

**The Fourth Annual WMD Summer Programme:  
Disarmament and Non-Proliferation of Weapons of Mass Destruction in a Changing World  
1 – 6 September 2013**

**Friday, September 6: Multi stakeholder approaches to WMD diplomacy & current challenges  
‘The UN investigative mission to Syria on the alleged use of chemical weapons’<sup>i</sup>**

*Introduction*

Good morning. My name is Scott Spence and I am the Senior Legal Officer at VERTIC where I implement the strategic vision and technical delivery of our National Implementation Measures (NIM) Programme. VERTIC is an independent, not-for-profit non-governmental organization that promotes the verification and implementation of international agreements and related regional and national initiatives. The NIM Programme, in particular, provides cost-free legislative drafting assistance and advice to interested States for implementation of the Biological Weapons Convention (BWC), Chemical Weapons Convention (CWC), certain instruments to secure nuclear and other radioactive material and UN Security Council Resolution 1540 in their domestic legal frameworks. This afternoon I will speak further about engaging academia and civil society in WMD disarmament and non-proliferation.

This morning, however, I will speak about the on-going unrest in Syria, the allegations of use of chemical weapons, and on the UN Secretary-General’s Mechanism to investigate these allegations. I will also address the issue of accountability in cases where chemical weapons have indeed been used.

Since the start of the internal conflict in Syria almost two-and-a-half years ago, there have been concerns about the security of Syria’s chemical weapons stockpiles and their possible use against foreign armed forces, opposing armed groups or civilians. Allegations of use of these weapons, specifically sarin, started in early 2013 and so far France, the United Kingdom, and the United States have claimed they found evidence of sarin use. Other states have not made public statements confirming or denying these findings, but Russia stated that it has evidence that the opposing armed groups have used sarin against government armed forces. In July this year, the ‘Independent International Commission of Inquiry for the Syrian Arab Republic’ reported to the UN Human Rights Council that “[i]n four attacks ... there are reasonable grounds to believe that limited quantities of toxic chemicals were used. It has not been possible, on the evidence available, to determine the precise chemical agents used, their delivery systems or the perpetrator.”<sup>ii</sup>

The Independent International Commission relied on first-hand accounts, but did not have access to Syria. France, the United Kingdom and the United States have not given sufficient information on how they reached their conclusions or to prove the veracity of their findings. For example, they have not claimed how chain-of-custody of the samples was adequately maintained. Much importance has therefore been placed on the only international investigation mechanism available in this case, namely the UN Secretary-General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons.

*UN Secretary-General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons*

I would like to address the procedures and scope of this mechanism. At the request of a UN Member State, the Secretary-General can launch an investigation into alleged use of chemical and biological weapons. Following ad hoc investigations of alleged use by the Secretary-General in the late 1970s and early 1980s, pursuant to his fact-finding authority under Article 99 of the UN Charter to “bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security”, this investigatory mechanism was established and complemented with respect to biological and chemical weapons use by UN General Assembly resolutions in 1982 and 1987.<sup>iii</sup> It was formalized by a UN Security Council resolution in 1988, in which the Security Council also decided “to consider immediately, taking into account the investigations of the Secretary-General, appropriate and effective measures in accordance with the Charter of the United Nations, should there be any future use of chemical weapons in violation of international law, wherever and by whomever committed”.<sup>iv</sup> Pursuant to these resolutions, the Secretary-General adopted technical guidelines and procedures, a list of experts with names provided by Member States, and a list of laboratories capable of conducting the necessary tests.

The procedures for this mechanism as established by a group of qualified experts and endorsed by the UN General Assembly are as follows.<sup>v</sup> Based on the information provided by the reporting UN Member State, the Secretary General, with the assistance of expert consultants, will discuss whether an investigation is warranted. The Secretary-General is to look for a “degree of sufficiency, conclusiveness and credibility” in the Member State's report.<sup>vi</sup> If the information in the report is unclear, the Secretary-General can ask the reporting Member State for clarification, which should be given within 24 to 36 hours. The Secretary-General may also consider information provided by other Member States. His decision should be taken quickly, “no later than 24 hours after the receipt of the report, if possible.”<sup>vii</sup> Once the decision is taken, the Secretary-General has to arrange access for a team of qualified experts to the territory in question. The Member State in question should grant rapid access to the site and should be called upon by other Member States not to refuse. Experts should be dispatched to the site of the alleged incident as quickly as possible, no later than 48 hours after the decision has been taken to carry out such an investigation. Once at the site, the Secretary-General's Mechanism has guidelines as to how samples should be collected, handled, stored, transported and analysed. It also has guidelines to ensure chain-of-custody of these samples, which is crucial for ensuring their reliability.

In terms of scope, any use of chemical and biological weapons, whether during armed conflict or peacetime, will be considered by the Secretary-General's Mechanism. According to the General Assembly resolutions, the Secretary-General's Mechanism is to determine whether chemical, biological or toxin weapons have been used that may constitute a violation of the 1925 Geneva Protocol or other relevant rules of customary international law. The Geneva Protocol is an 88-year-old instrument and quite limited in what it prohibits. Specifically, the Geneva Protocol prohibits "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" and "bacteriological methods of warfare" (leaving out other biological agents such as viruses, fungi, etc.). The Geneva Protocol, as an international law instrument, only applies between States that have become party to it and is restricted to use in wartime. However, the Secretary-General is also requested to consider "other relevant rules of customary international law". The ICRC's Customary International Humanitarian Law study stated in 2005 that the use of poison weapons, chemical weapons and biological weapons is prohibited during peacetime and also in both international and non-international armed conflicts.<sup>viii</sup> Moreover, the International Criminal Tribunal for the former Yugoslavia (ICTY) noted in 1995, in *Prosecutor v. Tadic*, that 'there had undisputedly emerged a general consensus in the international community on the principle that the use of chemical weapons is also prohibited in internal armed conflicts.'<sup>ix</sup>

As for cooperation with other international organisations, the General Assembly resolutions ask the Secretary-General to work with relevant international organisations. In the reports establishing the procedures, the Secretary-General is asked to cooperate with the forthcoming Organisation for the Prohibition of Chemical Weapons (OPCW). The OPCW concluded an agreement with the UN in 2000, which addresses their cooperation in chemical weapons' use investigations. Article II (2) (c) of the agreement refers to paragraph 27 of Part XI of the CWC's Verification Annex, which stipulates that the OPCW shall closely cooperate with the Secretary-General in cases of the alleged use of chemical weapons involving a State not party to the Convention *or* in a territory not controlled by a State Party to the Convention. It also states that the OPCW will place its resources at the disposal of the Secretary-General if so requested. Syria is a State Party to the Geneva Protocol, but it is one of only seven States that is not party to the CWC. The OPCW's mechanisms for investigation of alleged use involving States Parties cannot, therefore, be put in place. However, in accordance with the CWC's Verification Annex and its agreement with the UN, the OPCW has provided experts to the Secretary-General's team, as has the World Health Organization in accordance with its MOU with the UN regarding the Secretary-General's Mechanism dating from 2011.<sup>x</sup>

The Secretary-General has to report his findings to all UN Member States. Experts will draft a report explaining their methodology, giving details on the sites, samples and witnesses, and state whether chemical weapons have been used or not.<sup>xi</sup> While the experts may be able to gather information on who has or may have used chemical or biological weapons, they would not make a determination on attribution of any chemical weapons use that they identify. Based on their report, UN Member States will have to decide how to proceed, with only the Security Council having authority to take binding or punitive enforcement measures.

Syria made a request to Secretary-General Ban Ki-moon to investigate possible chemical weapons use by opposing armed groups in March 2013. Other UN Member States also made a similar request for an investigation of alleged use in Syria.<sup>xii</sup> However, the team was not able to secure permission to visit certain sites where chemical weapons were alleged to have been used and could not obtain appropriate safety assurances to enable them to visit Syria before August 2013. While Syria wanted to restrict access of the experts to one site, the experts requested full access. The UN General Assembly also demanded in a resolution from June 2013 “that the Syrian authorities grant full and unfettered access to the investigation of the Secretary-General into all alleged uses of chemical weapons, and call[ed] upon all parties to cooperate with the investigation.”<sup>xiii</sup> The Secretary-General finally reached agreement with Syria on access to three sites; this was expanded to a fourth one on 25 August, to cover alleged chemical weapons use in the Damascus suburbs on 21 August.

There were concerns that the lapse of time would have consequences for the quality of the samples. The Secretary-General could have determined that an investigation was not warranted “if technical factors, such as the passage of time, would preclude an objective attempt to ascertain the facts of the allegation.”<sup>xiv</sup> It appears that, in this case, the situation did not reach that point.

The investigators arrived in The Hague on 31 August after a two-week deployment in Syria. The samples that the team collected are undergoing laboratory analysis and technical evaluation,<sup>xv</sup> and a final report will be submitted to UN Secretary-General Ban-ki Moon by the team leader, Dr Åke Sellström. As noted above, the Secretary-General will then share the report with all Member States; however only the Security Council will have the authority to take binding or punitive enforcement measures.

### Accountability

If the Secretary-General’s Mechanism establishes that chemical weapons have been used, how will we find out who the perpetrators are in order to hold them accountable? Mr Ban Ki-moon’s spokesman underscored that “[i]t is not the role of this mission to apportion responsibility or blame. [...] it is not a criminal investigation; it is looking at whether chemical weapons were used and not by whom.”<sup>xvi</sup>

However, Mr Ban Ki-moon also said that “if confirmed, the use of chemical weapons by any side under any circumstances must be held accountable and would constitute an international crime. Anyone responsible must be held accountable.”<sup>xvii</sup> Similarly, the Independent International Commission of Inquiry for Syria raised the issue of accountability in its report and stated that the use of chemical weapons is a war crime under the Rome Statute establishing the International Criminal Court (ICC).<sup>xviii</sup> If chemical weapons were used in Syria, the perpetrators could be tried at the ICC, whether they were government officials or non-state actors. Since Syria is not a State Party to the Rome Statute establishing the ICC, the Court would only have jurisdiction if the UN Security Council referred the situation to the Court.<sup>xix</sup> In January 2013, Switzerland asked the UN Security Council to do just that.<sup>xx</sup> It had the support of 55 states, including two

of the Security Council's P-5 members, France and the United Kingdom, but so far a referral has not yet taken place. Use of chemical weapons by Syria would also entail State responsibility, which in turn could require Syria to provide for reparation to any survivors or the families of the deceased.

If a referral to the ICC were to happen, the Court's Prosecutor would analyse whether the situation warrants an investigation and subsequently, prosecution. Hers will be a criminal investigation, carried out by a team of investigators, experts and lawyers. This team will question individuals, collect documents and other material, and carry out forensic research in a manner that will meet the necessary standards for trial. This means they will protect the rights of suspects, victims and witnesses while carrying out their work and make sure that the evidence collected can be used in court.

It should be noted that if any suspects of chemical weapons use were prosecuted at the ICC, they would not be charged with using chemical weapons, but with the use of 'poison or poisoned weapons' and 'asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices'. The fact that the Rome Statute does not prohibit 'chemical weapons' and 'biological weapons' *per se* is a shortcoming that should be addressed by the Rome Statute's States Parties.<sup>xxi</sup>

We should bear in mind that the International Criminal Court focuses on those individuals that bear the greatest responsibility for the most serious crimes. The 'smaller fish', however, should be held accountable as well. States Parties to the CWC with implementing legislation in place could investigate and prosecute any of its nationals that may be involved in possible chemical weapons production and use in Syria. According to the EU counter-terrorism co-ordinator Gilles de Kerchov, between 600 to 800 European Union nationals or residents are fighting in Syria.<sup>xxii</sup> Under the CWC, States Parties are required to extend their criminal legislation relating to the CWC to its nationals anywhere, but if States Parties have opted for other bases of jurisdiction, such as residency and universal jurisdiction, they can prosecute individuals who have arrived in their territory for chemical weapons use crimes on these bases of jurisdiction. When Syria enters the post-conflict stage, Syria can also try perpetrators for chemical weapons use itself. In any case, to prevent any use of chemical weapons and to uphold the norm against their use, even if they have been used, it is critical that allegations are properly investigated and perpetrators brought to justice.

Thank you very much for your attention.

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<sup>i</sup> Yasemin Balci, Legal Officer.

<sup>ii</sup> Human Rights Council, 'Report of Independent International Commission of Inquiry for Syria' (2013) A/HRC/23/58, para 139.

<sup>iii</sup> UN General Assembly Resolution 37/98 D (13 December 1982) A/Res/37/98 D; UNGA Res 42/27 C (30 November 1987) A/RES/42/37 C;

Jezz Littlewood, 'Investigating allegations of CBW use: reviving the UN Secretary-General's mechanism', *Compliance Chronicles No 3*, December 2006, p 3.

<sup>iv</sup> UN Security Council Resolution 620 (26 August 1988) S/Res/620.

<sup>v</sup> UNGA 'Report of the group of qualified experts established in pursuance of General Assembly Resolution 42/37 C' (4 October 1989) A/44/561, endorsed by UNGA Res 45/57 C (4 December 1990) A/RES/45/57C.

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- <sup>vi</sup> UNGA ‘Report of the group of qualified experts established in pursuance of General Assembly Resolution 42/37 C’ (4 October 1989) A/44/561, para 28.
- <sup>vii</sup> UNGA ‘Report of the group of qualified experts established in pursuance of General Assembly Resolution 42/37 C’ (4 October 1989) A/44/561, para 32.
- <sup>viii</sup> International Committee of the Red Cross, Customary International Humanitarian Law, Rule 72 Poison and Poisoned Weapons, Rule 73 Biological Weapons and Rule 74 Chemical Weapons, available at <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul](http://www.icrc.org/customary-ihl/eng/docs/v1_rul)>.
- <sup>ix</sup> Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995), para 124.
- <sup>x</sup> Memorandum of Understanding between the WHO and the UN Concerning WHO’s support to the Secretary-General’s Mechanism for Investigation of the Alleged Use of Chemical, Biological or Toxin Weapons (2011), available at <[http://www.un.org/disarmament/WMD/Secretary-General\\_Mechanism/UN\\_WHO\\_MOU\\_2011.pdf](http://www.un.org/disarmament/WMD/Secretary-General_Mechanism/UN_WHO_MOU_2011.pdf)>.
- <sup>xi</sup> UNGA ‘Report of the group of qualified experts established in pursuance of General Assembly Resolution 42/37 C’ (4 October 1989) A/44/561, para 102.
- <sup>xii</sup> UNSC ‘Letter dated 22 March 2013 from the Secretary-General addressed to the President of the Security Council’ (25 March 2013) S/2013/184.
- <sup>xiii</sup> UNGA Res 67/262 (4 June 2013) A/RES/67/262, para 12.
- <sup>xiv</sup> UNGA ‘Report of the group of qualified experts established in pursuance of General Assembly Resolution 42/37 C’ (4 October 1989) A/44/561, para 33 (d).
- <sup>xv</sup> For more on this, see VERTIC Brief no. 22 available at <http://www.vertic.org/media/assets/Publications/VB22.pdf>.
- <sup>xvi</sup> Daily Press Briefing by the Office of the Spokesperson for the Secretary-General, 27 March 2013, available at <<http://www.un.org/News/briefings/docs/2013/db130327.doc.htm>>.
- <sup>xvii</sup> UN News Centre, ‘UN chief spotlights Egypt, Syria and Pakistan in first press conference since Middle East visit’ (19 August 2013), available at <<http://www.un.org/apps/news/story.asp?NewsID=45650&Cr=palestin&Cr1=-.UheR0mTXjr8>>.
- <sup>xviii</sup> Human Rights Council, ‘Report of Independent International Commission of Inquiry for Syria’ (2013) A/HRC/23/58, para. 136.
- <sup>xix</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3, Article 13 (b).
- <sup>xx</sup> UNGA UNSC ‘Letter dated 14 January 2013 from the Chargé d’affaires a.i. of the Permanent Mission of Switzerland to the United Nations addressed to the Secretary-General’ (16 January 2013) A/67/694–S/2013/19.
- <sup>xxi</sup> See Kara Allen with Scott Spence and Rocío Escauriaza Leal, ‘Chemical and biological weapons use in the Rome Statute: a case for change’, [VERTIC Brief no. 14](#), February 2011.
- <sup>xxii</sup> Mary Fitzgerald, ‘EU concern at number of European fighters joining Syrian rebels’ *The Irish Times* (21 June 2013), available at <<http://www.irishtimes.com/news/world/middle-east/eu-concern-at-number-of-european-fighters-joining-syrian-rebels-1.1437239>>.