

**EFFECTIVE IMPLEMENTATION
OF THE
CHEMICAL WEAPONS CONVENTION**

Liability of the Future OPCW

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**Bad Homburg, Germany
8-10 September 1995**

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I. Introduction

The issue of liability of the future OPCW has so far been neglected not only during the negotiation process of the CWC in Geneva but also within the work of the PrepCom of the OPCW. During the 10th and 11th Plenary of the PrepCom for the first time one aspect of the future Organization's liability was addressed - compensation for breaches of confidentiality.¹ The fact that the problem of liability has not been touched during most of the CWC implementation process is in line with the development of many other international organizations, when the question of liability of the Organization was not on the agenda either. However, the question of liability is not a marginal problem, which can be dealt with as soon as the issue arises. It is very important for the standing of the international organization within any legal relationship, concerning international law or national law.² The latter context is of major importance for the future OPCW. One might only think of the costs involved in contracts for the buying of equipment of inspectors, which were not concluded under international law.

The circumstances in which the organisation could be held liable are as follows³:

- 1) Liability for contractual obligations
- 2) Liability for tort-obligations other than breaches of confidentiality
- 3) Liability for tort-obligations concerning breaches of confidentiality

Two questions have to be answered to pave the way for a suitable liability regime of the future OPCW: first, whether the Organization is liable to any claimants at all and second, whether its members states are liable for obligations of the Organization to claimants or to the Organization as well.

There are two other points regarding the question of liability that will not be addressed in this paper. First the Organization is granted immunity in the national legal systems. This, however, only means that no action can be brought against the Organization in court; it does not prevent the Organization to be substantially liable for its obligations.⁴ The second point is the liability of an organization vis-à-vis Non Parties. There is an academic debate⁵ on this issue, but it is very unlikely that the problem will arise in the context of the OPCW and, thus, it can be neglected in

¹ Statement of the Asian Group PC- X/18 paragraph 4 (e); Report of the Commission, PC-XI/17 paragraph 7.10 (page 6) and Annex 2, IV no.3 (page 22).

² Pernice, I., *Die Haftung internationaler Organisationen und ihrer Mitarbeiter*, 26 Archiv des Völkerrecht (AVR) (1988), pp. 406 et seq., at p. 407.

³ See also PC-X/B/WP.3 paragraph 22.

⁴ With the IAEA as an example see Rockwood, L., *Responsibility of the international organization and of its civil servants*, paper presented at the Workshop on The Convention on the Prohibition and Elimination of Chemical Weapons, Hague Academy of International Law, at p. 4, forthcoming in *Recueil de Cours: Convention on the Prohibition and Elimination of Chemical Weapons: A Breakthrough in Multilateral Disarmament.*; Müller, W., *Trauschau wem! Oder: Von der zivilrechtlichen Verantwortlichkeit der Mitgliedstaaten Internationaler Organisationen*, Neue Juristische Wochenschrift (NJW) 1991, pp. 2175 et seq., at p. 2177.

⁵ For the different opinions see Mann, F.A., *Die juristische Person des Völkerrechts*, 152 Zeitschrift für Handelsrecht (1988), pp. 303 et seq. at p. 307; Hahn, H.J., *Euratom: The Conception of an International Personality*, 71 Harvard Law Review (1958), pp. 1001 et seq., at p. 1048; Meng, W., *Internationale Organisationen im völkerrechtlichen Delikt*, 45 ZaöRV (1985), pp. 324 et seq.; Mosler, H., *Die Erweiterung des Kreises der Völkerrechtssubjekte*, 22 ZaöRV (1962), pp. 1 et seq., at p. 32; Frowein, J.A., *Recognition*, EPIL <10>, 346 Collier, FS Lipstein, 1980, 21.

this paper.

II. Legal Personality of the OPCW

The liability of an international organization depends on the fact whether or not the organization possesses legal personality and thus, must be considered a subject of international law or the respective national legal system.⁶ The latter point is relevant for, *inter alia*, contracts concluded with enterprises which are not subjects of international law. These contracts may be governed by any national legal system and the Organization can only be held liable if it has legal personality under the respective legal system.⁷

Concerning the legal personality of the Organization under international law the mere wording of the CWC is not the decisive factor, but the whole context of the CWC, the nature, purpose and function of the Organization and the intention of states, whether the Organization should exercise and enjoy rights and duties, based on the possession of international personality and the capacity to operate on the international plane will be taken into account.⁸ Although there is no provision in the CWC stating that the future OPCW possesses international legal personality - Art. VIII paragraph 48 has not been considered to be sufficient to establish the Organization's international legal personality⁹ - it is obvious that the OPCW can only exercise its rights and functions, if it possesses international legal personality and is considered as a subject of international law.¹⁰ The conclusion of facility agreements between the OPCW and Member States, which will be treaties under international law, may serve as an example so far.

Regarding the aspect of legal personality under the legal systems of States Parties, Art. VIII, paragraph 48 of the Convention serves to prove that the OPCW will possess legal personality in the respective legal systems.¹¹

Since it cannot be disputed that the OPCW will possess legal personality, it is well established that international organization are responsible and liable for the acts of its agents.¹² This applies to international law¹³ as well as to national law¹⁴. Thus it can be concluded that the

⁶ Brownlie, I., *Principles of International Law*, 4th ed. 1990, at p. 701 states: The correlative of a legal personality and a capacity to present international claims is responsibility.

⁷ Mann, F.A., *Die juristische Person des Völkerrechts*, 152 Zeitschrift für Handelsrecht (1988), pp. 303 et seq., at p. 307; Ebenroth, C.T., *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Vol. VII, 2nd ed., nach Art. 10, no. 560.

⁸ Mann, F.A., *Die juristische Person des Völkerrechts*, 152 Zeitschrift für Handelsrecht (1988), pp. 303 et seq., at p. 306; see also *Advisory Opinion of the ICJ concerning Reparations for Injuries suffered in the Service of the United Nations*, ICJ Reports 1949, at p. 179.

⁹ Mann, F.A., *Die juristische Person des Völkerrechts*, 152 Zeitschrift für Handelsrecht (1988), pp. 303 et seq., at p. 306.

¹⁰ See Seidl-Hohenveldern, I., *Der Rückgriff auf die Mitgliedstaaten in Internationalen Organisationen*, in *Völkerrecht als Rechtsordnung - Internationaler Gerichtshof - Menschenrechte Festschrift für Herman Mosler*, pp. 881 et seq., at p.885 et seq.; Mann, F.A., *Die juristische Person des Völkerrechts*, 152 Zeitschrift für Handelsrecht (1988), pp. 303 et seq., at p. 307 states that as a rule one can assume that states, founding an international organisation, will also grant the international organisation legal personality in international law, although the constitutional documents do not include any provision in that respective; see also Hoffmann, G., *Der Durchgriff auf die Mitgliedstaaten internationaler Organisationen für deren Schulden*, *Neue Juristische Wochenschrift (NJW)* 1988, pp. 585 et seq., at p. 585 with further references in footnot 3; and Hahn, H.J., *Euratom: The Conception of an International Personality*, 71 *Harvard Law Review* (1958), pp. 1001 et seq., at p. 1048.

¹¹ See to that Ebenroth, C.T./ Fuhrmann, L., *Die zivilrechtliche Haftung internationaler Organisationen und ihrer Mitgliedstaaten*, *Juristische Zeitung (JZ)* 1989, pp. 221 et seq. at p. 215; Hoffmann, G., *Der Durchgriff auf die Mitgliedstaaten internationaler Organisationen für deren Schulden*, *Neue Juristische Wochenschrift (NJW)* 1988, pp. 585 et seq.

¹² Bothe, M., *Obligations and Protection of Individuals*, paper presented at the Workshop on The Convention on the Prohibition and Elimination of Chemical Weapons, Hague Academy of International Law, at p. 8 , forthcoming in *Recueil de Cours: Convention on the Prohibition and Elimination of Chemical Weapons: A Breakthrough in Multilateral Disarmament*.

¹³ Ginther, K., *International Organisations, Responsibility*, in *EPIL* <5> at p. 162; see also Rockwood, L.,

future OPCW will be liable for acts of its agents.

In the following paragraph it will be briefly examined in which situations the issue of liability will be relevant for the future OPCW. The Organization is not liable for any breach of confidentiality by a staff member of the TS¹⁵. Thus, the issue will not occur in such cases. Regarding the liability for contractual obligations it might be well the case, that the Organization will waive its immunity for being sued before national courts. This is due to the fact that contracts with private enterprises are concluded under the respective national law and that the Organization itself brings action against the enterprise which are related to the same contract. These claims can then be settled by the national court as well and the Organization can pursue that the judgment will be executed. Furthermore by waiving its immunity for being sued in national courts, the Organization does not waive its immunity for execution of private law judgments. Thus, any judgment passed by a national court cannot be executed against the OPCW. A last reason for waiving its immunity might be, that the Organization by doing so wants to uphold its reliability as a trading partner.

The issue of liability will therefore mainly be relevant for tort- obligations other than breaches of confidentiality.

III. Liability of Member States for the OPCW

The remaining question is whether the Member States of the Organization are also liable for acts of the Organization. This is of great importance for any claimant as well as for the Organization. If states are liable claimants can sue the State Parties and thus, it is more likely for them to receive the full amount of their claim and not merely a proportion as in the case of liquidation of the Organization. Vice versa the standing of the Organization in all legal relations will improve if the individual, who does business with the Organization, can be assured that the member states are also responsible for the financial obligations of the Organization.

In this regard many theories have been developed. Some of them stating that an organization alone must be held liable for its acts,¹⁶ while others state different shades of members states' liability for obligations of the Organization¹⁷¹⁸. However, no general rules on liability exist in

Responsibility of International Organisations and its civil servants, paper presented at the Workshop on The Convention on the Prohibition and Elimination of Chemical Weapons, Hague Academy of International Law, at p. 1, forthcoming in *Recueil de Cours: Convention on the Prohibition and Elimination of Chemical Weapons: A Breakthrough in Multilateral Disarmament*; Kadelbach, S., *Staatshaftung für Embargoschäden*, *Juristische Zeitung (JZ)* 1993, S. 1134 et seq.

¹⁴ Ebenroth, C.T./ Fuhrmann, L., *Die zivilrechtliche Haftung internationaler Organisationen und ihrer Mitgliedstaaten*, *Juristische Zeitung (JZ)* 1989, pp. 221 et seq., at p. 220; Hoffmann, G., *Der Durchgriff auf die Mitgliedstaaten internationaler Organisationen für deren Schulden*, *Neue Juristische Wochenschrift (NJW)* 1988, pp. 585 et seq., at p. 586.

¹⁵ Paragraph 22 of the Confidentiality Annex.

¹⁶ So Pernice, I., *Die Haftung internationaler Organisationen und ihrer Mitarbeiter*, 26 *Archiv des Völkerrecht (AVR)* (1988), pp. 406 et seq., at p.419 and 420; Seidl- Hohenveldern, I., *Die völkerrechtliche Haftung für Handlungen Internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten*, 11 *ÖZöR* (1961), pp. 497 et seq., at p. 505 et seq., Eisemann, P.M., *Crise du Conseil International de l'Étain et Insolvabilité d'une Organisation Intergouvernementale*, 31 *AFDI* (1985), pp. 730, at p. 745; Herdegen, M., *Bemerkungen zur Zwangsliquidation und zum Haftungsdurchgriff bei Internationalen Organisationen*, 47 *ZaöRV* (1987), pp. 537 et seq., at p. 555; with respect to the contractual obligations of the EC, see Conze, A., *Die völkerrechtliche Haftung der Europäischen Gemeinschaft*, 1987, at p. 70; with respect to tort-obligations of an international organisation v. Münch, I., *Das völkerrechtliche Delikt*, 1963 at p. 268.

¹⁷ Reuter, P., *Sur quelques limites du Droit des Organisations Internationales*, *Festschrift für Rudolf Bindschedler*, Bern 1980, pp. 491 et seq., at p. 505 et seq.; Seyerstedt, F., *Objective International Personality of Intergovernmental Organisations*, 1963, at p.97, Meng, W., *Internationale Organisationen im völkerrechtlichen Delikt*, 45 *ZaöRV* (1985), pp. 324 et seq., at p. 338; Bothe, M. *Die Stellung der Europäischen Gemeinschaften im Völkerrecht*, 37 *ZaöRV* (1977), pp. 122 et seq., at p. 128; Bernhardt, R., *Die Europäischen Gemeinschaften als neuer Rechtsträger im Geflecht*

international law so far.¹⁹ There is no codification addressing the issue in a general way²⁰, and there are no customary international law either. The few examples existing at present are the International Tin Council Case,²¹ the Eurochemie Case and the Westland Helicopters Case²² cannot serve as precedents for various reasons and all have been settled in different ways. Further, a survey of the constitutional documents of international organizations reveals that no coherent practice exists addressing the problem of member states' liability for acts of the Organization. Some of these documents contain specific clauses for the dissolution of the Organization, some include provisions limiting the liability of the Organization, some provide for the liability of member states but most of them do not refer to the question of liability at all.²³

Thus, to decide whether or not member states are liable for acts of an international organization, it is necessary to analyze the constitutional documents of the Organization²⁴ as well as all circumstances of its establishment and its assigned tasks.²⁵ Further, the intention of member states concerning their own liability for the Organization have to be taken into account.²⁶ But before turning to the interpretation of the CWC concerning the liability of

der traditionellen zwischenstaatlichen Beziehungen, 18 *Europarecht* (EUR) (1983), pp. 199 et seq., at p. 212; Schemers, H., *Liability of International Organisations*, 1 *Leiden Journal of International Law* (1988), pp. 1 et seq., at p. 9.

¹⁸ In this respect it is debated whether member states shall be jointly liable with the organisation towards the claimant or shall only be liable towards the organisation for compensation of claims brought against the organisation or whether member states shall be subsidiary liable for the organisation's obligation. However, this paper discusses only the question, whether member states are liable or not and leaves the question in which manner member states are liable aside.

¹⁹ In his doctoral thesis *Die Haftung der Mitgliedstaaten für Internationale Organisationen*, Berlin 1993, M. Hartwig analysed the various factors of a possible liability of member states in detail, such as control over the organisation, financial obligations of member states for the organisation etc.; his conclusion that so far no body of law ruling the question of liability exists is at p. 333; see also Amerasinghe, C.F., *Liability to Third Parties of Member States of International Organisations: Practice, Principle and Judicial Precedent*, 85 *AJIL* (1991), pp. 259 et seq. with further references; Cahier, *The Strengths and Weaknesses of International Arbitration Involving a State as a Party*, in *Contemporary Problems in International Arbitration*, J. Lew (ed.), 1987, at p. 244; see also the examination of Pernice, I., *Die Haftung internationaler Organisationen und ihrer Mitarbeiter*, 26 *Archiv des Völkerrecht* (AVR) (1988), pp. 406 et seq., at pp. 420-428.

²⁰ The Vienna Convention on the Law of Treaties between States and International Organisations and among International Organisations has not entered into force so far. To the Convention see Bothe, M., *Die Wiener Konvention über das Recht der Verträge zwischen Staaten und Internationalen Organisationen und zwischen Internationalen Organisationen*, *Neue Juristische Wochenschrift* (NJW) 1991, pp. 2169 et seq.

²¹ *Judgement of the House of Lords of 26.10.1989*, 3 [1989] *All E R* at pp. 523 et seq.; *Judgement of the Court of Appeal*, 3 [1988] *All E R*, 257 et seq.; For analysis of the case see Mallory, I., *Conduct unbecoming: The collapse of the International Tin Council*, *AM.U.J Int'l. L.&Pol'y* 1990, pp. 835 et seq.; Thomson, D., *The International Tin Council Litigation*, 22 *Journal of World Trade* (1988), pp.103 et seq.; Hartwig, M., *Die Haftung der Mitgliedstaaten für Internationale Organisationen*, Berlin 1993, pp.307 et seq.

²² *Interim Award of the International Chamber of Commerce Court of Arbitration*, *Westland Helicopters Limited v. Arab Organisation for Industrialization et al.*, 23 *ILM* (1984), pp. 1071 et seq.

²³ See Schemers, H., *Liability of International Organisations*, 1 *Leiden Journal of International Law* (1988), at p. 8 with examples; see also Pernice, I., *Die Haftung internationaler Organisationen und ihrer Mitarbeiter*, 26 *Archiv des Völkerrecht* (AVR) (1988), pp. 406 et seq., at p. 422.

²⁴ Müller, W., *Trau schau wem! Oder: Von der zivilrechtlichen Verantwortlichkeit der Mitgliedstaaten Internationaler Organisationen*, *Neue Juristische Wochenschrift* (NJW) 1991, pp. 2175 et seq., at pp. 2177-2180, especially at p. 2180; see also the decision in the *Westland Helicopters Case*, 23 *ILM* (1984), pp. 1071 et seq., at p. 1083.

²⁵ Harders, J.E., *Haftung und Verantwortlichkeit internationaler Organisationen* in Wolfrum, R. (ed.), *Handbuch des Völkerrechts*, pp. 248 et seq., at p. 251 (note 16).

²⁶ Shihata, *Role of Law in economic Development: The Legal Problems of International Ventures*, 25 *Revue égyptienne de Droit International* (1969), at p. 125, see also Seidl-Hohenveldern, I., *Piercing the corporate veil of International Organisations: The Tin Council Case in the English Court of Appeals*, *GYIL* 1989, at p. 47; Amerasinghe, C.F., *Liability to Third Parties of Member States of International Organisations: Practice, Principle and Judicial Precedent*, 85 *AJIL* (1991), p.279 points out: "There seems to be general agreement that the issue of secondary or concurrent liability of members of an international organisation for the latter's obligations must be decided in the first place by reference to the constituent instruments. This document is to be interpreted in the light of all the circumstances so as to determine the intention, express or implied, of the parties to it."

OPCW two additional remarks have to made.

First, for the interpretations of the documents the rules of the Vienna Convention on the Law of Treaties have to be applied, especially Art. 31 CLT if the documents are silent on a specific issue.²⁷ And secondly, as said constitutional documents of an international organization may include provisions limiting or acknowledging member states' liability for specific activities. None of these provision provides for a reasonable ground to interpret the constitutional documents in a way that, if the liability is excluded for specific activities, member states are liable for activities carried out under the other provisions of the treaty.²⁸ The same is valid for provisions, which acknowledge member states' liability for a specific activities of the international organization²⁹.³⁰ However, clauses excluding or including the liability of member states for specific circumstances are valid under international law and have to be taken into account.³¹

There is only a single provision of the CWC dealing with the liability of the Organization. This is paragraph 22 of the Confidentiality Annex, excluding the liability of the OPCW for any breach of confidentiality committed by a staff member of the Technical Secretariat. According to two authors, this provision was included in the CWC to protect the Organization against claims amounting to millions of US-Dollars for which States Parties could be held liable, and thus, pose an incalculable risk on the States Parties. This risk could have kept states from ratifying the CWC.³² But as stated above this clause does not provide any basis for further interpretation of the CWC.

The *travaux préparatoires* of the CWC, the Conference of Disarmament Documents, do not contain any reference to the question of liability either.

Thus, the CWC must be interpreted "in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its objects and purpose".³³ The last part of this rule is of special importance for the interpretation of the CWC regarding liability of the OPCW. The mere fact that states have established the Organization produces some information of the states' intention regarding liability. The main tasks of the CWC is to control the non- production, including chemical industries, and to oversee the destruction of existing chemical weapons. The verification mechanism for compliance with the obligations under the CWC includes on-site inspections as well as the observation of destruction of chemical weapons. These activities include the risk of causing damage to the inspected facilities by inspectors of the OPCW and there is no fund within the CWC providing for the compensation if such damage occurs. If the Organization would be solely liable, two situation could occur. The Organization is either incapable of fulfilling its obligations, for which the budget provides,

²⁷ Kewenig, W.A., *Der Internationale Zinnrat - Ein Lehrstück des Wirtschaftsvölkerrechts*, 36 *Recht der Internationalen Wirtschaft (RIW)* (1990), pp.781 et seq. at p. 783; Müller, W., *Trau schau wem! Oder: Von der zivilrechtlichen Verantwortlichkeit der Mitgliedstaaten Internationaler Organisationen*, *Neue Juristische Wochenschrift (NJW)* 1991, pp. 2175 et seq., at p. 2179.

²⁸ The absence of a provision excluding liability in the constitutional document leads Schemers, H., *Liability of International Organisations*, 1 *Leiden Journal of International Law* (1988), at p. 9 to the conclusion that member states are liable.

²⁹ Ralph Gibson L.J. of the UK Court of Appeal in the *Tin Council Case* [1988] 3 All E.R. at p. 352/3.

³⁰ Amerasinghe, C.F., *Liability to Third Parties of Member States of International Organisations: Practice, Principle and Judicial Precedent*, 85 *AJIL* (1991), at p. 273.

³¹ Mann, F.A., *Die juristische Person des Völkerrechts*, 152 *Zeitschrift für Handelsrecht* (1988), pp. 303 et seq., at p. 315; Ebenroth at p. 219; Brownlie, I., *Principles of International Law*, 4th ed. 1990, at p. 695; v. Münch, I., *Das völkerrechtliche Delikt*, 1963 at p. 262; Hoffmann, G., *Der Durchgriff auf die Mitgliedstaaten internationaler Organisationen für deren Schulden*, *Neue Juristische Wochenschrift (NJW)* 1988, pp. 585 et seq., at p. 586 and 587.

³² Krutsch, W./ Trapp, R., *Commentary on the Chemical Weapon Convention*, Dordrecht 1994, at p. 528.

³³ Art. 31 paragraph 1 of the Vienna Convention on the Law of Treaties.

as the funds would have to be used for compensation.³⁴ Thus, the Organization could not function anymore. The other possibility is that the work of the Organization could be substantially limited as e.g. inspectors may change their verification methods in order to avoid any damage. The fulfillment of obligations under the CWC by inspectors covers always the risk of damaging something. Thus, given the case that damage had been caused and the Organization is liable for it, the future OPCW will either be limited in functioning or, if the Organization did not pay its debts, it will be difficult to find trading partners. Both alternatives will create major problems for the functioning of the future OPCW.³⁵ States must have been aware of this risk during the setting up of the Organization. As it was the intention of states to set up the Organization they must provide for a proper functioning of the organization, which includes that they provide sufficient money for its activities. Operating an international without guaranteeing that someone will compensate for its obligations is impossible.³⁶ Thus, States Parties, as the founder of the Organization, must be and are liable for acts of the future OPCW.³⁷ The intention of States Parties to provide sufficient money for the functioning of the OPCW is also expressed in the Draft financial rules of the OPCW, which include a provision that money will be provided for unforeseen and extraordinary expenditures.

IV. Institutions

If recognizing that the States Parties are liable for acts of the Organization it will be to the benefit of the Organization to set a clear procedure, as to how claims against the Organization can be filed.³⁸ Such a claim settlement procedure must include, *inter alia*, the following aspects:

- A dispute settlement board should be established, which will consider contested claims as well as the amount of damage, if contested, and which decisions are binding for the parties involved;³⁹
- Clear procedural rules for lodging a claim and for the proceeding of the case;
- A scheme has to be developed, which reveals how States Parties will provide money for the

³⁴ See Müller, W., *Trau schau wem! Oder: Von der zivilrechtlichen Verantwortlichkeit der Mitgliedstaaten Internationaler Organisationen*, Neue Juristische Wochenschrift (NJW) 1991, pp. 2175 et seq., at p. 2177; PC-X/B/WP.3 paragraph 7.

³⁵ Ebenroth, C.T./ Fuhrmann, L., *Die zivilrechtliche Haftung internationaler Organisationen und ihrer Mitgliedstaaten*, Juristische Zeitung (JZ) 1989, pp. 221 et seq., at p. 217, see also Seidl- Hohenveldern, I./ Loibl, G., *Das Recht der Internationalen Organisationen einschließlich der supranationalen Organisationen*, 5th ed., Köln 1992, no. 1909.

³⁶ The intention of States Parties to provide sufficient money for the functioning of the future OPCW might also be expressed in other documents of the OPCW, such as policies or the financial rules, which are currently in the drafting process.

³⁷ It is quite often pointed out in the discussion on liability of International Organisations that for more technical characterized organisations (such as the OPCW), which have only a annual budget, and therefore depend on the members states member states should be liable, whereas more economic characterized organisations (such as e.g. the World Bank), which have a capital to work with, shall be solely liable.

³⁸ See Bothe, M., *Obligations and Protection of Individuals*, paper presented at the Workshop on The Convention on the Prohibition and Elimination of Chemical Weapons, Hague Academy of International Law, at p. 10, forthcoming in *Recueil de Cours: Convention on the Prohibition and Elimination of Chemical Weapons: A Breakthrough in Multilateral Disarmament*, points out, that it is a basic human right requirement, that the individual has an effective remedy if suffering damage. But as a general rule it is excluded against international organisations, due to the immunity of the organisation and its agents. He therefore pleads for a claim settlement procedure of the OPCW, as the organisation would set a good legal precedent in this field; See also Pernice, I., *Die Haftung internationaler Organisationen und ihrer Mitarbeiter*, 26 *Archiv des Völkerrecht (AVR)* (1988), pp. 406 et seq., at p. 433; Perez Gonzalez, M., *Les Organisations Internationales et le Droit de la Responsabilité*, 92 *RGDIP* (1988), pp. 63 et seq., at p. 101.

³⁹ Some international organisation do have such a claim settlement procedure, e.g. the ILO. Here the competence to settle such claims rests with the Administrative Tribunal of the ILO (see Art. II (4) ILO-AT- Statute. For further references see Bowett, D. W., *The Law of International Institutions*, 4th ed., London 1982, at p. 375; this was also proposed by the Executive Secretary of the PTS in PC-X/B/Wp.3 paragraph 24 et seq.

compensation. It seems to be reasonable to implement a "compensation fund", which would pay for compensation of claims. The fund could be set up in the following way: Each State Party pays its appropriation to the budget and pays additionally 1 per cent of this amount to the compensation fund. This will not be too cost-intensive for States Parties and provides for the possibility that the Organization can work with the money on the market in order to increase the total sum of the fund available. Over a period of 5 years the total sum of the fund should be sufficient to deal with the claims. Given the case that the capital of the fund would be too small to deal with all possible claims initially the above mentioned system could be set for a certain period again. An initial payment of 5 per cent in the first year and then 1 per cent in the following years would even more reduce the possibility of later payments being required by States Parties. To implement such a payment scheme also has certainly a positive effect on the ratification process: as stated above, paragraph 22 of the Confidentiality Annex should minimize the possibility that states do not ratify the CWC due to the incalculable risk of liability arising from breaches of confidentiality. But this leaves still untouched the risk of liability for acts other than breaches of confidentiality. The compensation fund as outlined above would reduce the risk for states of payments of compensation and thus, states could be more willing to ratify the CWC. Further, it would prevent long ongoing struggles between states about the percentage liability of each state for each compensation especially for states for which the CWC is almost not relevant due to a very small chemical industry, would be unwilling to pay large sums for compensation. Another, but definitely more cost-intensive scheme is that each State Party pays the same percentage for each compensation claim as it pays towards the budget;⁴⁰

- A provision must also be included that states are not liable vis à vis the claimant, but towards the Organization, so that the claimant can only sue the Organization. This would avoid the possibility that national courts of States Parties pass judgments on such issues and thereby develop an inconsistent pattern for the settlement of claims. It will also give the Organization a more independent standing from its States Parties;

- Safeguards for the assurance of payments by the State Parties for obligations arising from an obligation of the Organization will have to be developed. Here the same sanctions as for failure to pay the assessed contribution to the budget of the Organization could be implemented;⁴¹

- Similar to the practice of the IAEA, activities of the OPCW will have to be identified for which liability can be covered either by concluding agreements with States Parties in a way that the individual member state is liable for that specific activity or by insurance for that specific activity.⁴²

V. Conclusion

As has been said before, the future OPCW will be liable for its acts. In order to facilitate a proper functioning of the Organization, States Parties must provide sufficient money to compensate claims, which are brought against the Organization and where the liability of the Organization is established. States Parties are liable for compensation of these claims either towards the Organization or towards the claimants. Instead of dealing with each claim

⁴⁰ Noyes, J.E./ Smith, B.D., *State Responsibility and the Principal of Joint and Several Liability*, 13 *The Yale Law Journal of International Law* (1988), at p. 261 suggest this solution by addressing the issue in a broader context.

⁴¹ Article VIII paragraph 8 of the CWC.

⁴² On the practice of the IAEA see Rockwood, L., *Responsibility of the international organisation and its civil servants*, paper presented at the Workshop on The Convention on the Prohibition and Elimination of Chemical Weapons, Hague Academy of International Law, at p. 5 et seq., forthcoming in *Recueil de Cours: Convention on the Prohibition and Elimination of Chemical Weapons: A Breakthrough in Multilateral Disarmament*.

separately on a case by case basis, procedures and institutions, dealing with these claims, should be established. This would improve the standing of the future OPCW and contribute to a successful functioning of the Organization.

In closing the issue of compensation for breaches of confidentiality shall be considered briefly. As shown above the Organization is not liable for any breach of confidentiality of a staff member of the Technical Secretariat. But some States Parties⁴³ desire compensation to be provided, the OPCW can only pay *ex gratia* payments to compensate the damage caused by a breach of confidentiality. This would require that the States Parties develop a fund to be used in such cases. In order to facilitate a fair treatment of these claims *ex gratia* payments should only be provided according to the occurrence of specific circumstances. These circumstances have to be defined and should be included in guidelines for the handling of such claims. Cases in which either the grounds for *ex gratia* payments are contested or the amount of the payment shall be referred to the compensation settlement board which will give its advisory opinion on the case. The right to refer a case to the compensation settlement board shall only rest with the States Parties and the Organization. The opinion offered is not binding upon States Parties and the final decision shall be taken by the Conference of State Parties or the Executive Council. Any decision of the Conference of State Parties/ Executive Council shall not serve as a precedent. *Ex gratia* payments are made voluntarily and anything that could set some sort of legal binding rules (e.g. customary rules) should be avoided.

⁴³ See note 1.