

ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS



OPCW

Johan de Wittlaan 32

2517 BR, The Hague

The Netherlands

Telephone + 31 (0)70 416 33 00

Fax + 31 (0)70 306 35 35

[www.opcw.org](http://www.opcw.org)

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Dear Mr de Serpa Soares,

I refer to your letter dated 23 January 2014, in which you invited the Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons (“OPCW”) to contribute to the Secretary-General’s report on the principle of universal jurisdiction to be prepared pursuant to General Assembly resolution 68/117 of 16 December 2013.

Paragraph 3 of the said resolution invites “relevant observers, as appropriate, to submit, before 30 April 2014, information and observations on the scope and application of universal jurisdiction, including, where appropriate, information on relevant applicable international treaties, their national legal rules and judicial practice”.

In response to this request, I am pleased to inform you that, the number of States Parties having adopted implementing legislation to criminalise activities prohibited under the Chemical Weapons Convention has increased from 132 to 136, and the number of States Parties having included an extraterritorial provision in their legislation has increased from 115 to 121. These figures show a marked improvement from the observations made by our Office in April 2011 (L/LAO/166208/11) and February 2012 (L/LAO/173358/12). Consequently, paragraphs 6 and 7 of the report submitted by our Office in 2011, and enclosed herewith, should be amended as follows:

*6. [...] As of 15 April 2014, 136 States Parties to the CWC (72%) had informed the OPCW of the adoption of implementing legislation criminalising activities prohibited under the CWC.*

*7. In addition, the OPCW notes that, in response to the extraterritoriality requirement contained under subparagraph 1(c) of Article VII of the CWC, 121 States Parties to the CWC (64%) have informed the OPCW that they have extended their penal legislation to implement the prohibitions of the Convention to any activity undertaken anywhere by natural persons possessing their nationality.*

On behalf of the OPCW, I wish to express our gratitude for inviting again the Technical Secretariat of the OPCW to contribute to the report. Please do not hesitate to contact me if the OPCW can be of any further assistance to these discussions.

Yours sincerely,

Olufemi Elias  
Legal Adviser

## Attachment

1. Noting the mandate of the Organisation for the Prohibition of Chemical Weapons ("OPCW"), this analysis is limited to examining the prohibition of the use of chemical weapons and the possible exercise of universal jurisdiction for acts in violation of this prohibition.
2. The OPCW was established to achieve the object and purpose of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ("Chemical Weapons Convention", "Convention" or "CWC")<sup>1</sup> and to ensure the implementation of its provisions. It is not within the mandate of the OPCW to directly undertake prosecutions of individuals relating to a violation of an obligation under the CWC. Prosecutions in this regard are to be undertaken in national courts. Thus, these comments are limited to the possible exercise of universal jurisdiction by national courts in the case of an alleged breach of a prohibition set forth by the Convention.

### The Chemical Weapons Convention and its national implementation

3. Article I of the Chemical Weapons Convention establishes a prohibition on each State Party, never under any circumstances, "to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone" and "to use chemical weapons".
4. In the context of national implementation, States Parties are provided with some flexibility as to how to fulfil their obligations under the Convention. This flexibility comes directly from Article VII of the CWC, as it requires each State Party, "in accordance with its constitutional processes" to "adopt the necessary measures to implement its obligations" under the Convention.<sup>2</sup>
5. In particular, Article VII(1) of the Convention requires each State Party to prohibit to natural and legal persons anywhere on its territory any activity prohibited under the CWC. Moreover, Article VII(1)(c) requires States Parties to extend the penal provisions adopted to implement the CWC to any activity prohibited to a State Party under the Convention undertaken anywhere by their nationals, in conformity with international law. The Convention, however, does not require, nor prohibit, States Parties from going further and establishing universal jurisdiction over activities prohibited under the CWC that may also constitute universal crimes, e.g. the use of chemical weapons.
6. While the national implementation measures adopted by the States Parties to the CWC depend on each State Party's legal system, policy and practice, the OPCW observes that there is an increasing number of States Parties that have adopted measures that enable them to prosecute activities related to the use of chemical weapons in their territory or in any other place under their

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<sup>1</sup> The Convention was adopted by the Conference on Disarmament on 3 September 1992. Opened for signature on 13 January 1993, it entered into force on 29 April 1997.

<sup>2</sup> Paragraph 1 of Article VII of the CWC.

jurisdiction or control. As of 1 April 2011, 132 (70%) of the States Parties had informed the OPCW of the adoption of implementing legislation criminalising activities prohibited under the CWC.

7. In addition, the OPCW notes that, in response to the extraterritoriality requirement contained under subparagraph 1(c) of Article VII of the Convention, 114 States Parties (61%) have informed the OPCW that they have extended their penal legislation to implement the prohibitions of the Convention to any activity undertaken anywhere by natural persons possessing their nationality.
8. The OPCW observes that the majority of States Parties have tended not to address the issue of universal jurisdiction in their CWC implementing legislation, limiting the scope of their measures to the explicit requirements prescribed under the Convention. To the knowledge of the OPCW a limited number of States Parties,<sup>3</sup> on the basis of the concept of state sovereignty, have gone beyond what is required by the CWC and have provided for the exercise of universal jurisdiction by their national courts for crimes related to the CWC.
9. Despite the fact that implementing legislation of States Parties to the CWC does not, as a general tendency, provide for the exercise of universal jurisdiction, States may have adopted other pieces of legislation, in accordance with general principles of international law or in response to other international conventions, allowing for the exercise of universal jurisdiction, under which CWC-related crimes may be prosecuted. In this respect, the use of chemical weapons could, thus, constitute the material element of a crime prosecuted in a national court, if any other conditions established in the legislation are met.
10. The only international crimes by individuals explicitly related to chemical weapons which have been codified by the international community are the war crimes of the use of poison or poisoned weapons<sup>4</sup> and the use of asphyxiating, poisonous or other gases<sup>5</sup> in both international and non-international armed conflicts. Nonetheless, the OPCW is of the view that there is a comprehensive and universal prohibition on the use of chemical weapons in both customary and conventional international law.<sup>6</sup>

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<sup>3</sup>Sweden, for instance, has taken this a step further, by providing in Chapter 2, Section 3 of the amended Criminal Code that, "A crime against the Convention will be sentenced by Swedish law and at a Swedish court even if the crime is committed abroad and irrespective of the perpetrator's nationality," thus raising this offence to the level of an international crime of universal jurisdiction. See C-III/DG.1/Rev.1, dated 17 November 1998. Other States, including Belgium, Finland, Indonesia, Liberia, and Switzerland have taken the same approach.

<sup>4</sup>Rome Statute of the International Criminal Court ("ICC Statute"), Article 8(2)(b)(xvii) and Article 8(2)(e)(xiii).

<sup>5</sup>ICC Statute, Article 8(2)(b)(xviii) and Article 8(2)(e)(xiv).

<sup>6</sup>A series of treaties prohibited the use of chemical weapons in international armed conflicts. Among them: The Hague Declaration concerning Asphyxiating Gases (1899); the Geneva Gas Protocol (1925); Chemical Weapons Convention, Article I (1993); ICC Statute, Article 8(2)(b)(xviii) and Article 8(2)(e)(xiv) (1998 as amended in 2010). With respect to non-international armed conflicts see other instruments such as: the Mendoza Declaration on Chemical and Biological Weapons (1991); the

11. According to customary international humanitarian law the use of these weapons is prohibited to all parties to an armed conflict, whether of an international or non-international character. The prohibition of the use of chemical weapons is also reflected in the legislation of many States, in numerous declarations and practice by States, in international<sup>7</sup> and national case-law<sup>8</sup> and in numerous military manuals. Moreover, the United Nations ("UN") Security Council has consistently condemned the use of chemical weapons by States<sup>9</sup> and, more recently, UN Security Council resolution 1540 (2004) reaffirmed that the proliferation of chemical weapons constitutes a threat to international peace and security. In addition, States regularly declare that chemical weapons must never be used and must be destroyed.

#### National prosecutions for the use of chemical weapons

12. The OPCW has not found any example of States exercising universal jurisdiction to prosecute individuals for the use of chemical weapons on the basis of their CWC implementing legislation. There are instances, however, where the use of chemical weapons or related offences have been prosecuted as international crimes, and there is at least one instance in which a national court has considered the use of chemical weapons as constituting an international crime in the exercise of its universal jurisdiction.
13. At least two national courts, namely the Supreme Court of the Netherlands and the Iraqi High Tribunal, have examined the use of chemical weapons as constituting war crimes, crimes against humanity and genocide in the *Van Anraat case*<sup>10</sup> and the *Anfal case*,<sup>11</sup> respectively. In the *Van Anraat case*,

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Cartagena Declaration on Weapons of Mass Destruction (1991); Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, Part IV, Article 4(4) (1998).

<sup>7</sup> *Prosecutor v. Dusko Tadić*, Case No. IT-94 I AR72, 2 October 1995 (ICTY Appeals Chamber). The ICTY held in paragraph 124 that "there undisputedly emerged a general consensus in the international community on the principle that the use of [chemical] weapons is also prohibited in internal armed conflicts".

<sup>8</sup> See, e.g., Colombia, Constitutional Court, *Constitutional Case No. C-225/95*; Japan, District Court of Tokyo, *Shimoda case*.

<sup>9</sup> See UN Security Council resolution 582 (1986), resolution 598 (1987), resolution 612 (1988) and resolution 620 (1988) in the context of the Iran-Iraq War.

<sup>10</sup> In a judgment rendered on 23 December 2005, the District Court of The Hague convicted Mr Frans van Anraat for aiding and abetting violations of the laws and customs of war. The Court, however, acquitted the applicant of the first primary charge, aiding and abetting genocide, finding that genocidal intent on his part could not be proved. The District Court sentenced him to fifteen years in prison. Both the Court of Appeals of The Hague on 9 May 2007 and the Supreme Court of the Netherlands on 30 June 2009 upheld the conviction. The judgments are available at: <http://www.haguejusticeportal.net/eCache/DEF/6/411.html>

<sup>11</sup> Saddam Hussein, his cousin Ali Hassan al-Majid, and five other co-Defendants were referred to trial to the Iraqi High Tribunal based on their alleged roles in planning, authorizing and executing the 1988 Anfal campaign, a series of large-scale attacks against the Kurdish population of northern Iraq. The Iraqi High Tribunal is an internationalised national court, exercising jurisdiction over Iraqi nationals or residents for specific crimes, namely, genocide, crimes against humanity, war crimes, and under certain circumstances, violations of other Iraqi laws. See Article 11 of the Statute of the Iraqi Special Tribunal issued 10 December 2003 by the Coalition Provisional Authority of Iraq and promulgated, as amended as Law No. 10 (2005). For reference see: <http://www.rial-ihc.org/en/activities/informing-the-public/international-justice-map/international-justice-map/archives/june-2009.htm#06>;

charges of aiding and abetting genocide and aiding and abetting violations of the laws and customs of war were brought against the defendant, who was determined to have knowingly and intentionally supplied chemicals which were used by the former Iraqi regime to produce chemical weapons against Iran and the Kurdish population. In the *Anfal case*, the Iraqi High Tribunal formally indicted six defendants with genocide, crimes against humanity, and war crimes for their alleged roles in planning, authorizing and executing the 1988 Anfal campaign, a series of large-scale attacks against the Kurdish population of northern Iraq which involved the use of chemical weapons. All these cases, however, concerned prosecution in courts of nationals of the States exercising jurisdiction.

14. The OPCW notes that one further State, namely Denmark, relying directly on the principle of universal jurisdiction, brought charges against a foreign national, *General Nizar Khazraji*, who was allegedly involved in the use of chemical weapons against Iranian troops and the Kurdish population. The case was not prosecuted on the basis of a violation of the CWC but, rather, as a war crime in violation of the 1949 Geneva Conventions and various human rights abuses.<sup>12</sup>
15. It is observed that, whereas in the *Van Anraat case* and the *Anfal case* there was no assertion of exercise of universal jurisdiction by the courts of the Netherlands and Iraq as the crimes in question were committed by nationals, in the charges brought against *General Nizar al-Khazraji* by the Danish authorities, the principle of universal jurisdiction was the basis for prosecution. It is submitted, however, that the characterisation of the use of chemical weapons as war crimes, crimes against humanity or genocide, could provide a basis for the exercise of universal jurisdiction for the prosecution of the use of chemical weapons by national courts in those States that recognize the exercise of universal jurisdiction over the most serious international offences.

### Conclusion

16. The prohibition of the use of chemical weapons contained under Article I of the Chemical Weapons Convention exists as a principle of customary international law and, thus, is applicable to all States, even to those that have not become a party to the Convention.

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<http://jurl.law.pitt.edu/paperchase/2008/03/iraq-pm-says-no-chemical-ali-execution.php>; "Chemical Ali" Sentenced to Death Again, Global Security Newswire, Tuesday, 19 January 2010 ([http://www.globalsecuritynewswire.org/gsn/nw\\_20100119\\_6240.php](http://www.globalsecuritynewswire.org/gsn/nw_20100119_6240.php)).

<sup>12</sup> The trial in this case was, however, never completed. Although General Nizar al-Khazraji, was placed under house arrest, in 2003 he escaped from Denmark. Subsequently, the Danish authorities issued both national and international arrest warrants and indicated their willingness to request an extradition in the event the accused is found abroad. See: REDRESS and FIDH, *Universal Jurisdiction in the European Union. Country Studies*, available at <http://www.redress.org/downloads/conferences/conmrv%20studies.pdf>, visited on 4 April 2011. Also see Richard Beeston, "War crimes arrest blow to Iraqi opposition", The Times (London), 20 November 2002.

17. The Chemical Weapons Convention does not explicitly require States Parties to prosecute the activities prohibited under the Convention on the basis of universal jurisdiction. It only requires States Parties to enact legislation to enable them to prosecute such prohibited activities when these are committed anywhere by their nationals or within their territorial jurisdiction.
18. States Parties are not prevented from going beyond the requirements of the Convention and providing in their legislation for universal jurisdiction as a basis for prosecuting activities prohibited under the Convention. However, only a limited number of States Parties have made the commission of CWC prohibited activities, such as the use of chemical weapons, crimes of universal jurisdiction in their CWC implementing legislation.
19. While the use of chemical weapons has not been prosecuted by national courts on the basis of universal jurisdiction, its characterisation as the material element of war crimes, crimes against humanity or genocide, could provide a basis for the exercise of universal jurisdiction in those States that recognize this principle as a basis for prosecution of international crimes.

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