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# The Attribution Decision Adopted by the OPCW's Conference of States Parties and Its Legality

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## Abstract

This contribution examines the legal merit of the *Decision Addressing the Threat from Chemical Weapons*, adopted by the 89<sup>th</sup> Session of the General Conference of the Organization for the Prohibition of Chemical Weapons ('OPCW') on 27 July 2018. While relating to matters of high political importance, this *Decision* still raises important issues of the constitutionality of international organizations' use of their delegated powers. This contribution pursues the detail of this matter, by focusing, among others, on the scope of the OPCW's authority under the *Chemical Weapons Convention* and the relationship between the OPCW and the United Nations.

## Keywords

delegated powers – *Chemical Weapons Convention* – ultra vires activities of international organizations – budget of international organizations – UN Security Council – attribution of internationally wrongful acts

## 1 The Context of Adoption of the Decision and Objections to It

The *Decision Addressing the Threat from Chemical Weapons*, adopted by the 89<sup>th</sup> Session of the General Conference of the Organization for the Prohibition of Chemical Weapons ('OPCW') on 27 July 2018 ('the *Decision*'),<sup>1</sup> raises several issues as to the constitutionality of decisions made by international organizations and

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<sup>1</sup> OPCW, *Decision Addressing the Threat from Chemical Weapons Use*, OPCW Doc C-SS-4/DEC.3 (27 June 2018).

the compliance of their organs with legal requirements as to their competence (*vires*). Obviously, several countries have high political stakes with the adoption and operation of this *Decision*, and it has entailed major political divisions between states. However, the analysis developed below focuses on this *Decision* from the viewpoint of consensual positivist approach to international law.

Operative paragraph 2 of the *Decision* '[c]ondemns in the strongest terms that chemical weapons have since 2012 been used in Iraq, Malaysia, the Syrian Arab Republic, and the United Kingdom of Great Britain and Northern Ireland'. Operative paragraph 19 of the *Decision* has '[a]ffirm[ed] that, whenever a chemical weapons use occurs on the territory of a state Party, those who were the perpetrators, organisers, sponsors or otherwise involved should be identified, and underscore[ed] the added value of the Secretariat conducting an independent investigation of an alleged use of chemical weapons with a view to facilitating universal attribution of all chemical weapons attacks'.

According to paragraph 10 of the *Decision*, the Conference of States-Parties '[d]ecides that the Secretariat shall put in place arrangements to identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic by identifying and reporting on all information potentially relevant to the origin of those chemical weapons in those instances in which the OPCW Fact-Finding Mission in Syria determines or has determined that use or likely use occurred, and cases for which the OPCW-UN Joint Investigative Mechanism has not issued a report'.<sup>2</sup> In its report submitted to the 19th session of the OPCW Executive Council, the Director-General has reported that, pursuant to the *Decision*, '[t]he Secretariat is establishing the Investigation and Identification Team ('IIT')' which 'will be responsible for identifying the perpetrators of the use of chemical weapons in the Syrian Arab Republic' on the conditions stated in the *Decision*. Furthermore, '[t]he IIT reports directly to the Director-General'.<sup>3</sup>

The *Decision* was adopted soon after the UN Security Council refused to renew the mandate of the Joint Investigation Mechanism ('JIM') on Syria.<sup>4</sup>

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2 The Director-General's note of 24 January 2019 to the OPCW Executive Council suggested that the Secretariat '[i]s putting in place [those] arrangements', but does not specify any further detail. OPCW, *Note By The Director-General: Progress In The Elimination Of The Syrian Chemical Weapons Programme*, OPCW Doc EC-90/DG.7 (24 January 2019) [19].

3 OPCW, *Report by the Director-General: Progress in the Implementation of Decision C-SS-4/DEC.3 on Addressing the Threat from Chemical Weapons Use* OPCW Doc EC-90/DG.14 (7 March 2019) [5] and [7].

4 See SC Res 8073<sup>rd</sup> mtg, UN Doc S/PV.8073 (24 October 2017), containing the record of the meeting on 24 October 2017; and SC Draft Res, UN Doc S/2017/884 (24 October 2017), containing draft resolution vetoed by the Russian Federation. SC Res, UN Doc S/RES/2235(2015) (7 August 2015) [5] refers to the 'OPCW-United Nations Joint Investigative Mechanism to

Predictably enough, the most vocal opponent of this *Decision* has been the Russian government. In its statement to the 89th session of the OPCW Conference, the Russian representative considered the *Decision* to endow the Technical Secretariat with the task to establish the identity of those guilty of the use of chemical weapons illegitimate. Chief reasons the Russian government cited are the OPCW's intrusion into the competence of the UN Security Council; the contravention of the *Decision* with the OPCW's 'essence and tasks' and its excess of OPCW's powers; and the fact that the *Decision* was adopted by affirmative vote of 82 States, which means that 111 out of 193 Member states had not supported it.<sup>5</sup>

## 2 Grounds for Challenging OPCW's Decisions

Article VIII(16) of the *Chemical Weapons Convention*<sup>6</sup> suggests that 'A majority of the members of the Organization shall constitute a quorum for the Conference'. Article VIII(18) provides that:

[d]ecisions on matters of substance should be taken as far as possible by consensus. If consensus is not attainable when an issue comes up for decision, the Chairman shall defer any vote for 24 hours and during this period of deferment shall make every effort to facilitate achievement of consensus, and shall report to the Conference before the end of this period. If consensus is not possible at the end of 24 hours, the Conference shall take the decision by a two-thirds majority of members present and voting unless specified otherwise in this *Convention*.

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identify to the greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organizers, sponsors or otherwise involved in the use of chemicals as weapons' in Syria.

- 5 OPCW, Russian Federation Statement by GV Kalamonov Deputy Minister of Industry and Trade of the Russian Federation at the Eighty-Eighth Session of the Executive Council, OPCW Doc EC-88/NAT.23 (10 July 2018). See on voting results OPCW, Report of the Fourth Special Session of the Conference of the States Parties, OPCW Doc C-SS-4/3 (27 June 2018). 106 States Parties were present and voting; 82 States Parties voted in favour and 24 States Parties voted against the *Decision*.
- 6 *The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, opened for signature 3 September 1992, 33757 UNTS 1967 (entered into force on 29 April 1997).

The relevant documents of the 89th session of the Conference of States Parties do not expressly elaborate on whether consensus was attempted.<sup>7</sup> At any rate, even if the attainment of consensus was in fact sought, in line with what the International Court of Justice ('ICJ') has specified in the *WHO Advisory Opinion*, the compliance with procedural and voting requirements under Article VIII(18) does not guarantee that the *Decision* is intra vires of the Organization or any of its organs. As the ICJ has observed in the *WHO advisory opinion*:

[t]he question whether a resolution has been duly adopted from a procedural point of view and the question whether that resolution has been adopted intra vires are two separate issues. The mere fact that a majority of states, in voting on a resolution, have complied with all the relevant rules of form cannot in itself suffice to remedy any fundamental defects, such as acting ultra vires, with which the resolution [of an international organization] might be afflicted.<sup>8</sup>

Alongside with the procedural requirements, the substantive criteria of validity determine whether an organization's decision falls within the scope of its authority. According to the ICJ's *Opinion on WHO*, the issue of whether the WHO's competence was governed by the principle of specialty related to substantive criteria of validity of the WHO Assembly's decision to request the advisory opinion from the Court on the legality of the use of nuclear weapons.<sup>9</sup> Likewise, the distribution of competences as between various organs of an international organization such as the OPCW also relates to substantive criteria.

The Russian representative has thus evaluated specific aspects of the *Decision* in his explanation of vote statement:

Neither the Conference, nor the Executive Council, nor the Technical Secretariat has a mandate that would allow it to assign attribution for violating the *Convention*. The Conference—the main governing body—can act exclusively within the framework of its competencies as ascribed to it by this international treaty. Granting the function of attribution to the Organization by taking some kind of decisions at a special session

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7 The OPCW Public Affairs office has responded in rather general terms to the author's query, by stating that 'All rules and procedures were followed by the States Parties at the Special Session of the CSP' (by email, 10 January 2019).

8 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)*, [1996] ICJ Rep 66, 20.

9 *Ibid* 78ff.

of the Conference is not possible, and can only be done by introducing amendments to the *Convention* as stipulated in Article xv [of the *Convention*]. ... The establishment of new obligations for states parties that they had not undertaken themselves upon signing this international treaty is unacceptable.

What has been done today not only does not strengthen the *Convention's* regime, but leads it to a full range of grave consequences of a political, legal, technical, and administrative nature, which will in turn pose a direct threat to its very existence. Only the United Nations Security Council has the prerogative to take coercive measures when it comes to states, and attribution is one of the most important elements of that competency.<sup>10</sup>

Similarly, Ecuador pointed out that the process of the adoption of this *Decision* had exposed the difference of the opinions among member states as to the Organization's vires, and that therefore 'any decision that implies—or that could imply—entering amendments to the *Convention* must be considered at the Conference of the States Parties ... based on the principle of consensus and with the aim of endowing the decisions it adopts with as much legitimacy as possible'.

Apart from concerns expressed by the above States during the 89th session, the constitutionality of OPCW's decisions raises serious financial implications for the entire OPCW membership. Article VIII(7) of the *Convention* provides that 'The costs of the Organization's activities shall be paid by states parties in accordance with the United Nations scale of assessment adjusted to take into account differences in membership between the United Nations and this Organization'. The details are to be determined by the Conference of States Parties,<sup>11</sup> the very same organ which has empowered the Technical Secretariat to put the accountability and attribution arrangements in place. The Technical Secretariat may in this process establish some commission or other subordinate or subsidiary organ to determine accountability and attribution issues, possibly including on-spot investigations, and whether all this is within the vires of the OPCW or any of its particular organs is crucial for the existence of

10 OPCW, *Statement by GV Kalamonov, Head of the Delegation of the Russian Federation, on the results of the vote on the British draft decision at the fourth special session of the Conference of States-Parties*, OPCW Doc C-SS-4/NAT.42 (27 June 2018).

11 Article VIII(21)(b) of the *Convention* provides that the Conference shall 'decide on the scale of financial contributions to be paid by States Parties in accordance with paragraph 7'.

the duty of OPCW members to pay.<sup>12</sup> There may be implications for their voting rights too.<sup>13</sup>

The *Certain Expenses Advisory Opinion* of the ICJ contains most pertinent pronouncements, to the effect that:

[i]f the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorisation in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'.<sup>14</sup>

The Court further specifies that:

[i]f the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent.

However all expenses dealt with in that case were not freely and single-handedly incurred by the Secretariat of the UN, but they had been allocated, on a case-specific basis and with regard to particular operations, by the UN General Assembly which has the exclusive budgetary responsibility within the UN system.<sup>15</sup> In other words, the General Assembly did not provide the UN Secretariat with a blank cheque. Instead, it instructed or authorised the Secretariat to fund the peace-keeping operation which the General Assembly itself had established.

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12 The Russian representative indeed pointed to the fact that the OPCW's budget had been increased by EUR4.000.000 with the intention to fund the attribution mechanism, see statement, above n 5. The Conference of States Parties has adopted the 2019 budget of OPCW 'which takes into account the resource requirements for implementing paragraph 10 of C-SS-4/DEC.3'. Also, 'Further resource requirements for 2019 of approximately EUR 1.3 million for the implementation of paragraph 10 of C-SS-4/DEC.3 are to be met through voluntary contributions'. See, above n 3, [6] and [8].

13 Article VIII(8) of the *Convention* provides that 'A member of the Organization which is in arrears in the payment of its financial contribution to the Organization shall have no vote in the Organization if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding two full years'.

14 *Certain Expenses of the United Nations (Advisory Opinion)* [1962] ICJ Rep 168.

15 *Certain Expenses* [1962] ICJ Rep 151, 169.

### 3 The Constitutional Balance of Authority of OPCW's Organs

#### 3.1 *The General Relevance of the Attribution Task*

The issue of whether the OPCW should be used for the task of attributing particular uses of chemical weapons to particular entities is one that witnesses a major division of political interests. Political use of international organizations has not been unheard of over several decades. To illustrate, much as the creation of the UN was celebrated in some quarters as a tool of eradicating power politics, in reality the UN turned out to be one of the venues through which power politics is pursued by its member states.<sup>16</sup> As a bottom-line, however, the OPCW as an international organization operates through the powers and competence delegated to it by its member states through the constituent instrument of this organization—the *Chemical Weapons Convention*—and it is solely the scope of these delegated powers that determines whether the OPCW's performance of particular tasks forms part of its lawful mandate. The OPCW has been established 'to achieve the object and purpose of this *Convention*', and thus constitutes a central element of entire structure of the *Convention*.

Article VIII(1) of the *Convention* defines the Organization's tasks rather broadly 'to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among states Parties'. This provision is rather broadly drafted, and does not rule out operational and related activities not expressly mentioned in its text. Verification, cooperation and consultation that are expressly mentioned in Article VIII(1) are merely illustrative, not exhaustive, instances of what the Organization is for. It may, at once, seem that dealing with attribution issues is not inherently outside the OPCW's competence. But a more crucial issue is whether attribution matters fall within overall or generic competence of its particular organs, for an organization could hardly be more than the sum of its parts.

The preamble of the *Convention* emphasises that the states parties are 'Determined for the sake of all mankind to exclude completely the possibility of the use of chemical weapons through the implementation of the provisions of the *Convention*', and respective obligations are then stated in Article 1. Statement made by OPCW Director-General, Ambassador Ahmet Üzümcü, at the point of the adoption of the *Decision* conveyed a similar spirit. The Director-General suggested that:

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16 See, for instance, a rather prophetic contribution by H Morgenthau, 'Diplomacy' (1946) 55 *Yale Law Journal*, 1067.



[c]urrently there is no mechanism that would ensure that those who use chemical weapons are held fully accountable. Investigations of alleged use of chemical weapons are essential if we are to preserve the core norms of the *Convention*, its credibility, and its integrity.

As the ICJ has shown in *Certain Expenses*, an organ of an international organization can adopt a decision on matters not expressly mentioned in its constituent instrument, as long as those matters generically belong to the kind of activities to which the organ in question is expressly authorised.<sup>17</sup> In *Certain Expenses*, the establishment of peace-keeping operations not expressly mentioned in the *UN Charter* was seen to fit within the vires of the General Assembly and Security Council of the UN, as activities that fall within the task of peaceful adjustment of disputes or situations (Articles 10, 14 and 36 *UN Charter*). In the case of OPCW, hardly any powers conferred by the *Convention* to this organization are capable of generically subsuming the establishment of accountability of, and attribution of the use of chemical weapons to, the member-state. To illustrate, verification and inspection tasks are about possession, not use, of chemical weapons. Any conclusion made by the Technical Secretariat regarding attribution is premised on implied findings as to the state's possession of chemical weapons contrary to declarations or representations that state may have made to the OPCW. But in its essence, the attribution task is about the conduct of the state in a particular conflict situation and is thus qualitatively different from the verification task which is about the truthfulness of the state's declarations as to its possession of chemical weapons. This way, the attribution task subverts the statutory framework of the verification task and takes as granted the position which has to be established and substantiated through the verification activities in the first place.

Moreover, Article VIII(5) of the *Convention* provides that 'The Organization shall conduct its verification activities provided for under this *Convention* in the least intrusive manner possible consistent with the timely and efficient accomplishment of their objectives'. The least that follows from this is that attribution cannot be seen as generically falling within those statutory activities. The OPCW itself, its Director-General's above position notwithstanding has not, over decades witnessing grave instances of massive use of chemical weapons, for instance in Iraq in early 1990s, considered that the establishment of attribution and accountability mechanisms by OPCW's organs is 'essential

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17 *Certain Expenses* [1962] ICJ Rep 151, 167–168.

if we are to preserve the core norms of the *Convention*, its credibility, and its integrity’.

### 3.2 *Powers of Particular Organs of the OPCW*

The legality of decisions of international organizations turns not just on their overall powers but also on the distribution of powers among their particular organs. This is so for a simple reason that both the overall competence of an international organization and the issue of which organ could do what are at the core of statutory conferral institutional powers under constituent instruments, and the conditions of delegation of authority can be contravened also by undertaking a prima facie valid institutional task by an unauthorised organ.

To clarify which organ of the OPCW is competent to establish accountability and attribution mechanisms to foster the object and purpose of the *Chemical Weapons Convention*, we should examine the powers of each of the pertinent organ—the Conference of States Parties, the Executive Council and the Technical Secretariat—in a comparative perspective.

The authority of the Conference of States Parties is of general character. Article VIII(19) of the *Convention* provides that:

[t]he Conference shall be the principal organ of the Organization. It shall consider any questions, matters or issues within the scope of this *Convention*, including those relating to the powers and functions of the Executive Council and the Technical Secretariat. It may make recommendations and take decisions on any questions, matters or issues related to this *Convention* raised by a state party or brought to its attention by the Executive Council.

Article VIII(20) provides that:

[t]he Conference shall oversee the implementation of this *Convention*, and act in order to promote its object and purpose. The Conference shall review compliance with this *Convention*. It shall also oversee the activities of the Executive Council and the Technical Secretariat and may issue guidelines in accordance with this *Convention* to either of them in the exercise of their functions.

It could be arguable that the above broad terms of Article VIII(20) enable the Conference to put in place arrangements that make findings of attribution, as part of overseeing the implementation of the *Convention* by states-parties. But at most, this could enable the arrangements potentially to be set up by the

Conference itself, and then subject to the caveat that attribution requires both the observance of due process and the requisite investigative authority which could not be easily located within the OPCW framework.<sup>18</sup>

The second sentence in Article VIII(19) militates towards assuming that the Conference has an increased role in assessing the activities and decisions made by other organs such as the Council and Secretariat. However, whether the Conference can expand the Secretariat's statutory competence and entrust it with tasks not foreseen in the *Convention* is more questionable. A more plausible outcome is that the Conference is the body within which the compliance with the *Convention* by other organs of the OPCW ought to be discussed and assessed. Therefore, there is a certain degree of hierarchy between the Conference as the OPCW's most pre-eminent organ and its other organs (in contrast to the lack of hierarchy between six principal organs of the UN).

As for the Executive Council Article VIII(35) of the *Convention* provides that:

[t]he Executive Council shall consider any issue or matter within its competence affecting this *Convention* and its implementation, including concerns regarding compliance, and cases of non-compliance, and, as appropriate, inform states parties and bring the issue or matter to the attention of the Conference.

Overall, the Council's role is somewhat subordinate to the Conference's role, not entirely parallel to and co-extensive with it. Moreover, Article VIII(36) of the *Convention* provides that '[i]n its consideration of doubts or concerns regarding compliance and cases of non-compliance, including, inter alia, abuse of the rights provided for under this *Convention*, the Executive Council shall consult with the states parties involved' and, more specifically, '(b) Bring the issue or matter to the attention of the Conference; (c) Make recommendations to the Conference regarding measures to redress the situation and to ensure compliance'. The Conference is then supposed to hear reports from the Council and makes determinations on their subject-matter. And, pursuant to the same Article VIII(36), 'in cases of particular gravity and urgency' the Executive Council can bring the matter directly to the General Assembly or the Security Council of the United Nations. In short, the Council has no decision-making powers of its own in this area.

Paragraph 19 of the *Decision* emphasises the added value of the Secretariat in implementation of the *Convention*. By contrast, the Russian position was

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18 See below.

that the Technical Secretariat cannot accept the mandate as to any investigations, or formulation of its conclusions.<sup>19</sup> The *Convention* itself assigns to the Technical Secretariat a rather modest role and states its competence in a narrower manner. Article VIII(37) of the *Convention* provides that:

[t]he Technical Secretariat shall assist the Conference and the Executive Council in the performance of their functions. The Technical Secretariat shall carry out the verification measures provided for in this *Convention*. It shall carry out the other functions entrusted to it under this *Convention* as well as those functions delegated to it by the Conference and the Executive Council.

The Secretariat's powers under Article VIII(38) are similarly restricted to preparatory, assisting and advisory activities. Formulation of policy and determination of responsibility are generically, if not *definitionally*, outside the Secretariat's powers. This approach is further confirmed by the *Convention's* arrangement of relations of the Technical Secretariat with OPCW's other organs. Article VIII(40) of the *Convention* provides that:

[t]he Technical Secretariat shall inform the Executive Council of any problem that has arisen with regard to the discharge of its functions, including doubts, ambiguities or uncertainties about compliance with this *Convention* that have come to its notice in the performance of its verification activities and that it has been unable to resolve or clarify through its consultations with the state party concerned.

Therefore, every controversy with regard to matters of compliance must *ipso jure* come before the Council, and potentially before the Conference of States Parties. The *Decision* instead refers those matters back to the Secretariat, and is thus defective in terms of statutory basis.

### 3.3 *The Decision's 'Arrangements' as Subsidiary Organs*

Article VIII(21)(f) of the *Convention* provides that the Conference can '[e]stablish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this *Convention*'. Other organs of the OPCW do not have such power. As such, a full-fledged accountability mechanism would no doubt be conducive to the *Convention's* object and purpose, but the *Convention* does not create it, because it needs some directorial, if not enforcement, powers

<sup>19</sup> Statement, above n 5.

which could not be feasibly conferred to it within the framework of the OPCW. The *Convention* instead seems to aim at the implementation of obligations through other means such as consultation, verification and inspection.

In practice of other organizations such as the UN, adjudicatory and quasi-judicial organs have been established by the principal organs of the UN, but they also had due process safeguards built in them, and also their existence has been justified through pressing considerations of inherency, as has been the case with the UN Administrative Tribunal established by the General Assembly.<sup>20</sup> Quite simply, the UN would not be able to operate unless it could deal with internal staff disputes (which is in a stark contrast with external activities such as the establishment of member states' accountability for breaches of constitutive instruments). Similarly, the establishment of the International Criminal Tribunal for the Former Yugoslavia was seen to generically fall within the measures the UN Security Council can undertake under Article 41 of the *UN Charter*.<sup>21</sup> And as we saw above, the establishment of peace-keeping forces squarely fell within expressly stated peaceful settlement and adjustment powers of the UN's principal organs. The bottom-line within the UN law has, thus, invariably been that the establishment of a subsidiary organ must generically relate to tasks which have been expressly allocated by the *Charter* to the principal organ which establishes that subsidiary organ.

Some pattern of an overall institutional balance thus emerges from the above, in the sense that the establishment of subsidiary organs is within the Conference's authority, and Secretariat's action in this area is not authorised by the *Convention*. There may be systemic reasons as to why the *Convention* differentiates in terms of tasks and powers allocated to each of the organs of the OPCW, such as those relating to the representation of the OPCW's membership, which in its turns informs the legitimacy of decisions made by the relevant organ. This seems to be reason why the Conference's powers are formulated in a markedly, almost disproportionately, wider manner than those of the Council and the Secretariat.

In view of all the above, the Conference's decision to entrust the Secretariat with this task contravenes the overall balance or competences as between

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20 For instance, the *Effects of Award Advisory Opinion* points out that 'It was inevitable that there would be disputes between the Organization and staff members as to their rights and duties'. *Effect of awards of compensation made by the UN Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47, 57.

21 Article 41 of the *UN Charter* speaks of 'measures not involving the use of armed force', but provides their illustrative, not exhaustive, definitions, see *Prosecutor v Tadic (Appeal Judgment)* (ICTY, Appeal Chamber, Case No IT-94-1-AR72, 2 October 1995) [39].

OPCW's organs, and thus the *Convention's* object and purposes. Object and purpose of the treaty can cut both ways: it relates not only to overall aims to rid the humanity of chemical weapons, but also to the process and structure states-parties agreed upon to attain those general aims. One may also wonder whether the reason why the Conference eschewed dealing with the matter directly and entrusted with the arrangements the Technical Secretariat, was to avoid broader discussion and publicity in the process of making specific decisions on particular cases.

#### 4 The OPCW's Encroachment on the UN Security Council's Tasks and Authority

The *Decision* also involves some attempt of duplication of UN Security Council's tasks. Paragraph 10 of the *Decision* refers to establishing a state-party's responsibility in 'cases for which the OPCW-UN Joint Investigative Mechanism has not issued a report'. Thus the Secretariat has been expressly entrusted with authority to impinge on matters or OPCW-UN relations, regardless of the Secretariat's technical and advisory role assigned to it under the *Convention*.

In fact, some states have confirmed their voting intention that the OPCW *Decision* was precisely a response to the failure of the UN Security Council to renew the mandate of JIM. To illustrate, Albania has stated that 'We regret the failure to reach an agreement regarding the renewal of the mandate of the OPCW-UN Joint Investigative Mechanism (JIM). Restoring an independent mechanism for attribution has become particularly important during this time of increased use of chemical weapons and no other mechanism can address, at another level, this abhorrent practice'.<sup>22</sup> Identical or similar statements were made, among others, by Lithuania, Estonia, Ukraine, Czech Republic, Uruguay, Sweden, Ireland, Denmark, New Zealand, Germany, and Bulgaria (on behalf of the EU), as well as the Director-General in his opening statement.<sup>23</sup>

22 OPCW, *Albania: Statement by H.E. Ambassador Adia Sakiqi Permanent Representative of the Republic of Albania to the OPCW at the Fourth Special Session of the Conference of the States Parties*, OPCW Doc C-SS-4/NAT.3 (27 June 2018).

23 Respectively, OPCW, *Lithuania: Statement by the Republic of Lithuania at the Fourth Special Session of the Conference of the States Parties*, OPCW Docs C-SS-4/NAT.13 (27 June 2018); OPCW, *Estonia: Statement by H.E. Mr Paul Teesalu, Undersecretary for Political Affairs, Ministry of Foreign Affairs, Tallin, Republic of Estonia at the Fourth Special Session of the Conference of the States Parties*, OPCW Docs C-SS-4/NAT.22 (26 June 2018); OPCW, *Ukraine: Statement by Mr Vasyl Bodnar Deputy Minister of Foreign Affairs of Ukraine at the Fourth Special Session of the Conference of the States Parties*, OPCW Docs C-SS-4/NAT.27 (26 June 2018); OPCW, *Czech Republic: Statement by H.E. Ivo Šrámek, Deputy Minister of Foreign*

The USA was even more vocal in stating that 'There is no reason to believe that the same Organization involved in such work for the JIM is not up to the same task itself'.<sup>24</sup> By contrast, Ecuador emphasised that even as JIM Mandate was not renewed, 'it stands to recall that it is the United Nations Security Council that has the principal responsibility of maintaining international peace and security'.<sup>25</sup>

All this essentially involves an attempt to transfer the authority from the UN to the OPCW and consequently to evade the unanimity of permanent members of the Security Council. Such course of action is not always illegal, unless it encroaches upon the Security Council's exclusive authority, such as use of coercion against a state under Chapter VII of the *UN Charter*. Creation of a mechanism to ascertain liability is not as such an enforcement action and thus not inherently within the UN Security Council's monopoly. However, it

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*Affairs of the Czech Republic at the Fourth Special Session of the Conference of the States Parties*, OPCW Docs C-SS-4/NAT.26 (26 June 2018); OPCW, Uruguay: Statement by the Delegation of Uruguay to the OPCW at the Fourth Special Session of the Conference of the States Parties Explanation of Uruguay's Vote (Abstention), OPCW Docs C-SS-4/NAT.38 (27 June 2018);

OPCW, Sweden: *Statement by H.E. Ambassador Per Holstrom Permanent Representative of the Kingdom of Sweden to the OPCW at the Fourth Special Session of the Conference of the States Parties*, OPCW Docs C-SS-4/NAT.23 (27 June 2018); OPCW, Ireland: *Statement by H.E. Mr Kevin Kelly Ambassador of Ireland to the Kingdom of the Netherlands at the Fourth Special Session of the Conference of the States Parties*, OPCW Docs C-SS-4/NAT.7 (27 June 2018); OPCW, Denmark: *Statement by H.E. Ambassador Jens-Otto Horslund Permanent Representative of the Kingdom of Denmark to the OPCW at the Fourth Special Session of the Conference of the States Parties*, OPCW Docs C-SS-4/NAT.51 (27 June 2018); OPCW, New Zealand: *Statement Delivered by Mr Mr Heath Fisher Head of Delegation for New Zealand to the Fourth Special Session of the Conference of the States Parties*, OPCW Docs C-SS-4/NAT.4 (26 June 2018); OPCW, Germany: *Statement by Niels Annen, Minister of State at the Federal Foreign Office of Germany to the Fourth Special Session of the Conference of the States Parties*, OPCW Docs C-SS-4/NAT.9 (26 June 2018); OPCW, Bulgaria: *Statement on Behalf of the EU Delivered by Ms. Judit Koromi, Chair of the Working Party on Non-Proliferation (CONOP) of the Council of the EU, European External Action Service, at the Fourth Special Session of the Conference of the State Parties*, OPCW Docs C-SS-4/NAT.12 (27 June 2018); OPCW, *Opening Statement by the Director—General to the Conference of the States Parties at its Fourth Special Session*, OPCW Docs C-SS-4/DG.4 (26 June 2018).

24 OPCW, *United States of America: Statement by the Honorable John Sullivan, Deputy Secretary of State of the United States of America, at the Fourth Special Session of the Conference of the States Parties*, OPCW Doc C-SS-4/NAT.6 (27 June 2018).

25 OPCW, *Ecuador: Statement by Ambassador Fernando Bucheli Permanent Representative of the Republic of Ecuador to the OPCW at the Fourth Special Session of the Conference of the States Parties Explanation of Vote*, OPCW Doc C-SS-4/NAT.52 (27 June 2018).

is a task whose feasibility depends on the existence of binding powers which the Security Council possesses and OPCW organs, especially the Technical Secretariat, do not possess. To illustrate, paragraph 7 of UN Security Council resolution 2235(2015), establishing the JIM, has made the use of the Security Council's binding powers and prescribed that:

[t]he Syrian Arab Republic and all parties in Syria shall cooperate fully with the OPCW and the United Nations and stresses that this includes an obligation to cooperate with the OPCW Director General and its FFM and the United Nations Secretary-General and the Joint Investigative Mechanism, that such cooperation includes full access to all locations, individuals, and materials in the Syrian Arab Republic that the Joint Investigative Mechanism deems relevant to its investigation and where it determines there are reasonable grounds to believe access is justified based on its assessment of the facts and circumstances known to it at the time.

OPCW organs have no comparable authority to bind member states and therefore it is not clear the arrangements to be put in place by the Technical Secretariat, pursuant to the *Decision*, can provide for the outcomes that the (now defunct) Joint Investigative Mechanism was set up to provide.

Organs of the UN other than the Security Council have been aware of this contrast. General Assembly in its resolution 248(2016), paragraph 4, '[d]ecide[d] to establish the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011'. The Assembly, in view of the lack of its power to bind states, has not gone as far to establish any adjudicatory or prosecutorial organ. The Mechanism's terms of reference are focused on evidence-gathering,<sup>26</sup> and the resolution 248(2016), paragraph 4, expressly provides for such limited mandate:

to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and

26 For the text of the Terms of Reference, see International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 ('IIIM'), *Terms of reference of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011* <<https://iiim.un.org/terms-of-reference-of-iiim/>>.



independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.

The Mechanism is aware that it cannot access the Syrian territory without the territorial government's consent,<sup>27</sup> and that it is neither a prosecutor's office nor a court.<sup>28</sup> Even the Rapid Response and Assistance Mission ('RRAM') established by the OPCW's Director-General in 2016 for which the *Decision* commends the Director-General, is intended to deal with technical matters, not ones of policy or accountability. Consent and invitation of the host State required for RRAM's performance of its missions.<sup>29</sup>

Otherwise, it is not clear how the OPCW Secretariat can examine potential violations of the *Chemical Weapons Convention* if it cannot enter the territory of the relevant state. This may actually be the reason why the *Convention's* authors did not include the accountability and attribution task in its text, as being generically outside the OPCW organs' expressly defined tasks.

This problem has also been discussed at the example of the UN Security Council being exposed as abdicating the Security Council's responsibility in favour of member states which form part of the coalitions of 'able and willing', especially when requirements as to the duration of mandates and reporting are not clearly set.<sup>30</sup> And it seems here that the Secretariat has essentially been given a blank cheque by the Conference, without any built-in safeguards or any clear determination of how the Conference controls the operation of those 'arrangements'. Moreover, what would happen if the Conference were to consider the Secretariat's decisions and findings incorrect, or if they were to be unsupported by evidence yet the Conference was unwilling or unable to determine accordingly by the requirement that applies to decision-making on substantive issues? Presumably the same deadlock would materialise as happened

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27 UN General Assembly, *Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, UN Doc A/72/764 (28 February 2018) [70]–[71].

28 IIM, *Mandate* <<https://iiim.un.org/mandate/>>.

29 OPCW, *Note by the Technical Secretariat*, OPCW Doc S/1381/2016 (10 May 2016) [5]–[8].

30 See Niels Blokker, 'Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by "coalitions of the able and willing"' (2000) 11 *European Journal of International Law* 541.

with UNSCOM and Concealment Unit when the UN Security Council has effectively lost control over both these subsidiary organs it had established.<sup>31</sup>

## 5 Conclusion

The above analysis shows that the *Decision* adopted by the OPCW Conference of States Parties on 27 June 2018 has exceeded the authority of the Conference on the ground of distorting the intra-institutional balance under the *Chemical Weapons Convention*. The Technical Secretariat's activities conducted on the basis of the *Decision* would similarly be ultra vires and not opposable to member states. A further deficiency in the OPCW organs' vires is to try arrogating to themselves the tasks of the UN Security Council without having necessary statutory resource to carry out those tasks. All this goes directly against the conditions on which states-parties to the *Convention* have established the OPCW and delegated to its organs carefully defined powers. The 'arrangements' to be provided by the Technical Secretariat would further be inefficient and contribute little to the object and purpose of the *Convention*.

The OPCW's organs are not merely organs with abstract or concrete policy aims but, most importantly, organs with delegated powers. In the state-centric world, deviation from carefully arranged balance of competences cannot enhance the efficiency of international organizations and is bound to weaken their role owing to alienating states without legally having to do so.

One further outcome is that the expenses incurred by the OPCW Secretariat to fund activities under the *Decision* would not be valid expenses of the OPCW. The OPCW's institutional framework differs from that of the UN in which all principal organs are equal and not in a position of subordination. Hence, the words 'wrong organ', even if used by the ICJ in *Certain Expenses*, have only relative value in the UN context. As in the area of peace-keeping activities the functions of the General Assembly and Security Council are parallel and not exclusive, the former's use of its own authority, even without the Security Council's approval, would not lead to any legal defect in terms of vires. The matter would be different altogether if the Assembly were to authorise use of force against a state, thereby encroaching on the Chapter VII authority which the Council exclusively possesses under Chapter VII, and then try to allocate costs of that operation to states. On the ICJ's own terms, this latter exercise

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31 For analysis see Michael J Tierney, 'Delegation Success and Policy Failure: Collective Delegation and the Search for Iraqi Weapons of Mass Destruction' (2008) 71 *Law and Contemporary Problems* 283, 299–300.

would be not merely one carried out by a 'wrong organ' but one contradicting the letter and spirit of the *UN Charter* and thus as excessive of the Assembly's vires as anything could be. It is in this latter situation that the Conference's *Decision* has placed the Secretariat in relation both to the Conference and the *OPCW Convention*, by purporting to redistribute the authority that has been statutorily distributed as between the OPCW's organs.

The OPCW's continued adherence to their attribution arrangements raises the issue of what could be done about them. It is unlikely that OPCW organs would modify their decisions to ensure compliance with the *Chemical Weapons Convention*. However, the de facto operation of these arrangements is not the same as their legality under the *Convention* as the constituent instrument. As Judge Spender has suggested in *Certain Expenses*, such de facto extension of institutional powers should be disregarded as unlawful.<sup>32</sup> Consequently, member states are not under any obligation to cooperate with IIT or accept their findings as authoritative.

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32 *Certain Expenses* [1962] ICJ Rep 197 (Judge Spender).