

ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS



OPCW

Johan de Wittlaan 32  
2517 JR 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 18 December 2020, 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 scope and application of the principle of universal jurisdiction to be prepared pursuant to General Assembly resolution 75/142 of 15 December 2020.

Paragraph 3 of the said resolution invites “[...] relevant observers, as appropriate, to submit, before 30 April 2021, 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 having adopted implementing legislation to criminalise activities pertaining to chemical weapons prohibited under the Chemical Weapons Convention (“CWC”) currently stands at 145 and that there are now 124 States Parties that have included a provision on the extraterritorial application of their legislation (please see the attachment).

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,

Grant Dawson  
Acting Legal Adviser

Mr Miguel de Serpa Soares  
Under-Secretary-General for Legal Affairs  
and United Nations Legal Counsel  
United Nations Headquarters  
New York, NY 10017  
United States of America

### 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”)<sup>1</sup> 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.<sup>2</sup>
5. In particular, Article VII(1) of the Convention requires each State Party to prohibit natural and legal persons from undertaking any activity prohibited under the CWC 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 1 April 2021, 145 (75%) of the States Parties had informed the OPCW of the adoption of implementing legislation

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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.

criminalising activities relating to chemical weapons 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, 124 States Parties (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.
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 weapons<sup>3</sup> and the use of asphyxiating, poisonous or other gases.<sup>4</sup> Moreover, there is a comprehensive and universal prohibition of the use of chemical weapons in both customary and conventional international law.<sup>5</sup>
9. According to customary international humanitarian law, the use of chemical 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>6</sup> and national case-law<sup>7</sup> and in numerous military manuals. Moreover, the United Nations (“UN”) Security Council has consistently condemned the use of chemical weapons by States<sup>8</sup> and determined that the proliferation or use of chemical weapons constitutes a threat to international peace and security.<sup>9</sup> The UN Security Council has further affirmed that the use of 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.<sup>10</sup> States regularly declare that chemical weapons must

<sup>3</sup> Rome Statute of the International Criminal Court (“ICC Statute”), Article 8(2)(b)(xvii) and Article 8(2)(e)(xiii).

<sup>4</sup> ICC Statute, Article 8(2)(b)(xviii) and Article 8(2)(e)(xiv).

<sup>5</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 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>6</sup> United Nations International Criminal Tribunal for the former Yugoslavia (“ICTY”), *Prosecutor v. Duško Tadić*, 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”.

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

<sup>8</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. See also resolution 2118 (2013) and 2235 (2015) in the context of the conflict in the Syrian Arab Republic.

<sup>9</sup> UN Security Council resolution 1540 (2004), resolution 2118 (2013).

<sup>10</sup> UN Security Council resolution 2118 (2013), resolution 2235 (2015).

never be used and must be destroyed pursuant to Article IV of the Convention.

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