



Practice Note



The Privileges and Immunities of the Organization for the Prohibition of Chemical Weapons

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Abstract

This practice note describes the privileges and immunities legal framework of the Organization for the Prohibition of Chemical Weapons. This legal regime shows a certain complexity derived for the peculiar character of a disarmament and verification institution, whose intrusiveness poses many challenges to States Parties, particularly on the privileges and immunities of inspection teams and the protection of confidential information. The OPCW managed to protect its privileges and immunities adequately, without almost no legal conflicts both at the domestic and international level. The disputes settlement mechanisms play an important role in providing ways to avoid legal controversies.

Keywords

privileges and immunities – international organizations – OPCW – settlement of disputes – verification – inspection – international law – United Nations

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1 The Chemical Weapons Convention

A Introduction

Chemicals have been used as an instrument of warfare since ancient times, in different forms and for a variety of purposes. Although some political and religious prohibitions on the use of certain chemical weapons have been in existence throughout mankind's history,¹ it was not until the end of World War I, when chemical weapons were being produced on an industrial scale and widely used, that a legal instrument forbidding their use was adopted: the *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and the Bacteriological Methods of Warfare*, which was signed in Geneva on 17 June 1925. The use of chemical weapons was prohibited by the Protocol, but their development, production and stockpiling were not illegal. Several States Parties made reservations on their right to retaliate with such weapons if attacked first with them.²

After World War II, chemical weapons were used on several occasions in different countries.³ Although concern about the inhuman consequences of these weapons was growing in world public opinion, and several attempts to ban them completely were proposed at the United Nations, concrete negotiations on a comprehensive treaty started only in 1982⁴ at the Conference of Disarmament in Geneva.⁵

B Negotiation and Adoption of the Convention

Negotiations at the Conference continued until 3 September 1992, when the text of the draft *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction* ('CWC') was adopted by the Conference on Disarmament and transmitted in its Report to the UN General Assembly.⁶ The text of the Convention was commended by the

1 Julian Perry Robinson, "The Negotiations on the Chemical Weapons Convention: A Historical Overview" in M. Bothe, N. Ronzitti and A. Rosas (eds.), *The New Chemical Weapons Convention: Implementation and Prospects* (Kluwer Law International, 1998).

2 France is the Depositary of this Protocol. Reservations may be consulted via the website of *France Diplomatie*, available at: <<http://basedoc.diplomatie.gouv.fr/>>.

3 See Robinson, *supra* note 1, p. 33.

4 On 9 December 1981, the UN General Assembly adopted Resolution 36/96 A, which requested the Committee on Disarmament to re-establish its Ad-Hoc Working Group on Chemical Weapons "with an appropriately revised mandate enabling the Committee to achieve agreement on a chemical weapons convention at the earliest date" (in operative paragraph 3).

5 The Committee on Disarmament has been known as the 'Conference on Disarmament' since its 1984 annual session.

6 Conference on Disarmament, *Report of the Conference on Disarmament*. (23 September 1992) UN Doc. A/47/27, Supp. No. 27.

General Assembly in late 1992, with the request to the UN Secretary-General, as Depository of the Convention, that it be opened for signature in Paris on 13 January 1993.⁷ 130 States signed the Convention within the first two days. To prepare for the treaty's entry into force and the implementation of the verification regime, a Preparatory Commission was established in 1993.⁸

C *Entry into Force of the Convention*

Article XXI provided that the CWC would enter into force 180 days after the date on which the 65th instrument of ratification was deposited, but in no case earlier than two years after its opening for signature. On 31 October 1996, Hungary was the 65th country to ratify the Convention, thus, on 29 April 1997 the CWC entered into force. As at August 2015, 191 States were parties to the Convention. (Only five States still remain outside the Convention, preventing universality from being achieved: one signatory State has yet to ratify the Convention,⁹ and four States have neither signed nor acceded to the Convention.)¹⁰ Article XXI of the CWC also provides that for States whose instruments of ratification or accession that are deposited subsequent to the entry into force of the Convention, the Convention shall enter into force for such States on the 30th day following the date of deposit of their instrument of ratification or accession.

2 The CWC Provisions on Privileges and Immunities

A *Sources of the OPCW's Privileges and Immunities*

(a) The CWC Provisions

The basis of the Organization's privileges and immunities are contained in the provisions in the Convention.¹¹ Article VIII, Section E states that the OPCW enjoys on the territory and in any other place under the jurisdiction or control of a State Party such privileges and immunities as are necessary for the exercise

7 UN GA Resolution 47/39 (30 November 1992).

8 Resolution establishing the Preparatory Commission for the Organization for the Prohibition of Chemical Weapons, adopted in Paris during the Signing Ceremony of the CWC (13–15 January 1993), Legal Series PC-OPCW 1 (1994). The Resolution contains the privileges and immunities granted by the Netherlands and the City of The Hague to the Preparatory Commission (Annexes 1, 2 and 3). See Félix Calderón, 'The Preparatory Commission for the Organization for the Prohibition of Chemical Weapons', in Hague Academy of International Law, *The Convention on the Prohibition and Elimination of Chemical Weapons: A Breakthrough in Multilateral Disarmament* (Martinus Nijhoff, 1995).

9 Israel (signed 13 January 1993).

10 Angola, Egypt, North Korea and South Sudan.

11 The Convention appears in the UN Treaty Series at 1974 UNTS p. 45.

of its functions. Privileges and immunities are also extended to delegates of States Parties, their alternates and advisers, representatives appointed to the Executive Council with their alternates and advisers, the Director General and staff members as are necessary in the independent exercise of their functions in connection with the Organization. Paragraph 50 of that Article establishes an obligation for State Parties according to which these privileges and immunities are to be defined in separate individual bilateral agreements between the OPCW and States Parties, including the Host Country.

(b) The Verification Annex¹²

In addition, the privileges and immunities of the inspectors and their assistants, applicable during verification activities, are specifically defined in Part II, Section B of the Verification Annex to the CWC. The privileges and immunities of inspection teams needed for the conduct of verification activities¹³ prevail over any provision in two other key agreements: the model Privileges and Immunities Agreement between an individual State Party and the Organization ('MAPI');¹⁴ and the headquarters agreement, being the Agreement between the Organization for the Prohibition of Chemical Weapons and the Kingdom of the Netherlands Concerning the Headquarters of the OPCW ('HQA').¹⁵ These agreements cannot offer any advantage or exception *vis-à-vis* the obligations assumed by the States Parties under the CWC's Verification Annex. This relationship is expressly recognized in Article 11.2 of the MAPI:

The provisions of this Agreement shall in no way limit or prejudice the privileges and immunities accorded to members of the inspection team in Part II, Section B, of the Verification Annex to the Convention, or the privileges and immunities accorded to the Director-General and the staff of the Secretariat of the OPCW in Article VIII, paragraph 51,¹⁶ of the Convention. The provisions of this Agreement shall not themselves operate so as to abrogate, or derogate from, any provisions of the Convention or any rights and obligations which the OPCW may otherwise have, acquire or assume.

12 According to Article XVII, the Verification Annex forms an integral part of the CWC.

13 See below: *Privileges and Immunities of Members of the Inspection Team*.

14 See below: *Agreements between the OPCW and a State Party*.

15 Signed 22 May 1997, entered into force 7 June 1997.

16 CWC, Article VIII, para. 51: Notwithstanding paragraphs 48 and 49, the privileges and immunities enjoyed by the Director General and the staff of the Technical Secretariat during the conduct of verification activities shall be those set forth in Part II, Section B, of the Verification Annex. States Parties have the right not to accept an inspector or inspection assistant (Verification Annex, Part II, A, 2.).

(c) Other Sources

One important source in the area of privileges and immunities, outside the CWC, is the 1961 *Vienna Convention on Diplomatic Relations* ('Vienna Convention'), which is referred to several times in Section B of Part II of the Verification Annex. As a result, members of the inspection team must be accorded several of the privileges and immunities defined in the Vienna Convention.¹⁷

The privileges and immunities of the OPCW may also be granted by States through other sources such as legislative, administrative measures and/or judicial decisions.¹⁸ In fact, some States Parties have adopted national legislation that grants privileges and immunities to international organizations which may, in some cases, be used as a substitute for concluding separate bilateral agreements with the organizations.¹⁹

17 See below: *Immunities of Members of the Inspection Team*.

18 Judgments of Dutch Tribunals on privileges and immunities of international organizations may also potentially affect the interpretation of the provisions contained in the HQA. See e.g. *European Patent Office v. Stichting Restaurant De La Tour*, 21 June 2011, Court Appeal of The Hague, LJN BR0188 on procurement of services for its cafeteria.

19 E.g. the United States *International Organizations Immunities Act*, 9 December 1945, Public Law 291, 79th Congress, 22 U.S.C. 288. The OPCW has been designated an International Organization under this Act by Executive Order Number 13049 of 11 June 1997, which provides: "By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 1 of the *International Organizations Immunities Act* ... and having found that the Organization for the Prohibition of Chemical Weapons is a public International organization in which the United States participates within the meaning of the *International Organization Immunities Act*, I hereby designate the Organization for the Prohibition of Chemical Weapons as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the *International Organizations Immunities Act*. This designation is not intended to abridge in any respect privileges, exemptions, or immunities that such organization may have acquired or may acquire by international agreements, including the Chemical Weapons Convention, or by congressional action". Therefore, the OPCW is recognized as entitled to those privileges and immunities. However, the President of the United States is authorized, "[i]n the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity". The President is also authorized, "[i]f in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided in this subchapter or for any

Customary international law and general principles of international law are also potentially applicable sources of the Organization's privileges and immunities necessary for the exercise of its functions in different aspects of its operations.²⁰ OPCW's privileges and immunities may be also recognized by International Organizations and International Tribunals, including the International Court of Justice,²¹ and they may be even imposed by resolutions of the UN Security Council ('UNSC').²²

other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization" for these purposes. See 29 December 1945, Ch. 652, Title I, § 1, 59 Stat. 669. 22 U.S.C. 288. The UK has a similar text in its *International Organisations Act 1968* ('10A'). For a discussion on further domestic developments on privileges and immunities of international organizations in the U.S., see Aaron I. Young, 'Deconstructing International Organization Immunity', (2012) 44 *Georgetown Journal of International Law* p. 311.

20 But cf. M. Wood, 'Do International Organizations Enjoy Immunity under Customary International Law?', (2014) 10(2) *International Organizations Law Review* p. 287.

21 The International Court of Justice may be requested to give an Advisory Opinion in the settlement of disputes between two or more States Parties or between one or more States Parties and the Organization, in matters related to the interpretation or application of the CWC, which may involve disputes concerning privileges and immunities. There have, as yet, been no such cases.

22 See e.g. UN SC Resolution 2118 (27 September 2013). This resolution determined that the Syrian Arab Republic must comply with all aspects of the decision of the OPCW EC of 27 September 2013 (Doc. EC-M-33/DEC.1.), and must recognize the privileges and immunities of its personnel:

Para. 7. Decides that the Syrian Arab Republic shall cooperate fully with the OPCW and the United Nations, including by complying with their relevant recommendations, by accepting personnel designated by the OPCW or the United Nations, by providing for and ensuring the security of activities undertaken by these personnel, by providing these personnel with immediate and unfettered access to and the right to inspect, in discharging their functions, any and all sites, and by allowing immediate and unfettered access to individuals that the OPCW has grounds to believe to be of importance for the purpose of its mandate, and decides that all parties in Syria shall cooperate fully in this regard;

Para. 9. Notes that the Syrian Arab Republic is a party to the Convention on the Privileges and Immunities of the United Nations, decides that OPCW-designated personnel undertaking activities provided for in this resolution or the decision of the OPCW Executive Council of 27 September 2013 shall enjoy the privileges and immunities contained in the Verification Annex, Part II(B) of the Chemical Weapons Convention, and calls on the Syrian Arab Republic to conclude modalities agreements with the United Nations and the OPCW.

(d) OPCW Headquarters Agreement

The HQA includes a Separate Arrangement ('HQA-SA') which contains additional details on how the privileges granted should be interpreted and implemented.²³ Memoranda of Understanding ('MoUs') may follow this Agreement, as in the case of the MoU on the OPCW Commissary, signed on 1 December 2008.²⁴

A Committee on Relations with the Host Country ('HCC') was established by the Conference of the States Parties ('CSP') in 2006,²⁵ with the purpose of resolving in a constructive and timely fashion any issues that might arise in connection with the interpretation and implementation of the HQA. The HCC was instructed by the CSP to address issues related to privileges and immunities and to find, together with the Secretariat and the Host Country, mutually satisfactory solutions to pending matters related to the full implementation of the HQA. The Committee reports annually to the States Parties on its activities.²⁶

(e) Agreements between the OPCW and a State Party

Within the territory of its States Parties, with the exception of the Host State, the legal capacity of the Organization and the privileges and immunities established in paragraph 50 of Article VIII are to be defined in separate individual agreements concluded between the Organization and the relevant

23 C-1/DEC.59 (14 May 1997). Unless otherwise indicated, all references to document numbers in this practice note are to OPCW documents. The HQA is also published in the Dutch legal gazette (see *Tractatenblad van het Koninkrijk der Nederlanden 1997*, Nr, 114). See also 2311 UNTS p. 91.

24 Lisa Woollomes Tabassi (ed.), *OPCW: The Legal Texts* (2nd ed.) (TMC Asser Press, 2009) p. 416.

25 C-11/DEC.9 (7 December 2006).

26 See Report by the Host Country Committee on the performance of its activities, for the period from September 2012 to January 2013 (EC-71/HCC/1 C-18/HCC/1) and for the period from February to September 2013 (EC-74/HCC/1 C-18/HCC/2); Report of the Committee on Relations with the Host Country on the Performance of its Activities, September 2011 to January 2012 (C-17/HCC/1, EC-67/HCC/1); Report of the Committee on Relations with the Host Country on the Performance of its Activities, November 2009 to September 2010 (C-15/HCC/1, EC-62/HCC/10); Report of the Committee on Relations with the Host Country on the Performance of its Activities, December 2008 to October 2009 (C-14/HCC/1, EC-58/HCC/1); Report of the Committee on Relations with the Host Country on the Performance of its Activities in 2008 (C-13/HCC/1); Report by the Committee on Relations with the Host Country on the Performance of its Activities since its Establishment (C-12/HCC.1)

State Party.²⁷ These separate agreements are an important element for protecting the interests of the Organization and for facilitating the implementation of the CWC, as a significant number of activities of the OPCW related to States Parties are not covered by the privileges and immunities directly vested by the Convention. However, a separate agreement does not have to be concluded to establish the privileges and immunities needed for the conduct of verification activities, since as noted above these are specified in the Verification Annex.

Privileges and Immunities Agreements ('PIA') are negotiated by the Technical Secretariat,²⁸ then concluded by the Executive Council²⁹ and subsequently signed by the Director-General on behalf of the Organization³⁰ and the authorised representative of the State Party. In negotiating these bilateral agreements on behalf of the Organization, the Technical Secretariat seeks to achieve consistency, bearing in mind the principle of impartial and even-handed implementation of the Convention. Consistency and equal treatment provide practical advantages to the OPCW by ensuring independence of action of and cost-effectiveness in respect of its operations, especially by enabling it to work smoothly in different national jurisdictions. Immunities serve this purpose primarily as they help the Organization work better and more efficiently.

The Technical Secretariat has a model Privileges and Immunities Agreement ('MAPI') that is proposed to States Parties willing to enter into negotiations leading to a formal Privileges and Immunities Agreement,³¹ which follows the lines of the 1949 *Convention on the Privileges and Immunities of the Specialized*

27 Although the possibility of adopting a single multilateral agreement on the privileges and immunities of the Organization was explored by the CSP at its First Session, no consensus was reached. Consequently, the OPCW needs to proceed through individual agreements with each State Party. See RC-2/S/1(2008), para. 3.310.

28 The Office of the Legal Adviser ('LAO') conducts the negotiations with the final approval of the Director-General.

29 Sub-para. 34(a) of Article VIII of the Convention states that the EC shall conclude agreements or arrangements with States and international organizations on behalf of the OPCW, subject to prior approval by the Conference of the States Parties. On 23 October 2003, the Conference adopted decision C-8/DEC.12 by which it gives prior approval to the Council to conclude privileges and immunities agreements between the OPCW and States Parties.

30 The EC usually requests the Director-General to enter into the concluded agreement on behalf of the OPCW.

31 The Model Agreement text is available in Tabassi (ed.), supra note 24 p. 421. Versions in all six official languages are available at the OPCW website, which is available at: <www.opcw.org>.

Agencies ('Specialized Agencies Convention').³² These bilateral agreements confirm the legal capacity, privileges and immunities of the Organization and those of the privileged persons, as may be necessary for the independent exercise of their functions in the territory and in any other place under the jurisdiction or control of a State Party.

Since the entry into force of the CWC,³³ 51 bilateral agreements on the privileges and immunities of the OPCW have been signed and 35 of them are already into force.

OPCW privileges and immunities are usually also recognized by States Parties in the Facility Agreement ('FA') for on-site verification.³⁴ The FA spells out in more detail the privileges and immunities already set forth in the Verification Annex.

(f) Agreements between the OPCW and the United Nations, and
Laissez-Passer

The OPCW has signed an Agreement concerning the relationship between the United Nations and the OPCW ('RA-UN-OPCW').³⁵

The RA-UN-OPCW establishes in Article IX that officials of the OPCW are entitled to use the laissez-passer of the United Nations ('UNLP') as a valid travel document, where such use is recognized by States Parties in the applicable instruments defining the privileges and immunities of OPCW and its officials.³⁶ UNLPs used by OPCW officials contain an insert which refers to the CWC privileges and immunities. States Parties must recognize and accept as valid UNLPs issued to the officials of the OPCW, for the purpose of carrying out their tasks related to the CWC.³⁷

Each State Party must, not later than 30 days after acknowledgement of receipt of the list of inspectors and inspection assistants or of changes thereto,

32 Opened for signature 21 November 1947, 33 UNTS p. 261 (entered into force 2 December 1948).

33 As of 31 August 2015.

34 Verification Annex, Part I, 7: "Facility Agreement means an agreement or arrangement between a State Party and the Organization relating to a specific facility subject to on-site verification pursuant to Articles IV, V and VI".

35 Adopted by the EC on 1 September 2000. See EC-MXI/DEC.1. The Relationship Agreement was approved by the OPCW Conference of the States Parties in decision C-VI/DEC.5 (17 May 2001) and by the United Nations General Assembly Resolution A/RES/55/283 (7 September 2001). It was applied provisionally from 17 October 2000 and entered into force on 26 September 2001.

36 RA-UN-OPCW, Article IX.

37 MAPI, Article 9, 1.

provide multiple entry/exit and/or transit visas and other such documents to enable each inspector or inspection assistant to enter and remain on the territory of that State Party for the purpose of carrying out inspection activities. These documents should be valid for at least two years after their provision to the Technical Secretariat.³⁸

(g) Agreements between the OPCW, the UN and a State Party
 Certain types of activities may require the OPCW to enter into additional agreements to ensure that privileges and immunities necessary for the performance of certain activities not initially contemplated under the CWC or the bilateral agreements with States Parties. For example, these include agreements concluded in 2013 and 2014 to fulfil the mandate entrusted to the UN and the OPCW concerning the elimination of the Syrian Chemical Weapons programme, which included:

- (1) A Tripartite status-of-mission agreement among the United Nations, the OPCW and the Government of the Syrian Arab Republic.³⁹
- (2) A Tripartite exchange of letters with the Government of Cyprus, for the Joint Mission Staging Area and Support Base.⁴⁰ (An office was established in Cyprus on the basis of this tripartite exchange.)
- (3) Arrangements with the Lebanese Republic to facilitate the transit of Joint Mission personnel and equipment.⁴¹

B *Retroactive Force of the Convention*

The CWC contains no express provision on its retroactive application.⁴² In particular, the privileges and immunities regime contained in the CWC do not have any retroactive consequences for States Parties or any international body.

C *'Functional' Legal Personality and Immunity*

This traditional approach to the privileges and immunities of International Organizations is contained in Article VIII, Section E, Paragraph 48, which pro-

³⁸ Verification Annex, Part II, B, 10.

³⁹ S/2013/629 (28 October 2013). The Agreement was signed on 5 February 2014: S/2014/133 (27 February 2014). Text not publicly available.

⁴⁰ S/2013/629 (28 October 2013). Text not publicly available.

⁴¹ *Ibid.*

⁴² References to past situations are present in the definitions and obligations related to old (Article 11.5), abandoned (Article 11.6), buried and sea-dumped chemical weapons (Article 111.2). Time also affects declarations due by States Parties on their chemical weapons (Article 111).

vides that the Organization shall enjoy on the territory and in any other place under the jurisdiction or control of a State Party such privileges and immunities as are necessary for the exercise of its functions. The same notion constitutes the basis for the privileges and immunities of Delegates of States Parties together with their alternates and advisers, Representatives appointed to the Executive Council together with their alternates and advisers, the Director General, and the staff of the Organization: these individuals shall, under Article VIII, Section E, Paragraph 49, enjoy such privileges and immunities as are necessary to the independent exercise of their functions related to the Organization.

Following the same pattern, the privileges and immunities accorded to inspectors and inspection assistants in the Verification Annex are granted “[f]or the sake of the CWC and not for the personal benefit of the individuals themselves”.⁴³ Although this expression could be interpreted as “limiting” the immunity of members of the inspection team to functional immunity, the Verification Annex⁴⁴ explicitly grants to the members of the inspection team the immunities accorded to diplomatic agents pursuant to Article 31, paragraphs 1, 2 and 3 of the Vienna Convention.

Article VIII, Section E, Paragraph 50 of the CWC states that the legal capacity, privileges and immunities of the OPCW shall be defined in agreements between the Organization and States Parties, with the exception of those contained in the Verification Annex, that are directly applicable. Both the HQA and the MAPI state at Article 2 that:

The OPCW shall possess full legal personality. In particular, it shall have the capacity:

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property; and
- (c) to institute and act in legal proceedings.

Two differences appear between these OPCW instruments and the Specialized Agencies Convention:

- (1) Whereas the OPCW instruments refer to “full legal personality”, the Specialized Agencies Convention uses the expression “juridical personality”.

43 Verification Annex, Part II, B. 10.

44 Verification Annex, Part II, B. 11(e).

Both expressions may be considered similar in scope.⁴⁵ The OPCW enjoys an autonomous legal personality derived directly from the CWC as an independent treaty. The OPCW has the legal capacity necessary to discharge its functions and perform its duties,⁴⁶ including the powers and functions of the Conference of States Parties, the Executive Council and the Technical Secretariat⁴⁷

- (2) The OPCW texts include the expression “and act” in legal proceedings, that allows the OPCW to participate in legal proceedings that have not been instituted by it.

Article 3, paragraph 1 of MAPI states that the OPCW and its property, wherever located and by whomsoever held, shall enjoy immunity “from every form of legal process” except in so far the Organization has expressly waived its immunity in a particular case. The HQA also contains the same provision in Article 4, paragraph 1, but with two caveats:

45 “‘Personality’ is normally regarded as the capability of an entity to possess rights and obligations under a specific legal system, ... [w]hereas ‘capacity’ is more often regarded as a qualification of personality indicating specific legal powers possessed by an entity having personality”: August Reinisch, *International Organizations before National Courts* (Cambridge University Press, 2000), p. 12. See also August Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press, 2013), p. 5. Anthony Miller, ‘The Privileges and Immunities of the United Nations’, (2009) 6 *International Organizations Law Review* pp. 7–115 says that the Draft Convention on the Privileges and Immunities of the United Nations prepared by the Preparatory Commission suggested the expression “full juridical personality” rather than “juridical personality”, and this was finally adopted. See also UN Doc. A/C.6/20 (30 January 1946).

46 *Reparations for Injuries Suffered in the Service of the United Nations*, 11 April 1949, International Court of Justice, Advisory Opinion [1949] ICJ Rep p. 174, at p. 179. This criteria is also used as a basis for the interpretation of both the HQA (Article 27.1: “This Agreement shall be construed in the light of its primary purpose of enabling the OPCW at its headquarters in the Kingdom of the Netherlands fully and efficiently to discharge its responsibilities and fulfil its purposes.”), and the MAPI (Article 11: “The provisions of this Agreement shall be interpreted in the light of the functions which the Convention entrusts to the OPCW”).

47 For example, to negotiate and conclude international treaties. In *M.L. v. OPCW*, 16 July 2003, ILOAT, Judgment No. 2256, it was recognized that the Director-General “has the authority under Staff Regulation 3.3. to conclude tax reimbursement agreements with States Parties”. Such is the case of the Agreement between the US and the OPCW on taxation reimbursement, signed at The Hague on 25 February 1999.

- (1) Immunity from any form of legal process is recognized “within the scope of its official activities”.
- (2) Immunity is not recognized in the cases of:
 - (i) a civil action by a third party for damages arising out of an accident caused by a vehicle belonging to, or operated on behalf of, the OPCW where these damages are not recoverable from insurance; or
 - (ii) a civil action relating to death or personal injury caused by an act or omission of the OPCW, or officials of the OPCW, in the Kingdom of the Netherlands.

Therefore, the three legal texts (CWC, HQA and MAPI) may be interpreted as adopting the functional approach⁴⁸ as the basis for the OPCW’s immunity before national courts. As has been correctly pointed out,⁴⁹ the functional definition of immunity does not impose any substantive restrictions on an organization’s privileges and immunities: on the contrary, conventional sources recognize it as almost unlimited immunity, as long as the organization and its members do not deviate from the constitutive treaty mandates, their objectives and functions.⁵⁰

D *The Capacity to Contract*

The capacity to contract includes all actions necessary for the acquisition, by purchase, rental or lease, of property, including products and real property, and of services, including works.⁵¹ Contracting capacity also includes the hiring of staff and the conclusion of contracts for professional services in the form of consultancies⁵² and contracts with banks and financial institutions for the custody and investment of funds.⁵³

48 Article VIII, Parts B, C, D of the CWC. This approach attributes to International Organizations those immunities that will enable it to exercise its functions or fulfill its purposes. However, “[i]t appears that, in practice, the concept of functional immunity frequently leads to de facto absolute immunity”. See Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra* note 45.

49 August Reinisch and Ulf Andreas Weber, ‘In the Shadow of *Waite and Kennedy*: The Jurisdictional Immunity of International Organizations, the Individual’s Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement, (2004) 1 *International Organizations Law Review* pp. 59–110, at p. 59.

50 Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra* note 45, page 8.

51 OPCW Financial Regulations and Rules, 10.6.

52 OPCW Financial Regulations and Rules, 10.6.01.

53 OPCW Financial Regulations and Rules, 8 and 9.

E *The Capacity to Acquire and Dispose of Movable and Immovable Property*

The capacity to contract involves the capacity to acquire and dispose of movable and immovable property. This capacity is also recognized in HQA Article 1(r) and MAPI Article 1(j): “Property’ means all property, assets and funds, belonging to the OPCW or held or administered by the OPCW in furtherance of its functions under the Convention and all income of the OPCW.”

F *The Capacity to Institute and Act in Legal Proceedings*

As mentioned previously, one of the characteristics of having full legal personality is the possibility to institute and act in legal proceedings. Particularly, the power to initiate legal claims, appear before international and domestic courts and participate in legal and arbitration proceedings is traditionally an attribute of an international organization’s legal personality.

Like for other international organizations, the CWC and other conventional sources contain a number of provisions establishing diverse procedures for the settlement of disputes, intended to save the OPCW from the necessity of having recourse *per se* to national tribunals to protect its interests or pursue its objectives, because this would imply the waiver of at least certain of its privileges and immunities.

3 Privileges and Immunities of the OPCW

A *Inviolability of OPCW Premises, Archives and Property*

The HQA recognises the inviolability at all times of the OPCW headquarters⁵⁴ under its control and authority.⁵⁵ The HQA also states that OPCW property, wherever located and by whomsoever held, shall be immune from search, requisition, foreclosure, seizure, confiscation, expropriation and any other form of interference, all forms of attachment, injunction or legal process except in so far as in any particular case the OPCW shall have expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.⁵⁶

54 HQA, Article 1, (f), defines the “headquarters” as the area and any building, including any OPCW laboratory, equipment store, conference facilities, parts of buildings, land or facilities ancillary thereto, irrespective of ownership, used by the OPCW on a permanent basis or from time to time, to carry out its official functions.

55 HQA, Article 7, 1.

56 HQA, Articles 4, 2 and 5, 1. In *Hendrik Resodikromo v. OPCW*, 15 March 2007, Court of Appeal of The Hague, LjN BA 2778 (*‘Resodikromo case’*), the Court recognized that immunity from

The amenities of the headquarters are not to be prejudiced or obstructed by any use made of the land or buildings in its vicinity.⁵⁷ The security and tranquillity of the headquarters are not to be impaired by any person attempting unauthorised entry into, or creating disturbances in, the immediate vicinity of the headquarters. Adequate police protection on the boundaries and in the vicinity of the headquarters is to be provided, as the need arises, by the Host Country.⁵⁸ The headquarters shall be supplied, on fair conditions and on equitable terms, with the necessary services.⁵⁹

Within the headquarters, the OPCW has the power to make any regulation necessary for the full execution of its functions. No laws of the Host Country inconsistent with an OPCW regulation are applicable within the headquarters.⁶⁰

Any person authorised to enter any place under any legal provision shall not exercise that authority in respect of the headquarters unless prior express permission to do so has been given by or on behalf of the Director-General. Any such person may be requested to leave the headquarters immediately.⁶¹ However, the reasonable application of fire protection regulations must not be prevented by the OPCW.⁶²

Article 2 of the MAPI is concordant with Article III, 5 of Specialized Agencies Convention and stipulates:

The premises of the OPCW shall be inviolable. The property of the OPCW, wherever located and by whomsoever held, shall be immune from search,

execution is, in principle, separate from any immunity from jurisdiction; immunity from execution in respect of property (things and patrimonial rights) is intended to ensure that it remains available for the purpose for which it is held, namely the performance of official activities by the international organization concerned; that under Article 4, 2 of the HQA, the OPCW has such immunity from execution in respect of all property and possessions of the OPCW; and that the interests of the State in being able to perform this obligation under international law were so great as to take precedence over X's interest in being able to execute the judgment given in his favour. The Court of Appeal upheld a decision taken by the sub district court judge that had previously ruled, however, that "[t]he OPCW has not made clear — or not made sufficiently clear — why it claims immunity in this dispute, which specifically concerns Dutch employment law and in which no diplomatic or similar interests are involved": (2007) *United Nations Juridical Yearbook* pp. 505–507.

57 HQA, Article 8, 3.

58 HQA, Article 8, 1 and 2.

59 HQA, Article 9, 1.

60 HQA, Article 7, 2.

61 HQA, Article 7, 4.

62 HQA, Article 9.

requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

Under the HQA,⁶³ the archives,⁶⁴ samples, equipment and other material necessary for the OPCW activities, wherever located and by whomsoever held, are inviolable at all times. The MAPI, on the other hand, contains only a reference to the inviolability of archives, wherever located.⁶⁵ The latter more restricted formula could be explained by the fact that the CWC and the Verification Annex already contain other provisions related to the inviolability of archives, samples, equipment and other material necessary for OPCW activities, in particular when the same are used by the inspection teams. This therefore provides the essential minimum guarantees in all States Parties, even in the absence of a bilateral agreement concluded on the basis of the MAPI.

The MAPI, Article 3.1, follows the text of the Specialized Agencies Convention, Article III, Section 4:

The OPCW and its property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except in so far as in any particular case the OPCW have expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

The only difference from the text of the Specialized Agencies Convention is that assets are not expressly included together with the Organization's property. The same difference is present in MAPI, Article 3.2., which is similar to Specialized Agencies Convention, Article III, Section 5: assets are not included as such in this provision. However, the expression "property" has to be understood as including assets, as in the HQA⁶⁶ and the MAPI,⁶⁷ where the following definition of "property" can be found:

63 HQA, Article 5.

64 HQA, Article 1, (t), defines "archives" as all records, correspondence, documents, manuscripts, computer and media data, photographs, films, video and sound recordings belonging to or held by the Organization or any of its staff members in an official function, and any other material which the Director-General and the Host Country may agree shall form part of the archives of the OPCW.

65 MAPI, Article 3, 3.

66 HQA, Article 1(r).

67 MAPI, Article 1(j).

“Property” means all property, assets and funds, belonging to the OPCW or held or administered by the OPCW in furtherance of its functions under the Convention and all income of the OPCW.

B *Financial Operations. Holding of Funds and Operation of Accounts.
Transfer of Funds and Conversion of Currencies*

Article 12 of the HQA recognizes that OPCW financial assets and transactions are free from any financial controls, regulations, notification requirements or moratoria of any kind. Moreover, the OPCW may freely:

- (1) purchase any currencies through authorised channels and hold and dispose of them;
- (2) operate accounts in any currency;
- (3) purchase through authorised channels, hold and dispose of, funds, securities and gold;
- (4) transfer its funds, securities, gold and currencies to or from any country
- (5) convert any currency held by it into any other currency; and
- (6) raise funds in any manner which it deems desirable, except within the Host Country, where the concurrence of the Government is required.

The MAPI also establishes that the OPCW may not be restricted by financial controls, regulations or moratoria of any kind; that it may hold funds, gold or currency of any kind and operate accounts in any currency; convert any currency held by it into any other currency; and may freely transfer its funds, securities, gold and currencies within the State Party or to or from the State Party to or from any other country.⁶⁸

C *Exemptions from Taxes and Customs Duties*

The HQA contains provisions related to the exemption of the OPCW and its property from taxes and duties,⁶⁹ within the scope of its official activities. Articles imported or exported by the OPCW for official purposes shall be exempt from all prohibitions and restrictions imposed by the Host Country on imports and exports.⁷⁰ OPCW assets, income and other property are exempt from all direct taxes, whether levied by the national, provincial or local authorities of the Host Country, and in particular from:

⁶⁸ MAPI, Article 3, 4.

⁶⁹ HQA, Article 11.

⁷⁰ HQA, Article 13.

- (1) tax on motor vehicles, passenger motor vehicles and motorcycles;
- (2) value-added tax paid on all goods and services supplied on a recurring basis or involving considerable expenditure;⁷¹
- (3) excise duty included in the price of alcoholic beverages and hydrocarbons;
- (4) import and export taxes and duties;
- (5) insurance tax;
- (6) real property transfer tax; and
- (7) any other taxes and duties of a substantially similar character.

The exemptions provided for in (2), (3), (5) and (6), are granted by way of a refund. Goods acquired or imported under these terms shall not be sold, given away or otherwise disposed of, except in accordance with conditions agreed upon with the Host Country.⁷² The OPCW has established a tax- and duty-free commissary for the sale of limited quantities of certain articles for personal use or consumption, but not for gift or sale, open to officials of the OPCW who are not Dutch citizens or permanent residents in the Kingdom of the Netherlands, to Heads of Delegation, Permanent Representatives, alternates for, and advisers attached to, Heads of Delegation, to Members of the Permanent Missions and to Delegates of States Parties who have diplomatic status.⁷³

Article 3.6 of the MAPI recognizes that the OPCW and its property are exempt from:

- (1) all direct taxes, except those that, in fact, are no more than charges for public utility services;
- (2) customs duties and prohibitions and restrictions on imports and exports of articles for its official use;⁷⁴ and
- (3) duties and prohibitions and restrictions on imports and exports in respect of their publications.

Article 3.7 of the MAPI also establishes that, while the OPCW will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which forms part of the price to be paid,

⁷¹ According with HQA-SA, Paragraph 1, "considerable expenditure" means an amount above the threshold of Dfl. 500 per invoice (approximately 227 Euros).

⁷² They are established in the HQA-SA.

⁷³ HQA, Article 11. Modalities were agreed between the OPCW and the Host Country by MoU on the OPCW Commissary, signed on 1 December 2008.

⁷⁴ Articles imported under such exemption cannot be sold in the country into which they were imported except under conditions agreed to with the Government of that country.

nevertheless when the OPCW is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, the State Party will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

D *Facilities in Respect of Communications. Most-Favored-Nation Status. No- Censorship Rule. Use of Codes*

Article VIII, Section D, Paragraph 38, (d) of the cwc entitles the Technical Secretariat to address and receive communications on behalf of the Organization to and from States Parties on matters pertaining to the implementation of the Convention.

The HQA states that the Host Country authorities shall exercise, as far as is within their competence, and to the extent requested by the Director-General, their respective powers to ensure that the headquarters are supplied, on fair conditions and on equitable terms, with the necessary telephone and telegraph services, as well as with any means of communication⁷⁵ that may be necessary for the fulfilment of the functions of the OPCW. The Host Country is also obliged to allow the OPCW to communicate, freely and without the need for special permission, for all official purposes, and to protect the right of the OPCW to do so. HQA also recognizes that the OPCW enjoys the most favourable treatment accorded by the Host Country to any organization or government.⁷⁶

The OPCW has the right to publish and broadcast freely within the Host Country for purposes specified in the Convention, and may install and use a wireless transmitter.⁷⁷ All incoming and outgoing official communications, publications, still and moving pictures, videos, films, sound recordings and software, by whatever means or whatever form transmitted, are inviolable.⁷⁸ Copyright laws and conventions must be observed by the Organization.⁷⁹

The Organization has the right to use codes and to dispatch and receive official correspondence and other official communications by courier or in sealed bags, which shall be subject to the same privileges and immunities as diplomatic couriers and bags.⁸⁰

75 HQA Article 9, 1.

76 HQA Article 10, 2. This clause covers matters of priorities and rates for mails, cables, telegrams, telexes, radiograms, television, telephone, fax, and other communications, and press rates for information to the press and radio.

77 HQA Article 10, 4. The installation requires the consent of the Government, which shall not be unreasonably withheld once the wave length has been agreed upon.

78 HQA Article 10, 3.

79 HQA Article 10, 5.

80 HQA Article 10, 1.

The MAPI establishes that no censorship shall be applied to the official correspondence and other official communications of the OPCW, and recognizes its right to use codes, to dispatch and receive correspondence by courier or in sealed bags with the same privileges and immunities as diplomatic couriers and bags,⁸¹ and to publish and broadcast freely within the territory of the State Party for the purposes established in the Convention.⁸² All OPCW incoming and outgoing official communications, publications, still and moving pictures, videos, films, sound recordings and software are inviolable.⁸³

The MAPI also grants the OPCW treatment no less favourable than that accorded by the State Party in its territory to any other Government in the matter of priorities, rates and taxes on post and telecommunications, and press rates for information to the media.⁸⁴

E *Waiver of Immunity*

The OPCW headquarters enjoys inviolability at all times; however, the Director-General may allow the service of legal process to take place within the headquarters.⁸⁵

In the Host Country, express waiver of immunity may be extended to search, foreclosure, seizure, all forms of attachment, injunction or other legal process, but no waiver of immunity shall extend to any measure of execution.⁸⁶ The Host Country shall take whatever action may be necessary to ensure that the OPCW shall not be dispossessed of all or any part of the headquarters.⁸⁷

The MAPI establishes a wider range of immunities along Specialized Agencies Convention lines, as it states that:⁸⁸

The OPCW and its property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except in so far as in any particular case the OPCW has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

81 MAPI, Article 4, 2. However, these provisions do not preclude the adoption of appropriate security precautions to be determined by agreement between the State Party and the OPCW.

82 MAPI, Article 4, 3.

83 MAPI, Article 4, 4.

84 MAPI, Article 4, 1.

85 HQA, Article 7.1 and 6.

86 HQA, Article 4.

87 HQA, Article 6.

88 MAPI, Article 3, 1.

The Organization places a great emphasis on the preservation of its privileges and immunities; as a result, the immunity secured under the different instruments will not be waived unless considered necessary in light of a specific circumstance.

4 Privileges and Immunities of Member States' Representatives and Experts

Delegates of States Parties, together with their alternates and advisers, as well as the representatives appointed to the Executive Council together with their alternates and advisers, enjoy such immunities as are necessary in the independent exercise of their functions in connection with the Organization,⁸⁹ as defined in agreements between the Organization, the States Parties and the Host Country.⁹⁰

The HQA grants to Permanent Missions of States Parties to the OPCW,⁹¹ Heads of Delegation⁹² and Permanent Representatives⁹³ the same immunities accorded to heads of diplomatic missions accredited to the Host Country, in accordance with the Vienna Convention. Similar criteria are adopted to grant immunities to staff members of Permanent Missions of State Parties, their spouses, children and dependent members of their households, who enjoy the same immunities as those in diplomatic missions accredited in the Host Country having comparable rank under the Vienna Convention.⁹⁴

Delegates of States Parties,⁹⁵ alternates for, and advisers attached to, Heads of Delegation and experts,⁹⁶ while exercising their functions and during their

89 CWC, Article VIII, E, 49.

90 CWC, Article VIII, E, 50.

91 HQA, Article 15. The premises of the Permanent Missions (as defined in the Vienna Convention) also enjoy the same immunities.

92 "Head of Delegation" is defined as the accredited head of the delegation of a State Party to the Conference of the States Parties and/or to the Executive Council: HQA, Article 1(i).

93 HQA, Article 16, 1. "Permanent Representative" is defined as the principal representative of a State Party accredited to the OPCW: HQA, Article 1(k).

94 HQA, Article 16, 2 and 3.

95 "Delegates of States Parties" are defined as those designated representatives of States Parties and members of their delegations to any meeting of the OPCW which is not the Conference of the States Parties or the Executive Council: HQA, Article 1(m).

96 HQA, Article 19. According to the HQA, Article 1(n), "Experts" means persons performing missions authorized by, serving on subsidiary bodies of, or in any way, at its request,

journeys to and from the headquarters,⁹⁷ enjoy immunity from personal arrest or detention and from legal process of any kind in respect of words spoken or written, and of all acts done by them, while performing their official functions. This immunity continues although the persons concerned may no longer be engaged in the performance of such functions.⁹⁸ They also enjoy inviolability of all papers, documents and other official material, the right to use codes, and to dispatch or receive papers, correspondence or other official material by courier or in sealed bags.⁹⁹

These Delegates, alternates, advisers and experts, if they are not citizens of the Host Country or do not reside in its territory on a permanent basis,¹⁰⁰ also enjoy exemption with respect to themselves, their spouses and their dependent children from immigration restrictions, alien registration and national service obligations, as well as the same protection and repatriation facilities as are accorded in time of international crisis to members, having comparable rank, of the staff of diplomatic missions established in the Host Country, and the same immunities and facilities with respect to their personal¹⁰¹ and official baggage as the Host Country accords to members, having comparable rank, of the staff of diplomatic missions established in the Kingdom of the Netherlands.¹⁰² They have the right, for the purpose of all communications with the OPCW, to use codes and to dispatch or receive papers, documents,

consulting with, the OPCW, provided that they are neither officials of the OPCW nor attached to Permanent Representatives.

- 97 The Host Country is obliged to facilitate and allow in its territory the entry, transit, sojourn and departure of these persons, whatever their nationality, affording them any necessary protection: HQA, Article 14.
- 98 HQA, Article 17, 1. In the case of experts, such immunity is not extended, in any event, to civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, driven by or operated on behalf of the expert or in respect of a motor traffic offence involving such vehicle: HQA, Article 19, 1(b).
- 99 In the case of experts, such immunity is extended only for the purpose of all communications with the OPCW: HQA, Article 19, 1(c).
- 100 Periods during which they may be present in the Host Country for the discharge of their duties are not considered as periods of residence. In particular, they are exempt from taxation on their salaries and emoluments during such periods of duty (HQA, Articles 17, 3 and 19). Although Article 17, 2 and 3, only mentions "Delegates", alternates for and advisers attached to Heads of Delegation should also be considered as included in these provisions.
- 101 This privilege is not expressly accorded to experts. See: HQA, Article 19, 1.
- 102 HQA, Article 17, 1(e)–(h), 2 and 3.

correspondence or other official material by courier or in sealed bags, which are inviolable.¹⁰³

Immunities of representatives and officials of States not Party to the CWC who have official business with the OPCW are to be determined in agreements or arrangements concluded in accordance with the CWC.¹⁰⁴

Article 5 of the MAPI grants to representatives of States Parties, alternates, advisers, technical experts¹⁰⁵ and secretaries of their delegations, while exercising their functions and during their journeys to and from the place of meetings convened by the OPCW,¹⁰⁶ immunity from personal arrest or detention and from legal process of any kind, including in respect of words spoken or written and all acts done by them, in their official capacity, such immunity to continue to be accorded, notwithstanding that the persons concerned may no longer be engaged in the performance of such functions; inviolability for all papers, documents and official material; the right to use codes and to dispatch or receive papers, correspondence or official material by courier or in sealed bags; and exemption in respect of themselves and their spouses from immigration restrictions, alien registration or national service obligations while they are visiting or passing through the State Party in the exercise of their functions and the same immunities and facilities in respect of their personal baggage as are accorded to members of comparable rank of diplomatic missions.

Both the HQA and the MAPI grant the same privileges to these persons with respect to currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions.¹⁰⁷

Members of the Confidentiality Commission, who occasionally may also be cumulatively designated as representing their State Party before the OPCW,¹⁰⁸ are asked to sign a Secrecy Agreement with the CSP, by which they recognize

103 HQA Article 17, 1, (c) and (d). Experts' privileges are contained in HQA Article 19, 1, (c) and (d).

104 HQA, Article 20.

105 MAPI, Article 1, (h), defines "experts" as persons who, in their personal capacity, are performing missions authorized by the OPCW, are serving on its organs, or who are, in any way, at its request, consulting with the OPCW.

106 MAPI, Article 5, 3 recalls that these privileges and immunities are accorded to these persons in order to safeguard the independent exercise of their functions in connection with the OPCW and not their personal benefit, and that they have the duty to observe in all respects the laws and regulations of the State Party. They are not applicable if the person is a national of a State Party. MAPI, Article 5, 4.

107 HQA, Article 17, 1(g); MAPI, Article 5, 1(f).

108 Its members, unless they are already accredited to the OPCW as SP representatives, are considered as experts under the HQA.

being aware that a breach, as determined by the CSP, of the provisions contained in its operating procedures¹⁰⁹ and undertakings “may result in penal prosecution or civil action under the jurisdiction of a State Party to the Convention which could result in severe penalties or liability for damages”.¹¹⁰

5 Privileges and Immunities of OPCW Officials

A General Provisions

The Director-General and the rest of the staff of the OPCW¹¹¹ enjoy such privileges and immunities as are necessary in the independent exercise of their functions in connection with the Organization¹¹² and also as defined in agreements among the Organization, the States Parties and the Host Country.¹¹³ Privileges and immunities enjoyed by staff members are conferred in the interests

109 Doc. C-III/DEC.10/Rev.1. See also Tabassi (ed.), *supra* note 24, p. 701.

110 This provision may be seen as an implicit waiver of privileges and immunities of experts. Although no dispute has ever materialized, as the Confidentiality Commission never considered a case, the question of who is entitled to waive members' privileges and immunities may arise if the member has not been expressly authorized by the State Party to sign such an agreement or if the member enjoys also diplomatic immunity from other sources. Whether an implicit waiver may be considered as already given when the State Party presents the candidate for this position is an open question.

111 Staff members of the Secretariat are those international civil servants appointed by the Director-General in such capacity (Staff Regulations and Interim Staff Rules ('SRISR'), Regulation 4.1). Their responsibilities are not national but exclusively international (SRISR, Regulation 1.1). Under this category fall also individuals with a Short-Term Contract ('STC'), which is an appointment with a duration of up to four months, and individuals with a Temporary Assistance Contract ('TAC'), which is an appointment with a duration of between four months and one day and twelve months minus one day. Individuals under a Special Services Agreement ('SSA'), a category that includes consultants and individual contractors, are neither “staff members” nor “officials”: they have the status of “experts” for the purposes of the HQA: Administrative Directive AD/Per/26/Rev.2. The same regime is applicable to Chemical Weapons Destruction Facility ('CWDF') Inspectors. Information Circular OPCW-S/IC/76/Rev.1. In *J. M. B v. OPCW*, 16 July 2003, ILOAT, Judgment No. 2232 (2003), the Tribunal established that the Director-General “must be regarded as a staff member both for the purposes of the Organization's submission to the Tribunal's jurisdiction and Staff Rule 11.3.01(a)”. In the *Resodikromo case*, *supra* note 56, the OPCW maintained that employment contracts are governed exclusively by OPCW staff rules and regulations, and not by Dutch labour law.

112 CWC, Article VIII, E, 49.

113 CWC, Article VIII, E, 50.

of the Organization. They do not relieve staff members from complying with their private obligations or observing laws and regulations.¹¹⁴

The Director-General and all members of the staff of the Technical Secretariat are referred to as “Officials” in the MAPI.¹¹⁵ The HQA uses the term “Officials of the OPCW” to designate the Director-General and all members of the staff of the Technical Secretariat, except those who are locally recruited and remunerated on an hourly basis.¹¹⁶ The following privileges and immunities are granted to Staff members:¹¹⁷

- (1) Immunity from arrest or detention and from inspection or seizure of their official baggage.¹¹⁸
- (2) Immunity from legal process of any kind in respect of words spoken or written, and of acts performed by them, in their official capacity.¹¹⁹ Such immunity continues although the persons concerned may have ceased to be officials of the OPCW. However, immunity is not extended to civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, driven by, or operated on behalf of, an official of the OPCW or in respect of a motor traffic offence involving such vehicle.¹²⁰
- (3) Exemption from taxation in respect of the salaries, emoluments, pay and indemnities paid to them, directly or indirectly, in respect of their employment with the OPCW.¹²¹ They are exempt from all compulsory

114 The privileges and immunities of staff members are conferred by the HQA in the interests of the OPCW and not for the personal benefit of the individuals themselves. They are obliged to observe in all other respects the laws and regulations of the Host Country: HQA, Article 24; MAPI, Article 6, 5. Privileges and immunities provided by the Host Country in the Headquarters Agreement do not form part of the terms and conditions of employment: SRISR, Regulation 1.9.

115 MAPI, Article 1(d).

116 HQA, Article 1(o).

117 Some restrictions are applicable to staff members who are Dutch citizens or permanent residents in the Netherlands: HQA, Article 18, 3.

118 HQA, Article 18,1(a) ; MAPI, Article 6, 2(a).

119 MAPI, Article 6, 3(b).

120 HQA, Article 18, 1(b). Staff members who own or drive motor vehicles are obliged by SRISR, Rule 12.0.04, to carry public liability and property damage insurance in an amount adequate to insure them against claims arising from injury or death to other persons or from damage to the property of others caused by their motor vehicles.

121 The Host Country does not take income so exempted into account when assessing the amount of tax to be applied to income from other sources: HQA, Article 18, 1(c). See, in addition, HQA-SA, Article 3(a). MAPI, Article 6, 2(d), recognizes the same exemptions from taxation in respect of salaries and emoluments paid to them by the OPCW and on

contributions to the social security organizations of the Host Country.¹²² The Provident Fund maintained under the authority of the OPCW enjoys legal capacity and the same exemptions, privileges and immunities as the OPCW itself.¹²³

- (4) Exemption, with respect to themselves, their spouses, their dependent relatives and other members of their households, from immigration restrictions,¹²⁴ alien registration¹²⁵ and national service obligations.¹²⁶ They also have the right to the same protection and repatriation facilities as are accorded in time of international crisis to members, having comparable rank, of the staff of diplomatic missions established in the Host Country.¹²⁷
- (5) Freedom to acquire or maintain foreign securities, currency accounts and other movable¹²⁸ and immovable property.¹²⁹ At the termination of

the same conditions as are enjoyed by officials of the United Nations. In ILOAT Judgment No. 2256 (2003), *supra* note 47, the Tribunal reiterated that “the principle of tax exemption is fundamental” and that “it is ultimately the Organization’s responsibility to ensure that staff members are fully reimbursed for any income tax paid on their OPCW income”. In *Krutzschn v. OPCW*, 31 January 2001, ILOAT, Judgment No. 2032 (2001), the Tribunal had already established that “[e]xemption from national taxes is an essential condition of employment in the international civil service and is an important guarantee of independence and objectivity. It cannot be made to depend upon the whim of national taxing authorities who will be understandably reluctant to admit any exceptions to their claims”.

122 HQA, Article 22, 1. This also applies to spouses and dependent relatives forming part of the households of staff members, unless they are employed in the Host Country by an employer other than the OPCW (or an International Organization which enjoys similar privileges and immunities) or receive the Host Country social security benefit: HQA, Article 22, 3.

123 HQA, Article 22, 2. In ILOAT Judgment No. 2256 (2003), *supra* note 47, the Tribunal said that it was clear that taxes on Provident Fund should be reimbursed, and that “it does not accept that the problem of states which refuse to recognize their obligations can be dealt with by organizations at the expense of their own staff and in violation of the law”.

124 MAPI, Article 6, 2(e). The Host Country is obliged to facilitate and allow in its territory the entry, transit, sojourn and departure of these persons, whatever their nationality, affording them any necessary protection: HQA, Article 14.

125 HQA, Article 18, 1(d); MAPI, Article 6, 2(e).

126 If the person is a citizen of the Host Country, this privilege may be recognized or solely deferred. *See* HQA, Article 18, 1(e). The same appears in MAPI, Article 6, 3.

127 HQA, Article 18, 1(g); MAPI, Article 6, 2(f).

128 They also have the right to import their furniture and personal effects and to export them on termination of their duties, together with cars used in the household older than six months, exempt from duties and taxes that are not payments for services: HQA-SA, Article 2(c) and 3(e).

129 In this regard, MAPI Article 6, 2(g) only accords privileges in respect of exchange facilities, and to the extent as are granted to members of comparable rank of diplomatic missions.

their employment with the OPCW, they have the right to take out of the Kingdom of the Netherlands through authorised channels without prohibition, or restriction, their funds.¹³⁰

- (6) Spouses and members of the family forming part of the households of officials of the OPCW have the right to be granted temporary working permits for the duration of their employment with the OPCW in the Kingdom of the Netherlands.¹³¹

In addition to these privileges and immunities:

- (1) the Director-General and Deputy Director-General enjoy those other privileges, immunities, exemptions and facilities accorded to heads of diplomatic missions accredited to the Host Country in accordance with the Vienna Convention;¹³²
- (2) staff members having the professional or similar grade of P-5 and above, those accorded to diplomatic agents of comparable rank of the diplomatic missions established in the Host Country, in conformity with the Vienna Convention;¹³³
- (3) staff members having the grade of P-4 and below enjoy those accorded to members of the administrative and technical staff of the diplomatic missions established in the Host Country, in conformity with the Vienna Convention, provided that the immunity from criminal jurisdiction and personal inviolability shall not extend to acts performed outside the course of their official duties.¹³⁴

These privileges and immunities may be extended if the Host Country enters into an agreement with any intergovernmental organization containing terms or conditions more favourable to that organization than those granted to the OPCW.¹³⁵

¹³⁰ HQA, Article 18, 1(f).

¹³¹ HQA, Article 23.

¹³² HQA, Article 18, 2(a) and (b). They are also granted exemption from VAT and municipal taxes and the user component of property tax: HQA-SA, 3(b) and (d). MAPI, Article 6, 4, grants the Director-General and his spouse with the privileges, immunities, exemptions and facilities accorded to diplomatic agents in accordance with international law.

¹³³ HQA, Article 18, 2(c). They are also granted exemption from VAT and municipal taxes and the user component of property tax: HQA-SA, 3(b) and (d).

¹³⁴ HQA, Article 18, 2(d). They are also granted exemption from VAT and municipal taxes and the user component of property tax: HQA-SA, 3(b) and (d).

¹³⁵ HQA-SA, Article 4(a).

B *Waiver of Immunity of Staff Members*

Privileges and immunities are accorded to OPCW officials in order to safeguard the independent exercise of their functions in relation to the OPCW and not for the personal benefit of the individual themselves, as that could constitute an abuse of rights. They have the duty to observe in all other respects the laws and regulations of the State Party.¹³⁶

The OPCW has the right and the duty to waive the immunity of any official in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the Organization.¹³⁷ The OPCW is obliged to cooperate at all times with the appropriate authorities of the State Party to facilitate the proper administration of justice and to prevent any abuse of the privileges and immunities granted to its officials.¹³⁸

The Director-General has not only the right but also the duty to waive the immunity of any OPCW official or expert.¹³⁹ If a disagreement between the Director-General and the appropriate Host Country authorities persists on whether an abuse of privileges and immunities has occurred, the matter is to be settled through the arbitration procedure.¹⁴⁰ Controversies on the same subject between the OPCW and a State Party are to be settled following a similar procedure.¹⁴¹ If the Director-General is the subject of the dispute, the matter has to be considered by the Executive Council.¹⁴²

C *Waiver of Immunity as a Consequence of a Breach of the Confidentiality Regime*

In accordance with the Confidentiality Annex, Section B, Paragraph 9, staff members shall enter into individual secrecy agreements with the Technical

136 MAPI, Article 5, 3; Article 6, 5. HQA, Article 24, 1.

137 MAPI, Article 6, 5. HQA, Article 24, 3.

138 MAPI, Article 6, 6. HQA, Article 24, 4.

139 HQA, Article 24, 6. In accordance with OPCW SRISR Regulation 1.9, staff members who enjoy privileges and immunities cannot use them as a reason for failing to perform their private obligations or for failing to observe laws and regulations. In any case where a question of a staff member's privileges and immunities arises, such as when such staff member is arrested, charged with an offence other than a minor traffic violation, summoned before a court as defendant in a criminal proceeding or convicted, fined or imprisoned for any offence other than a minor traffic violation, the staff member concerned shall immediately report to the Director-General, who shall decide whether the immunity shall be waived. OPCW SRISR, Rule 1.9.01. It is understood that privileges and immunities provided by the HQA do not form part of the terms and conditions of employment.

140 HQA, Articles 24.5. and 26.2.

141 MAPI, Article 8, 1.

142 HQA, Article 24, 6.

Secretariat covering their period of employment and a period of five years after such employment is terminated.¹⁴³ The Standard Text of this Agreement,¹⁴⁴ while providing rules of conduct and prohibitions in the handling of confidential information to which staff members may have access while performing their professional duties, also contains a provision where the signing staff member confirms awareness that a breach of confidentiality provisions may result “[i]n a waiver of immunity and consequent penal prosecution or civil action under the jurisdiction of a State Party of the Convention which could result in severe penalties or liability for damages”.¹⁴⁵

The Confidentiality Annex, Section D, Paragraph 20, obliges the Director-General to impose appropriate punitive and disciplinary measures on staff members who have violated their obligations to protect confidential information and, in cases of serious breaches,¹⁴⁶ he may also waive the immunity from prosecution if, after an internal investigation, he comes to the conclusion that a serious breach or violation of confidentiality has been committed by staff members.¹⁴⁷ The waiver may extend to former staff members who may retain

143 This obligation is also contained in SRISR, Rule 1.6.02. According to Rule 1.6.01 (a), the Director-General shall promulgate an Administrative Directive containing procedures for the receipt, handling, reproduction, dispatch, storage, destruction and/or release of confidential information.

144 The text is available in Tabassi (ed.), *supra* note 24, p. 597.

145 Standard Text, Article 5.

146 Cases of breach of the confidentiality regime that may be considered serious enough by the Director-General to waive staff member immunity are, among others:

- (1) the disclosure, even after termination of their functions, to any unauthorized persons of any confidential information coming to his or her knowledge in the performance of his or her official duties — C. Annex, B, 7;
- (2) the communication to any State, organization or person outside the Technical Secretariat of any information to which he or she has access in connection with his or her activities in relation to any State Party — C. Annex, B, 7;
- (3) to make any records of information collected incidentally and not related to verification of compliance with the CWC — C. Annex, B, 8;
- (4) as member of an inspection team, not strictly abide by the provisions governing the conduct of inspections or not fully respect the procedures designed to protect sensitive installations and to prevent the disclosure of confidential data — C. Annex, C, 15.

147 When deciding on the waiver, the Director-General should take into account whether the breach is of a serious nature, whether individual responsibility has been established, and whether damage has been suffered as a result thereof. He should also conduct confidential consultations as to the possibilities of relevant national jurisdiction being applied. OPCW-PC, Part IX.1, 9.1. The decision to waive immunity may be subject to review or

immunity relating to actions taken during their term of service with the Secretariat.¹⁴⁸

To implement the waiver of immunity, a relevant State Party national jurisdiction would need to apply¹⁴⁹ and legal proceedings under an applicable jurisdiction should be instituted against such a staff member.¹⁵⁰ However, it will remain the primary responsibility of States Parties to determine the applicability of national jurisdiction on a case-by-case basis.¹⁵¹

Where a present or former staff member, who has been found responsible for a serious breach, is residing in, or is otherwise within the jurisdiction of, a State not Party to the Convention, the Director-General may seek the authority of the Executive Council or the Conference to undertake consultations with the aim of encouraging that State to initiate or facilitate appropriate action to support legal processes resulting from the breach.¹⁵²

D *Privileges and Immunities of Members of the Inspection Team*

An "Inspection Team" is the group of inspectors¹⁵³ and inspection assistants¹⁵⁴ assigned by the Director-General to conduct a particular inspection in accordance with the CWC.¹⁵⁵ Privileges and immunities are accorded to the members of the inspection team to exercise their functions effectively for the sake of the CWC and not for the personal benefit of the individuals themselves. They are granted for the entire period between arrival on, and departure from, the territory of the inspected State Party or Host State, and thereafter with respect to acts previously performed in the exercise of their official functions.¹⁵⁶

appeal in accordance with the procedures established under the OPCW SRISR (OPCW-PC, Part IX.1, 9.2).

148 OPCW-PC, Part IX.1, 9.1.

149 OPCW-PC, Part IX.3, 1.2.

150 OPCW-PC, Part IX.3, 4.1.

151 OPCW-PC, Part IX.3, 4.2.

152 OPCW-PC, Part IX.1, 9.3.

153 An "Inspector" means an individual designated by the Technical Secretariat to carry out an inspection or visit in accordance with the CWC. Verification Annex, Part I, 18. The HQA, Article 1(p) defines "Inspectors on mission" as members of an inspection team as referred to in the CWC who are in possession of an inspection mandate issued by the Director-General to conduct an inspection in accordance with the Convention.

154 An "Inspection Assistant" means an individual designated by the Technical Secretariat to assist inspectors in an inspection or visit, such as medical, security and administrative personnel and interpreters. Verification Annex, Part I, 13.

155 Verification Annex, Part I, 17.

156 Verification Annex, Part II, B, 11.

When transiting the territory of non-inspected States Parties, the members of the inspection team enjoy certain privileges and immunities recognized to diplomatic agents.¹⁵⁷ The team on mission is permitted to leave and enter the territory of the Host Country, by whatsoever means of transportation, with their equipment and samples.¹⁵⁸

The members of the inspection team enjoy the following privileges and immunities:¹⁵⁹

- (1) inviolability granted to diplomatic agents pursuant to Vienna Convention, Article 29;¹⁶⁰
- (2) immunities accorded to diplomatic agents pursuant to Vienna Convention, Article 31 (1), (2) and (3);¹⁶¹
- (3) their living quarters and office premises enjoy the inviolability and protection accorded to the premises of diplomatic agents pursuant to Vienna Convention, Article 30(1);¹⁶²
- (4) inviolability to their papers and correspondence, including records, as accorded to all papers and correspondence of diplomatic agents pursuant to Vienna Convention, Article 30(2);¹⁶³
- (5) inviolability and exemption from all custom duties on samples and approved equipment carried by them;¹⁶⁴
- (6) the right to communicate with the Technical Secretariat Headquarters using their own, duly certified, approved equipment,¹⁶⁵ and using codes

157 As set forth in Vienna Convention, Article 40, 1. Verification Annex, Part II, B, 12.

158 The appropriate authorities shall provide them, where appropriate, with priority treatment and priority luggage handling with regard to customs and security controls. The transport of toxic chemicals shall comply with the rules and regulations of the Host Country concerning the handling of such articles: HQA, Article 18, 2(e).

159 They are also covered by their privileges and immunities as staff members.

160 Verification Annex, Part II, B, 11(a).

161 Verification Annex, Part II, B, 11(e). Their inviolability according to the Vienna Convention, Article 31, (a), (b) and (c) prevails over the two exceptions in HQA Article 4,1 (see above: *V.i: General provisions, b*)), when performing their inspection activities in the territory of the Host Country. The Host Country is obliged to facilitate and allow in its territory the entry, transit, sojourn and departure of these persons, whatever their nationality, affording them any necessary protection: HQA, Article 14.

162 Verification Annex, Part II, B, 11(b).

163 Verification Annex, Part II, B, 11(c).

164 Verification Annex, Part II, B, 11(d).

165 "Approved Equipment" means the devices and instruments necessary for the performance of the inspection team's duties that have been certified by the Technical Secretariat

for their communications;¹⁶⁶ they also have the right to use their own two-way system of radio communications between personnel patrolling the perimeter¹⁶⁷ of the inspected site and other members of the inspection team; and the team may also request that the inspected State Party or Host State Party provide it with access to other telecommunications means¹⁶⁸ and the necessary amenities;¹⁶⁹

- (7) currency and exchange facilities, as are accorded to representatives of foreign Governments on temporary official missions;¹⁷⁰ and
- (8) exemption from dues and taxes, as accorded to diplomatic agents pursuant to Vienna Convention, Article 34,¹⁷¹ and the right to bring into the territory of the inspected State Party or Host State Party, without payment of any customs duties or related charges, articles for personal use, with the exception of articles the import or export of which is prohibited by law or controlled by quarantine regulations.¹⁷²

The members of the inspection team are obliged to respect the laws and regulations of the inspected State Party or Host State and, to the extent that this is consistent with the inspection mandate, not to interfere in the internal affairs of that State.¹⁷³ They shall not engage in any professional or commercial activity for personal profit on the territory of the inspected State Party or Host State.¹⁷⁴

Observers¹⁷⁵ enjoy the same privileges and immunities accorded to inspectors.¹⁷⁶ They have the right to be in communication with their embassies in the inspected State Party or in the Host State and, in the case of absence of an embassy, with the requesting State Party itself. The inspected State Party has to

and approved by the CSP. Such equipment may also refer to the recording materials that would be used by the inspection team. Verification Annex, I, 1.

¹⁶⁶ Verification Annex, Part II, B, 11(c).

¹⁶⁷ The perimeter is the external boundary of the inspection site. See: Verification Annex, I, 21.

¹⁶⁸ Verification Annex, Part II, E, 44.

¹⁶⁹ Verification Annex, Part II, C, 26.

¹⁷⁰ Verification Annex, Part II, B, 11(h).

¹⁷¹ Verification Annex, Part II, B, 11(f).

¹⁷² Verification Annex, Part II, B, 11(g).

¹⁷³ Verification Annex, Part II, B, 13.

¹⁷⁴ Verification Annex, Part II, B, 11(i).

¹⁷⁵ Verification Annex, I, 20: "Observer" means a representative of a requesting State Party or a third State Party to observe a challenge inspection.

¹⁷⁶ Verification Annex, Part II, B, 15. However, they are not granted inviolability of samples and don't carry approved equipment.

provide them means of communication, but the incurred expenses shall be paid by the requesting State.¹⁷⁷

E *Waiver of Immunity of Members of the Inspection Team*

The immunity of members of the inspection team from legal jurisdiction may be waived by the Director-General in those cases in which the Director-General is of the opinion that immunity would impede the course of justice and that it can be waived without prejudice to the implementation of the provisions of the Convention. A waiver must always be express.¹⁷⁸

Cases that may be considered serious enough by the Director-General to justify waiving the immunity of a member of an inspection team are:

- (1) use of privileges and immunities for his or her personal benefit;¹⁷⁹
- (2) engaging in any professional or commercial activity for personal profit on the territory of the inspected State Party or the Host State;¹⁸⁰
- (3) lack of respect for, or violation of the laws and regulations of, the inspected State Party or Host State;¹⁸¹
- (4) interference in the internal affairs of the inspected State Party or Host State to an extent that is inconsistent with the inspection mandate;¹⁸² and
- (5) the import or export of articles which are prohibited by law or controlled by quarantine regulations.¹⁸³

If the inspected State Party or Host State Party considers that there has been an abuse of privileges and immunities, consultations shall be held between the State Party and the Director General to determine whether such an abuse has occurred and, if so determined, to prevent a repetition of such abuse.¹⁸⁴

6 *Dispute Settlement*

A *General Provisions*

The OPCW enjoys full legal personality and, therefore, is entitled to institute and act in legal proceedings, as claimant, respondent or in any other capacity

¹⁷⁷ Verification Annex, Part x, 54 and 56.

¹⁷⁸ Verification Annex, Part II, B, 14.

¹⁷⁹ Verification Annex, Part II, B, 11.

¹⁸⁰ Verification Annex, Part II, B, 11(i).

¹⁸¹ Verification Annex, Part II, B, 13.

¹⁸² Verification Annex, Part II, B, 13.

¹⁸³ Verification Annex, Part II, B, 11(g).

¹⁸⁴ Verification Annex, Part II, B, 13.

that may be needed to protect its interests and those of the States Parties as these relate to the exercise of its functions in accordance with the CWC.¹⁸⁵

Although the OPCW enjoys immunity from legal process, it nevertheless bears responsibility, and may be obliged to render compensation, for any damages incurred as a result of acts performed by it or its agents acting in their official capacity. As claims against the OPCW may not be heard by national courts because of the privileges and immunities enjoyed by it, such claims must be settled using appropriate alternative methods.¹⁸⁶ The claimant may also be confronted at a later stage with the immunity of execution contained in the HQA, Article 4. 2, and MAPI, Article 3. 1¹⁸⁷: the waiver of jurisdictional immunity must not be interpreted as implicitly extending to immunity from enforcement.

B *Balancing Immunity with the Right of Access to Courts*

Article 10 of MAPI and Article 26 of the HQA oblige the OPCW to make provision for appropriate modes of settlement of:

- (1) disputes arising out of contracts or other disputes of a private law character to which the OPCW is a party; and
- (2) disputes involving any official of the OPCW or an expert who, by reason of his official position, enjoys immunity, if such immunity has not been waived by the OPCW.

Those alternative means¹⁸⁸ are already in place in matters related to staff members (through the International Labor Organization's Administrative

¹⁸⁵ See above: *The Capacity to Institute and Act in Legal Proceedings*.

¹⁸⁶ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 29 April 1999, International Court of Justice, Advisory Opinion [1999] ICJ Rep. p. 62. See also Reinisch and Weber, *supra* note 49.

¹⁸⁷ "It is, however, understood that no waiver of immunity shall extend to any measure of execution". Belgian and Swiss Courts have permitted execution measures when the claimant had no reasonable alternative means of enforcement: Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra* note 45. See also August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', (2006) 17 *European Journal of International Law* pp. 803–836.

¹⁸⁸ Particularly in Europe after the Waite and Kennedy case. Other Courts in non-European countries have arrived at similar conclusions. The "[c]ase is particularly remarkable as it demonstrates that national courts may be willing to deny immunity when they consider that adequate alternative means of dispute settlement are not available": Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts*, *supra* note 45.

Tribunal ('ILOAT')); private contractors (arbitration, as provided for in the GTC-G&S); States Parties and International Organizations (various means including arbitration and the International Court of Justice ('ICJ')) and States not Party to the CWC (through recourse to UN dispute resolution procedures).¹⁸⁹

C *Waiver of Immunity*

The HQA¹⁹⁰ and the MAPI¹⁹¹ state that privileges and immunities are accorded to OPCW officials, Representatives of States Parties, alternates, advisers, technical experts and secretaries of their delegations at meetings convened by the OPCW in order to safeguard the independent exercise of their functions in connection with the OPCW and not for the personal benefit of the individual themselves, which may constitute an abuse of their rights. Such individuals have the duty to observe in all other respects the laws and regulations of the State Party.

Other OPCW-related provisions on the waiver of immunities in various contexts are contained in different instruments:

- (1) waiver of the immunity, contained in the Verification Annex, of the members of an inspection team;¹⁹²
- (2) waiver as a consequence of a breach of the confidentiality regime, as specified in the Confidentiality Annex and the OPCW-PC;¹⁹³ and
- (3) waiver as a consequence of an abusive exercise of rights or a failure to observe the provisions contained in MAPI, HQA and OPCW Staff Regulations and Interim Staff Rules ('OPCW SRISR').¹⁹⁴

189 Taking into consideration current developments in domestic case law, it might happen, although it is quite unlikely, that OPCW immunity would be restricted by a domestic court if the OPCW has no reasonable alternative means for solving the dispute with the claimant. However, both the recent ICJ judgement on *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, 3 February 2012, International Court of Justice, [2012] ICJ Rep. p. 99, and the judgement in the *Mothers of Srebrenica v. the State of the Netherlands*, 13 April 2012, Supreme Court of the Netherlands, First Division 10/04437 EV/AS cannot be considered as being favourable to a restricted interpretation of State and International Organizations immunity. See Otto Spijkers, 'Case Note: The Immunity of the United Nations before the Dutch Courts', (2012) 51(2) *Military Law and the Law of War Review* p. 361.

190 HQA, Article 24, 1.

191 MAPI, Article 5.3; Article 6, 5.

192 See above: *Waiver of immunity of members of the inspection team*.

193 See above: *Waiver as a consequence of a breach of the confidentiality regime*.

194 See above: *Waiver of immunity of staff members*.

D *Means of Settling a Dispute*

The OPCW may be confronted with situations which require the settlement of disputes that have arisen with different actors on a variety of subjects. Different mechanisms may be used to settle the dispute, in accordance with the CWC and other legal sources.

- (a) Disputes between States Parties or between the OPCW and States Parties

Article XIV of the CWC establishes the general criterion that disputes that may arise concerning the application or the interpretation of the Convention shall be settled in accordance with the relevant provisions of the Convention and the provisions of the UN Charter. Disputes that may arise between two or more States Parties, or between one or more States Parties and the Organization, relating to the interpretation or application of the CWC, should be solved by mutual consultation, negotiation or by other peaceful means which the parties may choose, including recourse to the appropriate Policy Making Organs ('PMO'). The Executive Council may contribute to the settlement of a dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement process of their choice and recommending a time limit for any agreed procedure. The Conference may establish or entrust organs with tasks related to the settlement of these disputes. Both bodies are separately empowered, subject to authorization from the UN General Assembly, to request the ICJ to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. States Parties may also, by mutual consent, refer the case to the ICJ in conformity with the Statute of the Court.

In case the dispute involves matters related to the object and purpose of the CWC or the implementation of the provisions thereof, States Parties may consult each other, agree on suitable procedures to clarify and resolve the matter,¹⁹⁵ request clarification to the Executive Council¹⁹⁶ and, where

¹⁹⁵ CWC, Article IX, 1 and 2.

¹⁹⁶ CWC, Article VIII, C, 36:

The Executive Council shall consult with the States Parties involved and, as appropriate, request the State Party to take measures to redress the situation within a specified time. To the extent that the Executive Council considers further action to be necessary, it shall take, inter alia, one or more of the following measures:

- (a) Inform all States Parties of the issue or matter;
- (b) Bring the issue or matter to the attention of the Conference;
- (c) Make recommendations to the Conference regarding measures to redress the situation and to ensure compliance.

considered appropriate, resort to requesting a challenge inspection to be conducted by the Technical Secretariat.¹⁹⁷

If there is a need to ensure compliance with the Convention and to redress and remedy any situation which contravenes its provisions, the CWC¹⁹⁸ also entitles the CSP to:

- (1) restrict or suspend the State Party's rights and privileges under the Convention until it undertakes the necessary action to conform to its obligations under this Convention;
- (2) recommend collective measures to States Parties in conformity with international law; or
- (3) bring the issue to the attention of the UN General Assembly and the UN Security Council.

The HQA, Article 26, establishes the procedure for the settlement of disputes that may arise in the interpretation or application of the agreement: if an amicable settlement is not possible, the question must be referred to arbitration by a tribunal composed of three members. Such tribunal shall conduct its proceedings in accordance with the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States. The tribunal's decision shall be final and binding on the Parties to the dispute. Similar provisions are contained in MAPI, Article 10.

The Director-General has the right to appear or be represented in expulsion proceedings instituted by the Host Country, on behalf of representatives and officials of international organizations, experts and their spouses and dependent children with whom the OPCW has concluded agreements or arrangements in accordance with the CWC and who have official business with the OPCW, provided that these officials are not covered by special agreements to which the Host Country is a party.¹⁹⁹ Similar provisions are contained in the MAPI.²⁰⁰

The Executive Council shall, in cases of particular gravity and urgency, bring the issue or matter, including relevant information and conclusions, directly to the attention of the United Nations General Assembly and the United Nations Security Council. It shall at the same time inform all States Parties of this step.

197 CWC, Article IX. Procedures for challenge inspections and investigations in cases of alleged use of chemical weapons are set forth in Parts X and XI of the Verification Annex.

198 CWC, Article XII.

199 HQA, Article 14, 5.

200 MAPI, Article 8, 2.

Where a State Party appears responsible for a breach of the obligation to protect confidential information,²⁰¹ the matter would be subject to the Confidentiality Commission procedures²⁰² and the CWC dispute resolution mechanisms. If the breach involves a dispute between two or more States Parties, the Confidentiality Commission may either be chosen by States Parties²⁰³ to solve the dispute or called upon by the Executive Council or CSP²⁰⁴ to deal with it.

The Confidentiality Commission is entitled to seek a mutually agreeable resolution. In principle, its recommendations are not binding on the disputing parties.²⁰⁵ However, if the disputing States Parties agree, the Confidentiality Commission may decide on an arbitrated resolution to the dispute which is binding on the parties in dispute. In the absence of a mutually acceptable resolution of the dispute, the Confidentiality Commission may recommend further action to the parties and the PMO, thus opening the way for the CWC's general procedures for settlement of disputes.

(b) Disputes between the OPCW and a Non-State Party

The CWC does not contain any explicit provision on how to settle any dispute between the Organization and a non-State Party. In the absence of a separate agreement or arrangement between the OPCW and the non-State Party, one

201 CWC Annex on the Protection of Confidential Information [C-Annex], A.1: "A breach of the obligation to protect confidentiality ('a breach of confidentiality') includes any unauthorised disclosure of OPCW information to any individual, or government or private entity, regardless of the intention or the consequences of the disclosure. A breach of confidentiality can also be associated with misuse of information to gain a personal advantage or to benefit or damage the interests of a third party. A violation of obligations concerning the protection of confidential information is deemed to have taken place if there has been non-compliance with the specified procedures for the handling, protection, release and dissemination of confidential information so as to create a clear risk of unauthorised disclosure, with or without such disclosure actually occurring. In practical terms, there is considerable overlap between a breach of confidentiality and a violation of obligations to protect confidential information". OPCW Policy on Confidentiality [OPCW-PC], Part IX.1.2.

202 If an investigation conducted by the Director-General finds that a State Party appears responsible for a breach, that State Party shall assist the Director-General to resolve the matter. The Director-General may also raise the matter with the Executive Council and request further action in response to the investigation report. The CSP may call upon the Confidentiality Commission to deal with the case. OPCW-PC, Part IX.1.1 and Part IX.2.2.

203 OPCW-PC, Part IX.2.2.

204 Both PMOs are also entitled to do so by CWC Article XIV.

205 The report and recommendations of the Confidentiality Commission may provide a basis or rationale for further action on the part of the disputing parties or competent organs of the Organization: OPCW-PC, Part IX, 2.3.

possible avenue, depending on the circumstances, could be to refer the case to the UN.

In the case of alleged use of chemical weapons involving a non-State Party or in a territory not controlled by a State Party, paragraph 27 of Part XI, Section E of the Verification Annex establishes that the Organization shall closely cooperate with the Secretary-General of the United Nations, and, if so requested, the Organization shall put its resources at the disposal of the Secretary-General of the United Nations. This cooperation is reaffirmed in the RA-UN-OPCW, Article 2(c).²⁰⁶

(c) Disputes between the OPCW and International Organizations
Relations between the OPCW and other international organizations are usually regulated by Agreements and MoUs that contain provisions for the settlement of disputes. International organizations cannot, as such, be Parties to any case before the ICJ in accordance with the latter's Statute.²⁰⁷ The ICJ has established a special procedure, the advisory procedure, available to international organizations to let them seek advisory opinions of the Court. The RA-UN-OPCW provides that each such request for an advisory opinion shall first be submitted to the UN General Assembly, which will decide upon the request in accordance with Article 96 of the Charter.²⁰⁸

(d) Disputes between the OPCW and a Natural or Legal Person
Nothing in the CWC prevents the OPCW from suing any person with whom it has a dispute in the tribunals of that person's nationality or domicile, if no other provision concerning the settlement of disputes is in force.

The GTC-G & S template²⁰⁹ contains a number of provisions on dispute settlement;²¹⁰ however, specific terms and conditions may be established by

206 Agreement concerning the relationship between the UN and the OPCW, Article II, (c): "The OPCW shall, in accordance with paragraph 27 of Part XI of the Verification Annex, closely cooperate with the Secretary-General in cases of the alleged use of chemical weapons involving a State not party to the Convention or in a territory not controlled by a State Party to the Convention and, if so requested, shall in such cases place its resources at the disposal of the Secretary-General".

207 Statute of the International Court of Justice, Article 34, 1.

208 RA-UN-OPCW, Article VII, 2.

209 This template evolve according with the experience of the Organization and is usually posted on its website. We quote in this text the latest version available.

210 These provide:

(a) Without prejudice to the privileges and immunities of the Organization, any legal dispute relating to this contract shall be settled amicably by negotiation and in cooperation with the Host Country.

the OPCW in certain cases, as contract terms are usually adjusted depending on the scope and nature of the activities and risks involved thereto.

Where a person under the jurisdiction of a State Party appears to have been responsible for a breach of confidentiality, has derived particular advantage from it, or has otherwise been involved in it, that State Party may be required to take appropriate legal action against him.²¹¹ Although States Parties have the obligation to cooperate with the Director-General and the OPCW in relation to the investigation of a breach of confidentiality,²¹² it remains the primary responsibility of States Parties to determine the applicability of national jurisdiction on a case-by-case basis.²¹³

If the person is residing or is otherwise within the jurisdiction of a State not Party to the Convention, the Director-General may seek the authority of the Executive Council or the CSP to undertake consultations with the aim of encouraging that State to initiate or facilitate appropriate action to support legal processes resulting from the breach.²¹⁴

(e) Disputes between the OPCW and Staff Members

Staff members are entitled to appeal decisions taken by the Technical Secretariat on matters related to their contracts²¹⁵ and the OPCW to act as a

(b) Any dispute which cannot be settled by negotiation shall, without prejudice to the relevant privileges and immunities of the Organization, at the request of either Party, be submitted at the seat of the Organization to an Arbitration Board composed of: (i) two arbitrators, one being appointed by each of the parties; and (ii) a referee chosen by the two arbitrators.

(c) In the event of a disagreement as to the nomination of the referee or a Party's failure to appoint an arbitrator, these appointments shall be made by the Secretary-General of the Permanent Court of Arbitration in The Hague. The Arbitration Board shall have its seat in The Hague and shall establish its own procedure.

(d) In the absence of contractual provisions, the arbitrators shall apply the UNCITRAL Arbitration Rules as in force on the day both Parties have signed the contract.

²¹¹ OPCW-PC, Part IX.1.10.1. In case a private company is found responsible for a breach of the obligation to protect confidential information, the GTC-G&S establishes that "The Contractor shall be liable for any breach of confidentiality or any indirect disclosure which could vitiate the interests of the Organization. The extent of any such liability shall be directly proportional to the extent of the damage caused".

²¹² CWC, Article VII, para. 7; OPCW-PC, Part IX 3.1(a).

²¹³ OPCW-PC, Part IX 3.4.2.

²¹⁴ OPCW-PC, Part IX.1.10.2.

²¹⁵ The right of staff members to appeal to an independent tribunal any administrative decision of an International Organization is a well-established principle of international law. The ICJ has said (in *Effect of Awards of Compensation made by the United Nations*

defendant. After the internal procedure set up in Articles X and XI of the SRISR has been completed, Rule 11.3.01 establishes that a staff member has the right to appeal administrative decisions or disciplinary actions to the ILOAT.²¹⁶ However, nothing in the CWC prevents the OPCW from suing a staff member in the tribunals of his/her nationality or domicile in certain cases, as, for example, when there is a need to recover misappropriated funds.²¹⁷

Administrative Tribunal, 13 July 1954, International Court of Justice, Advisory Opinion, [1954] ICJ Rep. p. 47, at p. 57) that

the Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.

In ILOAT Judgment No. 2232 (2003), *supra* note 111, the Tribunal recognized that, in order to comply fully with the principle of due process, staff members should be able to follow a procedure enabling the individual concerned to defend his or her case effectively before an independent and impartial body, and, furthermore, that an international civil servant has the right to have his complaint examined by a judicial body. In the *Resodikromo case*, *supra* note 56, the OPCW argued that any dispute in relation to OPCW employment contracts is subject to the exhaustion of the internal remedies provided by the SRISR and the exclusive jurisdiction of the ILOAT.

216 OPCW SRISR Rule 11.3.01:

- (a) Staff members shall have the right to appeal to the Administrative Tribunal of the International Labour Organisation, in accordance with the provisions of the Statute of that Tribunal, against administrative decisions and disciplinary actions taken, after reference to the Appeals Council.
- (b) A staff member may, in agreement with the Director-General, waive the jurisdiction of the Appeals Council and appeal directly to the Administrative Tribunal of the International Labour Organisation, in accordance with the provisions of the Statute of that Tribunal.

217 OPCW Staff Regulations and Interim Staff Rules, Rule 12.0.01 on Financial Responsibility states:

Any staff member may be required to reimburse the Organization either partially or in full for any financial loss suffered by the Organization as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative directive.

If the Organization does not have at hand sufficient funds of the staff member to recover the amount of the damage, nothing prevents it from suing the staff member in domestic tribunals.

In case of a serious breach of a staff member's obligations related to confidentiality, which has caused damage, the Director-General may decide to waive the staff member's immunity, if there is a chance of a relevant national jurisdiction being applied,²¹⁸ after any internal review opportunities requested by the staff member have been exhausted.²¹⁹ States Parties shall, as far as possible, take appropriate legal action when making an appropriate response to a waiver of immunity,²²⁰ based on a request by the Director-General or by a State Party affected by such serious breach.²²¹ However, it remains the primary responsibility of States Parties to determine the applicability of national jurisdiction on a case-by-case basis.²²²

218 OPCW-PC, Part IX.1.9.1.

219 OPCW-PC, Part IX.9.2.

220 OPCW-PC, Part IX.1.9.3.

221 OPCW-PC, Part IX.3.4.1.

222 OPCW-PC, Part IX 3.4.2.