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The Verification Regime within and outside the Chemical Weapons Convention**

ABSTRACT

The Chemical Weapons Convention is praised as one of the most successful disarmament treaties in history. The CWC not only bans a whole category of weapons of mass destruction but also establishes a comprehensive verification regime to ensure compliance with treaty obligations. The verification system envisaged by the drafters of the Convention consists of routine verifications and irregular verification mechanisms, namely challenge inspections and investigations of alleged use.

On the one hand, the routine verification regime seems to operate effectively while also facing its own challenges, arising mostly from the advances of science and technology and the focus of routine inspections shifting from CW destruction to non-proliferation. On the other hand, challenge inspections and investigations of alleged use have not so far been invoked in the CWC era in the last quarter of a century. This, however, does not mean that no allegations of CW have occurred; on the contrary, CW use has been established on multiple occasions, most notably in connection with the Syrian conflict. The stakeholders of the UN and the OPCW were creative to establish *ad hoc* investigation mechanisms outside the CWC regime for undertaking CW use-related investigations.

This paper provides a review of the verification mechanisms within and outside the Chemical Weapons Convention and sets out the challenges facing the CWC's verification regime with regard to the implications of establishing and using *ad hoc* investigation mechanisms instead of invoking the tools already available under the CWC.

KEYWORDS: chemical weapons, Chemical Weapons Convention, verification, compliance, Syria, inspections

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** The views expressed in this article are those of the author.

I. INTRODUCTION

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the “CWC” or the “Convention”) has been praised as one of the most successful disarmament treaties in history. The novelty the Convention introduced is a multi-faceted compliance assessment system based on various consultation mechanisms and verification.

Building confidence between the States Parties of the Convention by ascertaining that other States Parties comply with their obligations undertaken in the Convention is essential in arms control and, more closely, in WMD (*weapons of mass destruction*) disarmament and non-proliferation regimes. It is argued that if a party’s confidence embedded in others’ compliance wavers, the former might be compelled to keep some of their existing military commodities to be prepared for an unforeseen event, most notably a use of force atrocity,¹ provided that it is attributable to a state.² Monitoring and verification by outside specialists in a transparent manner are suitable tools for ensuring that the parties have a reasonable trust in each other’s compliance, which could be key to successful multilateral disarmament.

A crucial part of the CWC’s compliance management regime is verification, which – as a general rule – is performed by the inspectors of the Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons (the “OPCW”). The CWC’s Annex on Implementation and Verification (the “Verification Annex”) provides detailed technical rules on the conduct of inspections.

However, regardless of the sophisticated verification system established by the Convention, to date, only routine inspections have been performed, while no challenge inspections or investigations of alleged use have been requested by any of the States Parties. At the same time, the lack of challenge inspections and investigations of alleged

¹ There are two types of lawful use of force, namely the right to self-defence and the authorization of the UN Security Council under Chapter VII. For more detail see G. Kajtár, Az általános erőszaktilalom rendszerének értéktartalma és hatékonysága a posztbipoláris rendszerben, in G. Kajtár and G. Kardos (eds), *Nemzetközi Jog és Európai Jog: Új Metszéspontok: Ünnepi tanulmányok Valki László 70. születésnapjára*, (Saxum and ELTE ÁJK, Budapest, 2011, 60–85) 73–74.

² It shall be noted here that the provisions of the UN Charter do not categorically exclude the involvement of non-state actors, such as terrorist organisations and revolutionary movements, in the established use of force and right to self-defence regimes. This interpretation was manifested in some of the post-Cold War resolutions of the Security Council when, for example, the Security Council decided on the use of sanctions against non-state actors and even against private persons (see e.g. SC Resolution 1267). The aforementioned decisions are, however, not sufficient evidence of a paradigm-shift but rather extend the applicability of attribution: if a state wishes to exercise its right to self-defence, the question of attribution nevertheless cannot be avoided, while the attributability of a non-state actor’s action to a state might be established on somewhat less strict grounds. See G. Kajtár, Self-Defence Against Non-State Actors – Methodological Challenges, (2013) 54 *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae: Sectio Iuridica*, 307–332., 323., 328.

use does not mean that there have been no (confirmed) allegations of chemical weapons (“CW”) use from the CWC’s entry into force in 1997. Most notably, responses to the Syrian conflict introduced various *ad hoc* mechanisms for fact-finding and even for attribution of responsibility in relation to allegations of CW use outside the CWC regime.

This paper intends to provide a description of the main elements of the CWC’s verification system and the *ad hoc* mechanisms established by stakeholders outside the CWC for the investigation of alleged use of chemical weapons. The author wishes to identify the challenges facing these institutionalised and *ad hoc* tools and to draw conclusions on the implications of the shift towards *ad hoc* measures instead of applying those envisaged by the drafters of the Convention.

II. VERIFICATION INSTRUMENTS ESTABLISHED BY THE CONVENTION

The OPCW organ responsible for conducting inspections is the Technical Secretariat; its inspectorate comprises approximately 100 inspectors who are chemical specialists in their field and are trained by the OPCW. There are three types of inspections established by the Convention: (i) routine inspections; (ii) challenge inspections and (iii) investigations of alleged use.

a) Routine Inspections

The Convention was drafted shortly after the Cold War and its primary purpose was to destroy chemical munitions that states had stockpiled during the Cold War and to prevent the future re-emergence of chemical weapons. Today, as almost all states are parties to the Convention³ and 99% of the chemical weapons stockpiles declared by possessor states have been verifiably destroyed,⁴ the focus of the OPCW is shifting from CW destruction to non-proliferation. Accordingly, the primary aim of routine inspections was to verify states’ compliance with their CW destruction obligations and keeping the deadlines, whereas now routine inspections are targeted on verifying that the chemicals produced at chemical facilities are used for purposes not prohibited by the CWC; in other words for peaceful purposes.

When a state becomes party to the Convention, it is obliged to provide an initial declaration to the OPCW within 30 days about, *inter alia*, the chemical weapons it owns, possesses or which are located under its jurisdiction or control; old chemical

³ As of today, 193 states committed to the CWC with only Egypt, Israel, North Korea and South Sudan being outside the aegis of the Convention.

⁴ <https://www.opcw.org/OPCW/by-the-Numbers> (Last accessed: 30 December 2021).

weapons; and chemical weapons production facilities and a plan for the destruction of the aforementioned or, in case of chemical weapons facilities, their transformation into industrial (peaceful) plants.⁵ In addition, each State Party is obliged to make annual declarations regarding certain chemicals and chemical facilities where chemicals listed in the Schedules of the CWC are manufactured above a defined quantity.⁶ Based on the declarations submitted by the States Parties, the OPCW inspectors conduct routine inspections to verify their contents.

Routine inspections are built up on the basis of the three Schedules of the CWC, where chemicals are listed based on their toxicity and their customary (industrial and/or military) use. Schedule 1 chemicals are considered as high risk compounds that have little or no use for purposes not prohibited by the CWC and consist of toxic chemicals and their precursors. They may only be used for research, medical, pharmaceutical or CW defence testing purposes and, if over 100 grams of them are produced per year, the responsible State Party shall declare them to the OPCW. The facilities manufacturing Schedule 1 chemicals are subject to the highest scrutiny by way of systematic verifications. Schedule 2 chemicals are not produced in large quantities in industry and pose a significant risk to the object and purpose of the CWC. The manufacture of Schedule 2 chemicals has to be declared to the OPCW and their export to non-OPCW member countries is restricted. Schedule 3 chemicals may be produced in large commercial quantities for purposes not prohibited by the Convention but have properties that might enable them to be used as chemical weapons. Chemical facilities manufacturing more than 30 metric tons of Schedule 3 chemicals per year must be declared by States Parties.⁷ Both Schedule 2 and Schedule 3 chemicals and the related chemical production facilities are subject to routine verification.⁸

It can be drawn from the above, that Schedules are an important guide for routine inspections and the analytical methods inspectors apply are developed based on the listed chemicals. This, however, does not mean that only those chemicals shall be considered as potential chemical weapons that are listed in the Schedules of the CWC. The definition of chemical weapons lies in the “General Purpose Criterion” set forth in Article 2 of the CWC, according to which chemical weapons are

⁵ Article III of the CWC.

⁶ Point 8 of Article VI of the CWC.

⁷ G. Carminati, F. Banigni and E. Farrugia, Chemical Challenges, Prevention and Responses, Including Considerations on Industrial Toxic Chemicals for Malevolent Use, CW Precursor Material for IEDs, in M. Martellini and A. Malizia (eds), *Cyber and Chemical, Biological, Radiological, Nuclear, Explosives Challenges, Terrorism, Security, and Computation*, (Springer, 2017, 73–89) 77–78. https://doi.org/10.1007/978-3-319-62108-1_5

⁸ R. Trapp, Compliance Management under the Chemical Weapons Convention, *UNIDIR WMD Compliance & Enforcement Series*, Paper Three, (2019) 35., <https://doi.org/10.37559/WMD/19/WMDCE3>

(a) [t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes; (b) [m]unitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices; (c) [a]ny equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

An important challenge facing routine inspections is that they are conducted based on the declarations submitted to the OPCW by the States Parties, which are prepared with regard to the Schedules. This means that, in practice, only scheduled chemicals appear in the declarations but other chemicals that could be used as CW, in line with the General Purpose Criterion, remain outside the scope of routine inspections. While it is clear that the aim of the General Purpose Criterion is to adapt the definition of chemical weapons to the advances in science and technology, the effective extension of the scope of routine inspections would require the amendment of the Schedules of the CWC. In fact, there is a procedure defined in the Convention itself to amend the Schedules of the CWC, which was used once in 2019, when Schedule 1 was supplemented to include the Novichok family chemical agents and carbamate nerve agents with the effective date of 7 June 2020. By way of background, it was the poisoning of Sergei and Yulia Skripal in the UK in 2018 that prompted the political will of OPCW decision-makers to amend Schedule 1 of the CWC, since a Novichok agent was used in the incident. Regardless of the amendment of Schedule 1, both Novichoks and carbamates were considered as chemical weapons before the amendment under the General Purpose Criterion; however, they were not subject to state declarations as they were not included in the Schedules of the CWC.⁹

Finally, apart from the routine inspection of the above-mentioned chemical facilities that produce Scheduled chemicals, the scope of routine verifications also cover “Other” Chemical Production Facilities (“OCPFs”). These are chemical production facilities where more than 200 metric tonnes of unscheduled discrete organic chemicals or more than 30 metric tonnes of unscheduled discrete organic chemicals containing the elements phosphorus, sulphur or fluorine are produced yearly.¹⁰ OCPFs also have to be declared by States Parties, and the OPCW Technical Secretariat selects a limited number of them to be inspected. The rationale behind the inspection of OCPFs is that these sites are usually small, multipurpose production facilities where the batch synthesis of organic compounds can be conducted in a more automated and flexible

⁹ A Historical Event: Chemicals Added to CWC Schedule 1, <https://costanziresearch.com/cw-nonproliferation/cw-control-lists/cwc-schedule-1-amendment/> (Last accessed: 14 November 2021).

¹⁰ Section A of Part IX of the Verification Annex of the CWC.

manner. Due to their flexibility, these plants are easier to be transformed into CW production facilities and the corresponding risk shall be assessed by the CWC's routine verification regime. In fact, since OCPFs often constitute the core of the chemical industry in developing countries and also become increasingly widespread around the world, the routine inspection of OCPFs should be extended in order to develop a better verification strategy, promoting the non-proliferation aim of the Convention.¹¹

b) Challenge inspections

Challenge inspections are considered one of the CWC's most innovative and unique legal instruments. The intention of a challenge inspection is to detect and clarify potential CWC non-compliance, meaning that this is one of the methods set out by the Convention for activating the investigation of alleged use mechanism. Point 8 of Article IX of the CWC provides that

[e]ach State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention, and to have this inspection conducted anywhere without delay by an inspection team designated by the Director-General and in accordance with the Verification Annex.

Based on the CWC text, challenge inspections are envisaged in an "any time, any place" concept, which means that they can be commenced at very short notice without limitation and their territorial scope is not limited to declared facilities but also extends to non-declared sites in the territory or any place under the jurisdiction or control of States Parties. Any State Party has the right to request a challenge inspection against any other State Party if the requesting State Party believes that the other State Party is in breach of their obligations set out by the Convention. It is not required that the requesting State Party is affected by the alleged non-compliance of the requested State Party; the legal interest of the former lies in the understanding that any action contravening the CWC breaches other States Parties' interests. The requesting State Party shall submit a challenge inspection request to the OPCW Executive Council and provide appropriate evidence of the alleged non-compliance. The requested State Party cannot refuse the challenge inspection and is obliged to cooperate with the OPCW inspectors. There is only one way to block a challenge inspection; namely, the Executive Council may vote with a three quarters majority to refuse the conduct of a challenge

¹¹ J. B. Tucker, Technological Advances Present Challenge to CWC Verification, *Arms Control Today*, 01.02.2007., https://www.armscontrol.org/act/2007_01-02/Tucker (Last accessed: 30 December 2021).

inspection within 12 hours, calculated from the receipt of the challenge inspection request, if it considers the request to be frivolous, abusive or clearly beyond the scope of the Convention.¹²

Challenge inspections are highly intrusive measures, where inspectors enter the territory of the inspected State Party to conduct an investigation of the factual circumstances of the alleged violation. As such, challenge inspections are considered as the *ultima ratio* of the CWC's verification system, being used as a last resort to peacefully and professionally clarify allegations of CW use. They provide a safety net, on the one hand, by ensuring that sites subject to routine inspection can be inspected outside the routine verification system if doubts arise regarding their compliance, and, on the other hand, by granting the possibility to inspect non-declared sites, which would normally be outside the focus of the OPCW Technical Secretariat.¹³

Although numerous (mock) challenge inspection exercises have been concluded by the OPCW with the assistance of States Parties, and the OPCW remains the only international organisation maintaining a trained and equipped staff to investigate allegations of states' non-compliance with the CWC, no actual challenge inspection has been requested since the CWC's entry into force. It was clear, even during the first few years of the Convention's era, that challenge inspections shall not become so sensitive that it will be impossible to use them¹⁴ and the longer that challenge inspections are unused, the expectations towards the success of the institution, as well as the likelihood of massive political and media attention for the first ever challenge inspection, increase. All these factors could then ultimately result in losing the credibility and deterrent value of this powerful institution.¹⁵ With the elapse of time, it will be increasingly difficult to keep expectations towards challenge inspections on reasonable grounds, especially in the event that the first challenge inspection is requested to confirm an evident breach of the CWC or if the inspection team turns out to be unable to draw clear conclusions due to the lack of available evidence.

¹² S. Casey-Maslen, *Verification of Arms Control and Disarmament Agreements*, in *Arms Control and Disarmament Law*, (Oxford University Press, Oxford, 2021) <https://doi.org/10.1093/law/9780198865032.001.0001>

¹³ J. E. Greengarden, *Requesting a Challenge Inspection Against Syria Under the Chemical Weapons Convention: Venturing into Uncharted Territory*, (2019) 10 *Journal of National Security Law & Policy*, 463–486., 476–477.

¹⁴ J. B. Tucker, *The Chemical Weapons Convention: Implementation Challenges and Solutions* (Monterey Institute of International Studies, 2001) 18.

¹⁵ J. B. Tucker, *The Conduct of Challenge Inspections Under the Chemical Weapons Convention*, In *Proceedings of an Expert Workshop Held on May 29–31, 2002, in Washington D.C.*, (2002) 2.

c) Investigations of alleged use

The other non-routine verification instrument established by the CWC in order to investigate a State Party's alleged non-compliance with the CWC is the investigation of alleged use pursuant to Article X of the Convention. For the avoidance of doubt, the term "investigation of alleged use" is referred to in this paper as the legal instrument defined by point 8 of Article X of the CWC, according to which

[e]ach State Party has the right to request and, subject to the procedures set forth in paragraphs 9, 10 and 11, to receive assistance and protection against the use or threat of use of chemical weapons if it considers that: (a) [c]hemical weapons have been used against it; (b) [r]iot control agents have been used against it as a method of warfare; or (c)[i]t is threatened by actions or activities of any State that are prohibited for States Parties by Article I.

Investigation of alleged use is hence a verification tool, which may be invoked by a State Party who is affected or potentially affected by the threat posed by another State Party's non-compliance with the CWC. Accordingly, investigation of alleged use is based on the request of a State Party for assistance and protection pursuant to Article X of the Convention, which is addressed to the OPCW Director-General. The Director General shall dispatch an investigation team within 24 hours calculated from receiving the request for investigation of alleged use and shall inform the Executive Council and the States Parties of this. Once the inspection is concluded and the final report is submitted to the Executive Council, it is the task of the Executive Council to decide on further measures, if necessary.¹⁶

Although the institution of investigation of alleged use has been less emphasised than challenge inspection in CW literature, the main purpose of these two mechanisms is similar: both procedures are targeted at the establishment of whether any of the States Parties breached their obligations under the CWC. Similarly to challenge inspections, no investigation of alleged use pursuant to Article X of the CWC has been initiated before. The conclusions drawn from the lack of challenge inspections apply to the absence of investigations of alleged use *mutatis mutandis*.

¹⁶ OPCW Fact Sheet, Three Types of Inspections, <https://www.acs.org/content/dam/acsorg/events/program-in-a-box/documents/2016-global-security/cw-inspections.pdf> (Last accessed: 30 December 2021).

III. VERIFICATION INSTRUMENTS OUTSIDE THE CWC REGIME

The CWC indeed provides a comprehensive system of fact-finding mechanisms, as summarised above, for the regular and irregular verification of compliance with CW destruction and non-proliferation obligations of States Parties under the Convention. Regular inspections are arguably conducted as envisaged by the negotiators of the Convention and their success strongly relies on the verification system's ability to react to developments in science and technology, and ultimately, on the political will of States Parties to support the system. The reluctance of States Parties to initiate challenge inspections or investigations of alleged use, however, does not mean that no allegations of non-compliance or even established non-compliance with CW disarmament and non-proliferation obligations have occurred during the last quarter of a century, when the CWC was in force.

Before we elaborate on verification instruments outside the CWC regime, a distinction shall be made on the basis of whether an alleged non-compliance concerns a state that is party to the Convention or not. If the alleged use of CW concerns a non-State Party or a territory that is not under the control and/or jurisdiction of a State Party, the UN Secretary-General's mechanism to investigate alleged use can be invoked. In cases where allegations exist regarding the compliance of a State Party, various *ad hoc* mechanisms were established instead of invoking of challenge inspections or investigations of alleged use.

1. The UN Secretary-General's mechanism

The UN Secretary-General's mechanism for the investigation of alleged use of chemical and biological weapons (the "Secretary-General's mechanism") is a fact-finding procedure originating from UN Assembly Resolution 42/37 C and was reaffirmed by UN Security Council Resolution 620 (1998). The procedure is aimed at determining whether chemical or biological weapons have been used. Its material scope is wider than that of investigations of alleged use and challenge inspections, as the process covers biological weapons-related investigations. It is noted that the Biological and Toxin Weapons Convention (BTWC) has no equivalent to the CWC's investigation mechanisms nor to the inspectorate of the OPCW Technical Secretariat, therefore, the Secretary-General's mechanism is the primary tool to investigate non-compliance with the BTWC.

Regarding chemical weapons, the Secretary-General's mechanism complements the CWC regime with the latter being applicable to the activities of States Parties, and the former to the activities of non-State Parties. While the name of the Secretary-General's

mechanism is similar to the term used by the CWC's investigation of alleged use tool, the two shall not be confused, primarily because the OPCW's competence does not and shall not extend to the investigation of non-State Parties.

In the event that the Secretary-General's mechanism is invoked, the OPCW shall cooperate with the Secretary-General to provide human and material resources at the disposal of the Secretary-General. The rationale behind the OPCW's cooperation and input is that the Secretary-General and the United Nations Office for Disarmament Affairs (UNODA), as the custodian of the Secretary-General's mechanism, does not have sufficient resources to conduct investigations of alleged use of CW but the OPCW maintains a permanent inspectorate. The UN and the OPCW strengthened their cooperation in an agreement in 2012, when the means of cooperation between the two international organisations were agreed.¹⁷

In practice, the Secretary-General activated this procedure three times, twice in 1992, responding to requests from Mozambique and Azerbaijan, and on the third occasion, in March 2013, in response to allegations of CW use in the Syrian conflict before Syria became a State Party to the CWC.¹⁸ In all three cases, the requests came from the states that wished to be investigated. The first two investigations are of little relevance for the assessment of the relationship between the Secretary-General's mechanism and the CWC's investigatory tools, since they were conducted before the CWC's entry into force. Accordingly, below we focus on the Secretary-General's mechanism activated by Syria.

Based on the powers granted to the UN Secretary-General, he established the UN Mission to Investigate the Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, which was composed of experts from the OPCW and the World Health Organisation (WHO). In the report submitted by the UN Mission on 13 September 2013, the experts concluded that chemical weapons were used on a relatively large scale in the Ghouta area, resulting in numerous casualties, in particular among civilians.¹⁹

On the day after the report on the confirmed use of chemical weapons in Ghouta was issued, the Syrian Arab Republic acceded to the CWC. The quick accession of the Syria to the CWC was enabled by a bilateral agreement between the United States and Russia, reached in the last minute on the framework for the elimination of chemical

¹⁷ UNODA Fact Sheet, The Secretary-General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons, <https://www.un.org/disarmament/wp-content/uploads/2019/07/SGM-Fact-Sheet-July2019.pdf> (Last accessed: 30 December 2021).

¹⁸ T. Abe, Challenge Inspections under the Chemical Weapons Convention: between ideal and reality, (2017) 24 (1–2) *The Nonproliferation Review*, 1–18., 10. <https://doi.org/10.1080/10736700.2017.1380429>

¹⁹ Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013, A/67/997-S/2013/553.

weapons in Syria.²⁰ As a result, the OPCW became the primary actor in the verification of implementing Syria's CW demilitarisation.

2. *Ad hoc* mechanisms

Various *ad hoc* mechanisms were established after Syria's accession to the CWC, when the international community witnessed the use of chemical weapons confirmed by the UN Secretary-General. The reasons for the adoption of these *ad hoc* measures depart from the need to ensure Syria's compliance with its destruction obligations by increasing the number of inspections to investigate alleged CW use after Syria became a State Party to the Convention and to assess the truthfulness of Syrian declarations *vis-à-vis* the continued use of CW in Syria.

The first special inspection mechanism was established based on Decision EC-M-33/Dec.1 of the OPCW Executive Council and Resolution 2118 of the UN Security Council. The OPCW decision authorised the Technical Secretariat to inspect sites identified by a State Party that is allegedly involved in the Syrian chemical weapons programme without delay, unless the OPCW Director-General deems such inspection unwarranted or the issue can be solved through consultations and cooperation. The OPCW decision, however, did not specify the exact procedural arrangements based on which such special investigations were to be concluded; furthermore, it politicised the role of the Director-General by granting him a veto right.

There are no records available that show that the abovementioned special inspection mechanism was ever invoked. There is also no documentary evidence on the reason behind the abandonment of the procedure, therefore one may only draw conclusions based on the conditions for invoking the mechanism: either no State Party identified a site involved in the Syrian CW programme, or the Director-General used his veto right, or the understanding of the parties has been that consultations and cooperation are still ongoing between the OPCW and Syria.²¹

After the introduction of the special inspection mechanism based on Decision EC-M-33/Dec.1, other *ad hoc* measures followed, which have been duly invoked and used.

a) Fact Finding Mission

At the beginning of 2014, allegations arose again concerning the continued use of chemical weapons in Syria, regardless of Syria's undertakings as a State Party to the CWC and the efforts of the OPCW and other States Parties to eliminate and destroy Syria's CW

²⁰ Trapp, Compliance Management under the Chemical Weapons Convention, 19.

²¹ Abe, Challenge Inspections under the Chemical Weapons Convention: between ideal and reality, 11–12.

arsenal. As a response to these allegations, the OPCW established a brand new entity, the Fact Finding Mission (“FFM”), to investigate the Syrian incidents and confirm *whether* chemical weapons were used. The FFM’s mandate did not extend to the attribution of liability, i.e. to confirm *who* was responsible for the use of chemical weapons.²²

States Parties supported the OPCW Director-General’s initiative to establish the FFM and the Syrian government agreed to accept it in order to clarify the facts concerning the allegations of CW use. However, from a legal perspective, the exact legal basis of launching the FFM was never mentioned. The Technical Secretariat, the OPCW body responsible for conducting the mission, did not point to a specific provision but merely cited the general authority of the Director-General to seek to uphold the object and purpose of the Convention.²³

Since May 2014, the FFM has been deployed by the OPCW on numerous occasions and still exists today. A notable mission of the FFM took place in 2018, investigating the chemical attack in Douma, and specifically the use of chlorine. The reason that the Technical Secretariat deployed the FFM instead of waiting for Syria to request an investigation of alleged use pursuant to Article X or other States Parties to request a challenge inspection was to react as quickly as possible to the alleged CW attack. The FFM was, however, unable to enter Douma for almost a week after its arrival but later undertook on-site visits, chemical detection, environmental and biomedical sample collection and interviews. Hence, the deployment of the FFM was less controversial and the OPCW could conduct a fact finding exercise without having to wait for a State Party’s inquiry.²⁴

b) Declaration Assessment Team

The Declaration Assessment Team (“DAT”) was also established in 2014 as a response to the inconsistencies that arose regarding the accuracy of Syria’s declarations. Notably, Syria amended its initial declaration in 2013–2014 four times, which increased concerns about the contents of the Syrian submissions. The dedicated task of the DAT was to engage with the Syrian authorities in order to assist the Syrian government with the preparation of declarations and to resolve the identified gaps.²⁵

It follows from the mandate of the DAT that its activities are not classified as inspection under the CWC, since the DAT does not and did not conduct fact-finding exercises but assesses a State Party’s compliance with its obligations under the

²² R. Hersman, Resisting Impunity for Chemical-Weapons Attacks, (2018) 60 (2) *Survival*, 73–90., 75. <https://doi.org/10.1080/00396338.2018.1448576>

²³ T. Abe, Effectiveness of the Institutional Approach to an Alleged Violation of International Law: The Case of the Syrian Chemical Weapons, (2014) 57 *Japanese Yearbook of International Law*, 333–370., 346.

²⁴ Greengarden, Requesting a Challenge Inspection Against Syria Under the Chemical Weapons Convention..., 475.

²⁵ <https://opcw.org/declaration-assessment-team> (Last accessed: 30 December 2021).

CWC.²⁶ In addition to its primary tasks, which in practice is manifested in various visits and consultations with the Syrian authorities on the inconsistencies of the Syrian declarations, there were occasions when the activities pursued by the DAT had a fact-finding nature; for example, when the DAT visited former chemical weapons sites and collected samples.²⁷ To sum up, the primary mandate of the DAT does not cover fact-finding activities but, to the extent necessary to fulfil its mandate, the DAT indeed concluded limited fact-finding activities to pursue its objectives.

c) The OPCW-UN Joint Investigative Mechanism

The OPCW-UN Joint Investigative Mechanism (“JIM”) was an unprecedented alternative measure established by UN Security Council Resolution 2235 in 2015, which reflects a rare and precious unity among the members of both the UN Security Council and the OPCW Executive Council. The JIM was the first – *ad hoc* – institution with a mandate to identify the perpetrators of CW attacks confirmed by the reports of the FFM and to attribute responsibility to such persons.²⁸

The novelty of the JIM was that it could overcome the deficiencies of previous theoretical and practical fact-finding concepts and stepped forward to attribute responsibility, building on the extensive evidence provided by the FFM reports. The JIM was extremely conservative in its analyses and in drawing conclusions on culpability, and maintained a high threshold for blame. As its work advanced, the JIM began to attribute responsibility to certain actors involved in the Syrian incidents. In 2017, the JIM issued a report establishing Syria’s culpability for the sarin attack in Khan Sheikhoun in 2017 and also assigned responsibility to ISIS for a sulphur-mustard attack in Umm Hawsh in 2016 based on the extensive evidence collected by the FFM. This JIM report prompted Russia to question the methodology and impartiality of the JIM, seeking to protect its Syrian allies.²⁹ This marks the commencement of dissensions between the West and Russia since the CWC’s entry into force, which made compliance management under the CWC increasingly problematic as the differences of opinion deepened. As a result, the UN Security Council was unable to extend the JIM’s mandate in 2017 because Russia used its veto right on multiple occasions. Furthermore, the dissensions between Western states and Russia and its allies also extended to the decision-making process of the OPCW Executive Council and preconditioned blocking further developments in the CW field. Ultimately, if the differences cannot be resolved, the new order could result in undermining the achievements reached by the CWC thus far.³⁰

²⁶ Abe, *Challenge Inspections under the Chemical Weapons Convention: between ideal and reality*, 12.

²⁷ <https://opcw.org/declaration-assessment-team> (Last accessed: 30 December 2021).

²⁸ Hersman, *Resisting Impunity for Chemical-Weapons Attacks*, 76.

²⁹ *Ibid.*

³⁰ Trapp, *Compliance Management under the Chemical Weapons Convention*, 20.

d) International, Impartial and Independent Mechanism

Not extending the JIM's mandate left a void in the investigation and attribution of responsibility in relation to chemical weapons use cases in Syria. As a response, the UN General Assembly introduced the International, Impartial and Independent Mechanism ("IIIM") to assist in the investigation and prosecution of persons responsible for the most serious crimes in the Syrian Arab Republic that had occurred since March 2011. The IIIM's mandate overlaps but also extends those of the other *ad hoc* tools established in relation to the Syrian conflict. The IIIM concentrates on the attribution of responsibility of individuals but questions relating to state responsibility is outside the scope of the IIIM's mandate.³¹

Meanwhile, the establishment of the IIIM and later on in 2018, the OPCW's agenda remained dominated by the need to investigate allegations of CW use in Syria and elsewhere, which need was increased by the poisoning of the Skripals in Salisbury in the UK in March 2018. In fact, it was the UK that submitted a draft decision during the Fourth Special Session of the Conference of the States Parties in the OPCW, which later became known as "the June decision". The decision comprised two topics: first, it granted powers to the OPCW to attribute responsibility for the CW attacks in Syria and, second, it authorised the OPCW to share information with UN investigatory mechanisms, such as the IIIM.³²

The first part of the June decision turned out to be more problematic, as it reflected the deepening disagreements between OPCW members concerning the attribution of liability. In fact, Russia called the June decision illegitimate and considered it a destructive step for the chemical disarmament and non-proliferation regime, i.e. the CWC. During the discussions, States Parties were divided into three distinct groups: those who supported the June decision, those who were against it and those who maintained a neutral stance because they did not see a way to bring the opinion of the former two groups together.³³

Despite the outspoken disagreements concerning the June decision, the Fourth Special Session of the Conference of the States Parties adopted decision C-SS-4/Dec.3 by vote, which indicated the deepening of the division between Eastern and Western states. Based on the decision, the Technical Secretariat shall preserve information collected in relation to the CW use cases in Syria and share such information with the IIIM. While the IIIM itself has investigative powers, the assistance of the OPCW Technical Secretariat is important in cases where evidence is already available at the Technical Secretariat or if evidence cannot be recovered any longer. This way, the evidence collected by the OPCW Technical Secretariat could be used by the IIIM in

³¹ <https://iiim.un.org/who-we-are/mandate/> (Last accessed: 30 December 2021).

³² C. McLeish, Chemical weapons: Arms control and disarmament, in *Non-proliferation, arms control and disarmament*, (2018, 418–433) 419–421.

³³ *Ibid.* 425–426.

criminal prosecutions where the OPCW could not commence proceedings (e.g. in front of national authorities).³⁴

e) Investigation and Identification Team

The Investigation and Identification Team (“IIT”) also derives its mandate from decision C-SS-4/Dec.3. The IIT’s task is to investigate cases where the FFM determined that the use or likely use of CW has occurred in Syria. The IIT’s mandate is primarily fact-finding in order to collect information to identify the perpetrators of CW use in Syria.³⁵ Hence, the information gathered by the IIT may be shared with the IIM and other UN investigatory bodies to take the investigation procedure forward to attribution of responsibility by potentially commencing proceedings by the IIM as discussed above.

IV. CONCLUSIONS

The CWC established a comprehensive, forward-looking verification system, which is, in principle, able to adapt to the advances of science and technology. The verification regime has proved to be effective in monitoring and ascertaining the destruction of declared chemical weapon stockpiles that states had under their jurisdiction and control after the Cold War. The OPCW also successfully monitored and verified the destruction or transformation of declared chemical weapons facilities into peaceful ones.

Even today, when the CW destruction phase is soon reaching its end, the Convention remains an important international law instrument, providing a legal basis for the international verification of the non-proliferation of hazardous chemicals. The CWC’s routine industry verification, while facing its own challenges that mainly arise from advances in science and technology and new trends in the chemical industry, the Convention has the potential to adapt its routine verification system to these changes.

In addition to the routine inspection system, the CWC introduced the institution of challenge inspections and investigations of alleged use to serve the purpose of investigating circumstances of potential non-compliance with the obligations set forth by the CWC. The scope of challenge inspections and investigations of alleged use is not limited to declared sites; therefore, at least in theory, territories under the jurisdiction and/or control of every State Party may be subject to these extraordinary verification mechanisms.

³⁴ Trapp, *Compliance Management under the Chemical Weapons Convention*, 23.

³⁵ <https://opcw.org/iit> (Last accessed: 30 December 2021).

In practice, however, challenge inspections and investigations of alleged use have not once been invoked during the 25 years of the CWC's existence. The reluctance of States Parties to invoke these mechanisms is especially problematic in the case of challenge inspections. These are the most powerful tool established by the CWC, by granting the right to any State Party, without being affected by an alleged breach, to request the OPCW Technical Secretariat to launch a challenge inspection to clarify the facts concerning the allegation. The inspection team conducts an on-site visit, which cannot be denied by the requested State Party. The problem with abandoning the challenge inspection mechanism is that the longer States Parties refrain from requesting a challenge inspection, if ever, the more likely that unrealistic expectations heighten regarding the outcome of the first one. Still, the mere existence of the challenge inspection and investigation of alleged use mechanisms could have a deterrent force but, with the passage of time, their deterrent nature is likely to deteriorate.

Instead of invoking a challenge inspection, the international community came up with various innovative solutions in the form of *ad hoc* mechanisms within and outside the CWC regime, when concerns arose about the use of chemical weapons in the Syrian conflict. The purpose of the majority of these tools overlaps with that of challenge inspections: to collect factual information on whether chemical weapons have been used in a given situation. By the establishment of such *ad hoc* measures, states were able to avoid the burden of requesting the first-ever challenge inspection but ultimately, such measures further undermined confidence in the CWC's challenge inspection mechanism, making it even more unlikely that it will be activated in the future.

In addition, *ad hoc* measures were first introduced when a consensus existed between the dominant players of international law. However, when *ad hoc* instruments became to be mandated with the attribution of responsibility, consensus has broken and has not been reached again since then between Western states and Russia and its allies.

It is the author's view that there are two options to strengthen the non-routine verification regime of the CWC. First, the international community could turn back its attention to the challenge inspection mechanism as a tool suitable for the assessment of potential non-compliance with the CWC in an institutionalised manner. Confidence shall be built, or rebuilt, in this institution, which could be drawn from the mutual understanding that invocation of a challenge inspection will have no exaggerated or excessive consequences. Second, as the system of *ad hoc* measures has become increasingly complex and dissensions keep strengthening behind their support, the institutionalisation of certain *ad hoc* measures could also bring a breakthrough by leaving the sensitivities of invoking a challenge inspection undisturbed. Either way, it is the author's understanding that the ultimate success of the verification regime depends on the cooperation of States Parties and the underlying political will to move forward.