



OPCW

Organisation for the Prohibition of Chemical Weapons

The Hague, 30 April 2024

L/LA0-225/24

LA0/2024/2

Dear Mr de Serpa Soares,

I refer to your letter dated 27 December 2023, in which you invited the Technical Secretariat ("Secretariat") of the Organisation for the Prohibition of Chemical Weapons ("OPCW") to contribute to the Secretary-General's report on the scope and application of the principle of universal jurisdiction to be prepared pursuant to General Assembly resolution 78/113 of 7 December 2023.

Paragraph 4 of the said resolution invites "[...] relevant observers to the General Assembly, as appropriate, to submit, before 26 April 2024, information and observations on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties and their national legal rules and judicial practice [...]".

In response to this request, I am pleased to inform you that the number of States Parties that have informed the OPCW of the adoption of implementing legislation fully criminalising activities pertaining to chemical weapons prohibited under the Chemical Weapons Convention ("CWC") currently stands at 150, and that there are now 131 States Parties that have reported the inclusion of a provision on the extraterritorial application of their legislation with respect to their nationals (please see the attachment).

On behalf of the OPCW, I wish to express our gratitude for inviting again the 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.

[Signed]
Johan Rautenbach
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 to develop, produce, acquire, stockpile or retain, transfer, or use 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")¹ and to ensure the implementation of its provisions. The present comments pertain 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.
3. Article 1 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.²
5. In particular, Article VII(1) of the Convention requires each State Party to prohibit natural and legal persons from undelinking any activity prohibited under the **ewe** anywhere on its territory or in any other place under its jurisdiction as recognised by international law. 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.
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 persons involved in the use of chemical weapons on their territory or in any other place under their jurisdiction or control. As of 4 April 2024, 150 (78%) of the States Parties had informed the OPCW of the adoption of implementing legislation fully criminalising activities relating to chemical weapons prohibited under the **ewe**.

¹ 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.

² Paragraph 1 of Article VII of 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, 131 States Parties (68%) 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 use of chemical weapons constitutes a war crime-in both international and non-international armed conflicts-specifically the use of poison or poisoned weapons³ and the use of asphyxiating, poisonous or other gases.⁴ Moreover, there is a comprehensive and universal prohibition of the use of chemical weapons in both customary and conventional international law.⁵
9. According to customary international humanitarian law, the use of chemical weapons is prohibited for 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 international⁶ and national case-law⁷ and in numerous military manuals. To date, a number of criminal complaints related to the use of chemical weapons have been filed before the domestic courts of countries exercising universal jurisdiction.⁸ Moreover, the various organs of the United Nations ("UN"), such as the UN Security Council, the UN General Assembly, and the UN Human Rights Council have consistently condemned the use of chemical weapons by States;⁹ affirmed that the use of

³ Rome Statute of the International Criminal Court ("ICC Statute"), Article 8(2)(b)(xvii) and Article 8(2)(e)(xiii).

⁴ ICC Statute, Article 8(2)(b)(xviii) and Article 8(2)(e)(xiv).

⁵ A series of treaties prohibit the use of chemical weapons in international armed conflicts. Among them: The Hague Declaration concerning Asphyxiating Gases (1899); the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925); Chemical Weapons Convention, Article I (1992); ICC Statute, Article 8(2)(b)(xvii) 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); Cartagena Declaration on Weapons of Mass Destruction (1991); Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, Part IV, Article 4(4) (1998).

⁶ United Nations International Criminal Tribunal for the former Yugoslavia ("ICTY"), *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (ICTY Appeals Chambers). 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".

⁷ The Netherlands, District Court in The Hague, *Van Anraat*, 09/751003-04, 23 December 2005.

⁸ The OPCW notes that, pursuant to operative paragraph 4 of General Assembly resolution 78/113 of 7 December 2023, UN Member States have been invited to report on the scope and application of universal jurisdiction. The OPCW defers to the submissions of UN Member States exercising universal jurisdiction, pursuant to the said resolution, for more detailed information relating to criminal complaints on the use of chemical weapons filed before domestic courts.

⁹ 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, resolution 2118 (2013) and resolution 2235 (2015) in the context of the conflict in the Syrian Arab Republic; UN General Assembly resolution 72/191 (2017), resolution 73/182 (2018), resolution 74/169 (2019), resolution 75/193 (2020), resolution 76/228 (2021), resolution 77/230 (2022), and resolution 78/222 (2023) in the context of the conflict in the Syrian Arab Republic; UN Human Rights Council resolution 39/15 (2018), resolution 40/17 (2019), resolution 49/27 (2020), resolution 43/28 (2020), resolution 51/26 (2022), and resolution 52/30 (2023) in the context of the conflict in the Syrian Arab Republic.

chemical weapons constitutes a serious violation of international law; and repeatedly stressed that those individuals responsible for any use of chemical weapons must be held accountable.¹⁰ The UN Security Council has further determined that the proliferation or use of chemical weapons constitutes a threat to international peace and security.¹¹

¹⁰ See UN Security Council resolution 2118 (2013), resolution 2209 (2015), resolution 2235 (2015); UN General Assembly resolution 72/191 (2017), resolution 73/182 (2018), resolution 74/169 (2019), resolution 75/193 (2020), resolution 76/228 (2021), resolution 77/230 (2022) and resolution 78/29 (2023); UN Human Rights Council resolution 39/15 (2018), resolution 40/17 (2019), resolution 43/28 (2020), resolution 46/22 (2021) and resolution 51/26 (2022).

¹¹ See UN Security Council resolution 1540 (2004) and resolution 2118 (2013).