

**EFFECTIVE IMPLEMENTATION
OF THE
CHEMICAL WEAPONS CONVENTION**

**Effective Regime Governing Sanctions against Staff Members of
the Technical Secretariat for Breaches of Confidentiality**

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I. Introduction

Once the Draft OPCW Policy on Confidentiality was finalized and adopted at the Eleventh Plenary of the PrepCom,¹ the Expert Group on Confidentiality was entrusted with investigating the issue of penal sanctions against Technical Secretariat (TS) staff members for breaches, especially serious breaches, of confidentiality.² While investigating the various possibilities for a regime governing breaches of confidentiality the group will focus particularly on the possibilities of concurrent jurisdiction.³ The implementation of such a regime - whether established under concurrent or a single jurisdiction - requires implementation within the national penal legislation of States Parties. States Parties have either to defer their jurisdiction for these offences (single jurisdiction system) or to implement penal provisions for serious breaches of confidentiality to prosecute staff members in accordance with national law once the immunity of the staff member has been waived by the Director-General.⁴ The purpose of this paper is to address some aspects of the development of an effective regime governing sanctions against staff members of the TS for breaches of confidentiality and its implementation into the legal systems of States Parties. Thus, for the establishment of such a regime the prerequisites of it first have to be elaborated,⁵ second, compliance with these prerequisites in a single or concurrent jurisdiction have to be examined,⁶ and finally, the results of the examination have to be compared.⁷

II. Requirements of an effective regime

The establishment of an effective regime requires compliance with standards of criminal procedure in both national and international law.⁸ Therefore the following points have to be taken into account:

¹ PC-XI/17 paragraph 7.7 (page 5).

² Commission Report PC-XI/17 paragraph 7.8 and 7.9 (page 6); also Annex 2 to this Report at p. 22, paragraph IV.1.

³ The issue has already been considered by the PTS (PC-VII/B/WP.1 and PC-X/B/WP.3 paragraph 16 et seq.) and within the Expert Group on Confidentiality at the beginning of this year (PC-X/B/WP.7 paragraph 2). By a concurrent jurisdiction solution it is understood that all State Parties can enforce their jurisdiction for breaches of confidentiality according to certain circumstances (e.g. the breach has been committed on the territory of the State Party or the culprit or the victim of the breach is a national of the State Party). Whereas in a single jurisdiction solution all State Parties would have to defer their jurisdiction for breaches of confidentiality under the jurisdiction of one State Party, which will enforce its jurisdiction for all breaches of confidentiality.

⁴ The Director-General can waive the immunity of staff members pursuant to paragraph 20 of the Confidentiality Annex.

⁵ see under II. Requirements of an effective regime (below).

⁶ see under III. Examination of the prerequisites in a single or concurrent jurisdiction based system (below).

⁷ see under IV. Conclusion (below).

⁸ Crawford, J., *The ILC adopts a Statute for an International Criminal Crime Court*, 89 AJIL (1995), at p. 416.

The definition of a breach and a serious breach of confidentiality

One standard of criminal procedure is the principle of *nullum crimen sine lege*, which, *inter alia*, means that one can only be prosecuted and convicted if the offence has been established in law before the action of the culprit took place. The lack of clearly defined war crimes was one of the main criticisms during the Nuremberg War Crime Tribunal.⁹ Thus, a clear and unambiguous definition of what establishes a serious breach of confidentiality has to be developed. The same applies to breaches of confidentiality for which disciplinary measures will be imposed.¹⁰ Without precise definitions, different sanctions for cases with similar facts could be imposed and the regime would appear to be arbitrary. However, clear definitions are only useful if they are known by the staff members of the TS. Thus, it is necessary to include these definitions in the Staff Rules and Regulations and staff members should sign a separate declaration, stating that they are aware about the existence of possible offences and penalties. This will also foster the effect of deterrence, which requires the knowledge of the offences by potential culprits.

The imposition of sanctions

For an effective regime it is necessary that sanctions for serious breaches of confidentiality are imposed in accordance with the facts of the case and independent of the standing of staff members. Otherwise the regime would fail of having an effect of deterrence, which is an important part of it. To meet this requirement the following has to be observed:

Waiver of Immunity

The wording of paragraph 20 of the Confidentiality Annex grants discretion to the Director-General for waiving the immunity of staff members.¹¹ In order to withhold the effect of deterrence of the penal sanctions, the discretion of the Director-General has to be limited. Otherwise, the effectiveness of the regime will only depend on the Director-General's exercise of discretion which leaves room for arbitrary decisions in cases of similar facts. Thus, it would be useful to consider the issuing of rules or guidelines concerning facts of when the immunity may be waived.

Further, the Attorney-General of the State Party enforcing its jurisdiction, who is in charge of prosecuting these offences, has to be obliged to investigate each individual case, in which the immunity of a staff member has been waived.

Third, as the waiving of immunity always will be one of the last steps to be taken by the Director-General in an investigation, an independent committee should also investigate the allegation. This limits the discretion of the Director General or the attempts of any other staff member to influence the investigation. In this respect, one should also pay attention to the problem of when an investigation will be initiated. The wording of the Chemical Weapons Convention (CWC) is unambiguous; only the Director-General can initiate an investigation.¹² Here, rules have to be established, which may limit the discretion of the Director-General due to objective facts, such as e.g., an allegation by a State Party, two different allegations independent from each other by professional staff members etc., should automatically lead to

⁹ Ipsen in Ipsen, *Völkerrecht*, third ed., Munich, 1990, §38 no. 25.

¹⁰ Paragraph 20 of the Confidentiality Annex of the CWC.

¹¹ Paragraph 20:In cases of serious breaches, the immunity from jurisdiction may be waived by the Director-General.

¹² Paragraph 19 of the Confidentiality Annex of the CWC.

an investigation.

Appearance in court and execution of sanctions

For an effective regime the accused staff member has to appear in court. Furthermore, any sentences delivered by court must be enforced.

Jurisdiction

To establish an effective regime requires that no ambiguities exist regarding the enforcement of the jurisdiction. Otherwise the initiation of the trial would be delayed due to contested opinions of States Parties concerning the enforcement of jurisdiction.

Firm legal basis of the criminal court

A requirement which has to be observed is that any court hearing the case of a serious breach of confidentiality needs a solid legal foundation.¹³ This is certainly given for courts in the national legal system. A single jurisdiction solution would require an agreement by States Parties that courts of one State Party (preferable the Netherlands as the host country)¹⁴ can enforce their jurisdiction in case of alleged serious breach of confidentiality.

Rules of criminal procedure

Rules governing the criminal procedure have to be established. The necessity of such criminal procedures has previously been recognized by the International Law Commission (ILC) as a requirement of any international criminal court.¹⁵ Therefore, clear and unambiguous rules have to be elaborated with which all staff members have to be familiar.¹⁶ The importance of this requirement *is* highlighted again by reference to the Nuremberg War Crime Tribunals, where the applicability of Anglo-American criminal procedure rules have been heavily criticized due to the fact that the culprits were not familiar with these rules.¹⁷

III. Examination of the prerequisites in a single or concurrent jurisdiction based system

With regard to the prerequisites of a definition of a serious breach of confidentiality the danger exists that, even if the definition is implemented in all national penal acts (concurrent jurisdiction solution), similar cases will be interpreted differently by courts of different States Parties.¹⁸ This will lead to unequal treatment of staff members with nationality being the decisive factor for the unequal treatment. The problem would not occur in a single jurisdiction system as the same court will always hear the case and develop precedents for the offence.

Examining the question of investigation of Attorney-Generals there is no difference between a single and the concurrent jurisdiction solution. The same is valid for the waiving of

¹³ See to that Crawford, J., *The ILC adopts a Statute for an International Crime Court*, 89 AJIL (1995) at p. 416.

¹⁴ See also PC-X/B/WP.3 paragraph 20.

¹⁵ See Crawford, J., *The ILC adopts a Statute for an international Criminal Court*, 89 AJIL (1995) at p.416.

¹⁶ However, so far no complete body of rules for criminal procedures exists in international law, see Crawford, J., *The ILC adopts a Statute for an international Crime Court*, 89 AJIL (1995), at p. 407.

¹⁷ Ipsen in Ipsen, *Völkerrecht*, 3rd ed., Munich 1990, §38 no. 25.

¹⁸ See also PC-VII/B/WP.1 paragraph 4.5.

immunity, being an aspect that is exclusively in the sphere of the Organization.

The appearance in court would be assured in a concurrent jurisdiction system. Each State Party will certainly comply with that requirement and the staff member concerned would appear in court. However, the crucial weakness of a concurrent jurisdiction system is that courts could be influenced by States Parties or receive orders to take a favorable decision for the accused, especially if the State Party has benefited from the offence. Here, legal 'safe heavens' for national staff members could be established,¹⁹ and the State Party, by trying the staff member before its court, would even comply with its obligation under the CWC.

For a single jurisdiction solution, appearance in court is one of the, if not the major, problem. To comply with this prerequisite States Parties have to extradite staff members of the TS regardless of their nationality. But the extradition of its own nationals by a state is prohibited by law in many countries,²⁰ and an obligation to extradite staff members is not included in the CWC. The argumentation that States Parties are obliged to extradite their nationals pursuant to Article VII paragraphs 2 and 7 of the CWC in conjunction with paragraph 21 of the Confidentiality Annex (extradition as part of the obligation to cooperate)²¹ cannot be upheld.

Article VII paragraph 2 refers to obligations of States Parties under the CWC (mainly Article I and Article VII paragraph 1 CWC) and there is nothing in the wording which refers to an obligation to extradite its own nationals by States Parties. As such an obligation affects the basic relationship between an individual and the national state, the obligation - new in international law - would need to be expressed explicitly in the CWC. Considering paragraph 21 of the Confidentiality Annex States Parties are only obliged 'to the possible extent' to cooperate and to support the Director-General in the investigation of a breach of confidentiality. The limitation 'to a possible extent' clearly shows that States Parties were aware during the negotiations of the CWC, that their cooperation may be limited in the investigation due to their respective national laws. It would therefore, be a mis-interpretation of the Convention, if this limitation is not respected. Further, under paragraph 21 of the Confidentiality Annex States Parties are only obliged to cooperate with the Director-General during the investigation of the alleged breach, and the investigation itself does certainly not require the extradition of staff members. To support the Director-General in taking appropriate action, in cases a breach of confidentiality has been established, does not include the obligation for States Parties to extradite their own nationals.²²

Examining the requirement of jurisdiction, it is obvious that a single jurisdiction system complies with the prerequisites of this requirement, whereas a concurrent jurisdiction system raises various problems in this respect. The question will be to define, which state can enforce its jurisdiction according to which circumstances. Given the scenario that a staff member, who is a national of state A, committed a breach of confidentiality in a state B and thereby causes damage to state C. Is it State A, B or C which should enforce its jurisdiction?

The enforcement of sentences in a concurrent jurisdiction system allows States Parties the opportunity to produce 'safe heavens' for the staff member by either not applying any sanction or applying the sanction in a way, that would be contradictory to the purpose of Part D of the

¹⁹ PC-X/B/WP.3 Paragraph 18.

²⁰ See to that Jennings/ Watts, *Oppenheim's International Law*, Oxford 1990, at p. 956.

²¹ PC- X/B/WP.3 paragraph 19.

²² This position is shared by Krutzsch, W./Trapp, R., *Commentary on the Chemical Weapons Convention*, Dordrecht 1994, at p.118/9, where it is pointed out that 'Cooperation and legal assistance in the prosecution of such offences (serious breaches of confidentiality) should exerted in the following fields: - extradition;...(other fields are following)..'. Although it is not totally clear what is meant by the term 'exerted' in this context it is assumed that the authors refer to extradition being a field to which cooperation should be extended and that no obligation to extradite own nationals does exist for the States Parties under the CWC so far.

Confidentiality Annex.²³ This opportunity, however, is not given in a regime based on a single jurisdiction, as the State Party, which enforces its jurisdiction, will also execute the sentence and the execution will be observed by other States Parties. Furthermore it is unlikely that the executing State Party, even if it has benefited from the breach, will apply different standards on convicted TS staff members as the State Party would lose to a great extent confidence on the political level.

Regarding clear procedural rules, it has to be observed that all staff members are familiar with the criminal procedure rules and, particular with their rights in a trial. This is especially relevant for a single jurisdiction system, but could also be relevant for a concurrent jurisdiction solution, given the case where a staff member will be prosecuted in a state other than his national state.

IV. Conclusion

Comparing the two possibilities for an effective regime, it became obvious that a solution based on a single jurisdiction for these offences is the preferable solution. A regime based on concurrent jurisdiction contains too many weak points and thereby, leaves room for States Parties to undermine the purpose of Part D of the Confidentiality Annex. However, states are very unwilling to defer their jurisdiction and a solution to the problem of extradition seems to be very unlikely at the moment.²⁴ Thus, the establishment of an effective regime based on concurrent jurisdiction will be the predictable solution. In order to limit the above noted weaknesses safeguards have to be established in an agreement by the States Parties. This agreement has to include, *inter alia*, the following points:²⁵

- All States Parties implement the same definition of a serious breach of confidentiality in their penal law system. This definition must define not only the circumstances of the offence, but also a minimum sanction for the offence. Further, one could also list sanctions proposals in accordance with the seriousness of the breach which should be taken into account by national courts as guidelines. This will help to come closer to a uniform application of the definition and sanctions;

- The OPCW has to observe any such trial, the execution of sanctions and has to report to the Executive Council. Another possibility is to include these reports in the annual Confidentiality report;

- Clear definitions under which circumstances which States Parties' jurisdiction will apply;

- Evidence produced during the investigation of the case prior to the waiving of the immunity, has to be applicable in the trial; and

- State Parties have to consider the interpretation of the definition of the offence by observing different cases. Directives for the interpretation should be developed, which are binding for national courts.

To adhere to these prerequisites will certainly help to develop and strengthen an uniform application to the offence 'serious breach of confidentiality' and thus, provide for and support an effective regime governing the sanctions against staff members of the TS for breaches of confidentiality.

²³ That states are quite willing to produce such safe heavens is demonstrated by an example: After the bombing of the Rainbow Warrior the two French agents have been band on an island in the South Pacific for three years. Both agents were brought back to France after one year and recently being honoured for this action.

²⁴ See the difficulties described by W.C. Gilmore, *Combating International Drugs Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Commonwealth Secretariat, London, at p. 20 during the discussion of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances by addressing the problem of extradition; see also Jennings/ Watts, *Oppenheim's International Law*, Oxford 1990, at p. 956 and footnote 4 on that page.

²⁵ The list is far from being complete.