any proceedings for an offence referred to in Sections 6, 7, 8, 14, 16, 20, Subsection 21(2) and Section 22 as evidence of the matters in the certificate and the correctness of the results of the analysis or examination.

- (3) For the purposes of this Section, a document purporting to be a certificate referred to in Subsection (2) shall, unless the contrary is established, be deemed to be such a certificate and to have been duly given.
- (4) A certificate shall not be received in evidence in pursuance of Subsection (2) in a proceeding for an offence unless the person charged with the offence has been given a copy of the certificate together with reasonable notice of the intention to produce the certificate as evidence in the proceeding.
- (5) Where, in pursuance of Subsection (2), a certificate of an analyst is admitted in evidence in a proceeding for an offence, the person charged with the offence may require the analyst to be called as a witness for the prosecution and the analyst may be cross-examined as if he had given evidence of the matters stated in the certificate.
- (6) Subsection (5) does not entitle a person to require an analyst to be called as a witness for the prosecution unless:
 - (a) the prosecutor has been given at least 5 days notice of the person's intention to require the analyst to be so called; or
 - (b) the Court, by order, allows the person to require the analyst to be so called.

PART V – REGULATIONS

24 Regulations

The Minister, and any other Minister who has powers in relation to biological agents or toxins, may make regulations

- (a) defining 'biological agent', 'microbial agent', 'toxin' and 'equipment' for the purposes of this Act;
- (b) respecting conditions under which activities referred to in Subsection 8(1) may be carried on, providing for the issue, suspension and cancellation of authorizations governing the carrying on of any such activity and prescribing the fees or the manner of calculating the fees to be paid in respect of any such authorizations;
- (c) identifying microbial or other biological agents, toxins and related equipment for the purposes of Subsections 8(1) or (2);

- (d) respecting the powers, privileges, immunities and obligations of representatives of the responsible authority who are designated under Subsection 9(2) and respecting the privileges and immunities of inspectors;
- (e) respecting the detention, storage, transfer, restoration, forfeiture and disposal - including destruction - of things removed by inspectors under this Act;
- (f) for the purposes of Section 20, identifying microbial or other biological agents and toxins and related equipment, and specifying anything that is to be specified by the regulations; and
- (g) generally for carrying out the purposes and provisions of the Convention and the Protocol.

PART VI – FINAL PROVISIONS

25 Commencement

This Act shall come into effect on *[INSERT DATE]*.

26 Saving and transitional arrangements

SCHEDULE 1

Text of Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972.

SCHEDULE 2

Text of Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925.