

# COUNTERING THE USE OF CHEMICAL WEAPONS IN SYRIA: OPTIONS FOR SUPPORTING INTERNATIONAL NORMS AND INSTITUTIONS

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## INTRODUCTION

For more than six years the people of Syria and the international community have had to face the fact that chemical weapons have become part of the weapons arsenal in the Syrian civil war. By using these weapons, those responsible—the Syrian Government included—have violated one of the most robust taboos in international humanitarian law. In recent years, the international community, the United Nations and the Organisation for the Prohibition of Chemical Weapons (OPCW) have found creative ways to address this situation, but no strategy has so far succeeded in truly redressing the problem. Several other potentially useful institutions, such as the International Criminal Court (ICC) or the compliance mechanisms of the 1993 Chemical Weapons Convention (CWC), cannot yet be employed.<sup>1</sup> This is mostly due to the political dynamics within these institutions, in which global power politics, strategic considerations and national interests—in particular Russia's protection of the current Syrian Government, seemingly at all costs—impede the effective handling of the crisis. The dynamic evolution and adaptation of the instruments at the international community's disposal has therefore been accompanied by an unprecedented polarization of the relevant institutions and by political manoeuvring

<sup>1</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention, CWC), opened for signature 13 Jan. 1993, entered into force 29 Apr. 1997; Rome Statute of the International Criminal Court, opened for signature 17 July 1998, entered into force 1 July 2002.

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## SUMMARY

Chemical weapons are banned by international law. Nonetheless, there have been numerous alleged and proven chemical attacks during the Syrian civil war. The international community has found ways to address this problem, but it has not managed to exclude the possibility of further chemical attacks once and for all. Nor has it created accountability for the perpetrators. The establishment in 2018 of the Investigation and Identification Team within the Organisation for the Prohibition of Chemical Weapons (OPCW) is a step in the right direction, but it came at the price of increased polarization among member states. To maintain the OPCW's effectiveness, move closer to accountability and uphold the international norm on the non-use of chemical weapons, the European Union and its member states should consider short- and longer-term steps, such as emphasizing the norm's viability over potential threats, pressing the United Nations General Assembly to employ the Uniting for Peace principle, enhancing national criminal investigations or adopting universal jurisdiction pending the possibility of international legal prosecution for chemical weapon use, and supporting the OPCW and its ad hoc mechanisms in every possible way.

## ABOUT THE AUTHOR

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that threatens to undermine the OPCW's effectiveness in addressing chemical weapon use.

This paper provides some background on the international norm on the non-use of chemical weapons, describes pertinent developments in Syria since 2012 with a special focus on 2018, and analyses the current state of play for the OPCW and chemical weapons disarmament. It contains reflections on the strength of the non-use norm, on the relevance of efforts to identify the perpetrators of chemical weapon attacks and to create the conditions to eventually hold them to account, and on the need to maintain the OPCW's viability in the face of the current crisis. The final section contains options and recommendations for action in these three areas.

## THE PROHIBITION OF CHEMICAL WEAPONS

The prohibition of chemical weapons has been a success story. This assessment may seem counter-intuitive in the face of the Syrian conflict. However, chemical weapons have gone from being frequently employed weapons of choice in the early years of the 20th century to universally banned in the early 21st century.<sup>2</sup> The prohibition of chemical weapons was first codified in the early international humanitarian law documents of the late 19th and early 20th centuries, then most prominently in the 1925 Geneva Protocol and in the CWC. The Rome Statute of the ICC designates the use of 'poison or poisoned weapons' and 'asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices' as a war crime.<sup>3</sup> To date, the use of chemical weapons has been uniformly condemned, and no state has publicly admitted to having employed chemical weapons or justified such use as legitimate.

Notwithstanding certain ambiguities and varying interpretations, for example regarding the legal status of 'non-lethal' substances, the use of toxic chemicals as a means of warfare must be considered to be universally and unequivocally prohibited by international humanitarian, criminal, treaty and customary law.<sup>4</sup> All 193 parties to the CWC have

expressed their determination 'for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons'.<sup>5</sup> Such use has been declared a 'serious violation of international law' in UN Security Council Resolution 2118.<sup>6</sup> The norm against using chemical weapons is thus very strong.<sup>7</sup> Moreover, the use of chemical weapons in Syria, however deplorable, is the most recent entry in a relatively short list of norm violations.<sup>8</sup>

Although the non-use norm existed before the CWC and is thus not bound to that treaty alone, the CWC and its OPCW play a key role in the disarmament and non-proliferation of chemical weapons. The OPCW comprises policymaking organs—the Conference of the States Parties (CSP) and the 41-member Executive Council—and a technical secretariat, currently led by Director-General Fernando Arias.<sup>9</sup> Its main tasks are, inter alia, verifying the destruction of declared chemical weapon stockpiles and related facilities as well as verifying the legitimacy of the activities of relevant chemical industries, facilitating international cooperation on the peaceful use of chemistry and supporting states parties in implementing the CWC. Until recently, the work of the OPCW was running relatively smoothly, despite some political quarrels, and the organization has overseen and verified the destruction of over 96 per cent of all known chemical weapon stocks, precursors and facilities worldwide.<sup>10</sup> Also until recently, it had seemed that chemical

*International Humanitarian Law*, volume I, *Rules*, International Committee of the Red Cross (Cambridge University Press, Cambridge, 2005), pp. 259–67; Kelle, A. *Prohibiting Chemical and Biological Weapons: Multilateral Regimes and Their Evolution* (Lynne Rienner: Boulder, CO, 2014), pp. 123–29; Price (note 2); and Zanders, J. P., 'International norms against chemical and biological warfare: an ambiguous legacy', *Journal of Conflict and Security Law*, vol. 8, no. 2 (Oct. 2003), pp. 391–410.

<sup>5</sup> CWC, Preamble (note 1). As of March 2019, the CWC had 193 member states and one additional signatory state (Israel). Three states (Egypt, North Korea and South Sudan) have neither signed nor ratified the treaty.

<sup>6</sup> UN Security Council Resolution 2118, 27 Sep. 2013.

<sup>7</sup> Price, R., 'Syria and the chemical weapons taboo', *Journal of Global Security Studies*, vol. 4, no. 1 (Jan. 2019), pp. 37–52.

<sup>8</sup> After 1925, chemical weapons were used against people by Spain and France in Spanish Morocco in the 1920s, by Italy in Ethiopia in 1935–36, by Japan in China in 1943, by Egypt in Yemen in the 1960s and by Iraq against Iran and its own Kurdish population in the 1980s. See Tucker, J., *War of Nerves: Chemical Warfare from World War I to Al-Qaeda* (Anchor Books: New York, 2006); and Zanders, J. P., 'Chemical weapons', learning unit 2, EU nonproliferation and disarmament eLearning course, 2017.

<sup>9</sup> On this and the following see the OPCW website <www.opcw.org>; and Kelle (note 4).

<sup>10</sup> OPCW, 'OPCW by the numbers', accessed 6 Mar. 2019.

<sup>2</sup> Price, R., *The Chemical Weapons Taboo* (Cornell University Press: Ithaca, 1997).

<sup>3</sup> Rome Statute (note 1), Article 8, para. 2(b)(xvii, xviii).

<sup>4</sup> Crowley, M., 'International legal constraints upon the weaponization of toxic chemicals', eds Crowley, M., Dando, M. and Shang L., *Preventing Chemical Weapons: Arms Control and Disarmament as the Sciences Converge* (Royal Society of Chemistry: London, 2018), pp. 146–92; Henckaerts, J.-M. and Doswald-Beck, L., *Customary*

weapons disarmament was, notwithstanding some concerns about states outside the CWC, mostly a technical and routine issue.

## **SYRIA AND CHEMICAL WEAPONS DISARMAMENT**

So what has changed? In late 2012, roughly a year after the beginning of the civil war in Syria, reports emerged that chemical weapons might have been used.<sup>11</sup> When the number and gravity of these reports increased in early 2013, Syria and subsequently France and the United Kingdom requested that the UN Secretary-General's Mechanism (UNSGM) to investigate cases of alleged chemical and biological weapons use be activated.<sup>12</sup> As Syria was not a state party to the CWC at the time, the OPCW had no authority to act in these cases. The UNSGM team arrived in Damascus in mid-August 2013 to carry out its on-site activities. A few days later, on 21 August, the Ghouta area of Damascus was attacked using chemical weapons, resulting in estimates range from over 300 to around 1500 casualties.<sup>13</sup> This represents the most severe case of chemical warfare in Syria to date.

The Ghouta attacks triggered a series of events that ultimately led to Syria's accession to the CWC in September 2013 and to the verified dismantlement and destruction of its declared chemical weapons programme.<sup>14</sup> As part of their treaty obligations, CWC states parties must declare relevant activities and existing or past chemical weapons programmes with all their components. Syria submitted declarations to that end, but concerns about the accuracy and completeness of those declarations arose as early as

<sup>11</sup> See e.g. Trapp, R., 'The use of chemical weapons in Syria: Implications and consequences', eds Friedrich, B., Hoffmann, D., Renn, J., Schmaltz, F. and Wolf, M., *One Hundred Years of Chemical Warfare: Research, Deployment, Consequences* (Springer Nature: Basel, 2017), pp. 363–75, esp. p. 366.

<sup>12</sup> See United Nations, General Assembly, A/RES/42/37C (30 Nov. 1987); United Nations, Security Council Resolution 620 (26 Aug. 1988); and United Nations, General Assembly, A/RES/60/288 (8 Sep. 2006).

<sup>13</sup> Price (note 7), p. 39; and Trapp (note 11), p. 364. The report of the mission is contained in United Nations, General Assembly, '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, 16 Sep. 2013.

<sup>14</sup> Makdisi, K. and Pison Hindawi, C., 'The Syrian chemical weapons disarmament process in context: Narratives of coercion, consent, and everything in between', *Third World Quarterly*, vol. 38, no. 8 (2017), pp. 1691–709; and Trapp (note 11), pp. 367–72; see also the reports of the OPCW Director General to the Executive Council on 'Progress in the elimination of the Syrian chemical weapons programme'.

2014. Despite intensive efforts by the OPCW, these concerns have not been resolved to date.<sup>15</sup> This, together with other OPCW findings and reports about ongoing chemical weapon attacks, has nurtured uncertainty regarding Syria's full compliance with the CWC and its commitment to chemical disarmament.

## **CHEMICAL WARFARE IN SYRIA: DOCUMENTATION AND INVESTIGATIONS**

The confirmed chemical weapons attacks covered most prominently in the international media are: the sarin attacks on Ghouta in 2013, which triggered the Syrian chemical disarmament process; the use of sarin on Khan Shaykhun in April 2017, which prompted US military action against a Syrian airbase; and the chlorine attacks in Douma in April 2018 to which the USA, France and the UK reacted with airstrikes on chemical weapon-related locations. An alleged attack on Aleppo in November 2018 also received considerable attention but has not yet been independently confirmed.<sup>16</sup>

The overall figure for the number of chemical weapon attacks since 2012 ranges from around 40 to over 300 (see table 1). International bodies have carried out systematic data collection and investigations of chemical weapons attacks in Syria with a chemical weapons-specific focus and in the broader context of human rights violations (see table 2). Civil society actors have covered both aspects. The mandates and objectives have varied between ascertaining whether a chemical weapon attack took place and ascribing responsibility for such attacks.

The wide variation in the published number for chemical weapon attacks is mainly due to the differing methodologies and sources used. The OPCW has the most rigorous guidelines for carrying out its investigations, and it is the only actor carrying out primary technical, environmental and biomedical

<sup>15</sup> See e.g. OPCW, 'Progress in the elimination of the Syrian chemical weapons programme', Report of the OPCW Director General to the Executive Council, EC-91/DG.1, pp. 2–3, 25 Mar. 2019. On the Declaration Assessment Team see OPW, 'Declaration Assessment Team', accessed 6 Mar 2019. See also Meier, O., 'The danger of chemical weapons in Syria: Unfinished disarmament and international control efforts', SWP Comments, Stiftung Wissenschaft und Politik, April 2016.

<sup>16</sup> OPCW (note 15), para. 21. In the first two instances, Russia and Syria denied chemical weapons use or blamed opposition groups. Western states have in turn questioned the Syrian narrative of the Aleppo incident. See Sanders-Zakre, A., 'Russia blocks consensus at CWC Conference', *Arms Control Today*, January/February 2019.

**Table 1.1.** Investigations and documentation of alleged chemical weapons attacks in Syria, 2012–18

| Documented/investigated by             | Period      | No. of allegations considered | No. of chemical weapons attacks confirmed/highly likely |
|----------------------------------------|-------------|-------------------------------|---------------------------------------------------------|
| UNSGM, New York                        | 2013        | 7                             | 4                                                       |
| Global Public Policy Institute, Berlin | 2012–18     | 498                           | 336                                                     |
| Syrian Archive                         | 2012–18     | ..                            | 212                                                     |
| FFM, The Hague                         | 2014–2/2019 | >80                           | 41                                                      |
| CoI, The Hague                         | 2011–18     | >39                           | 39                                                      |
| OPCW–UN JIM, The Hague / New York      | 2014–17     | 11                            | 6                                                       |

UNSGM = United Nations Secretary-General’s Mechanism; FFM = Organization for the Prohibition of Chemical Weapons Fact-finding Mission; CoI = Commission of Inquiry of the United Nations Human Rights Council; OPCW–UN JIM = OPCW–United Nations Joint Investigative Mechanism

Note: .. = no data available.

Source: Author’s compilation.

analyses in addition to interviews and analyses of open-source information. Due to the security situation in Syria, the OPCW could not always fully meet its own criteria, especially regarding on-site visits and sampling. However, the organization has compensated for this through the triangulation of information from various sources, through transparent descriptions of the methodology used and through nuanced presentations of the investigation results.

With regard to civil society documentation, the Syrian Archive and the Berlin-based Global Public Policy Institute have counted 212 and 336 chemical attacks, respectively, in the period 2012–2018.<sup>17</sup> Their findings are based on videos, photographs, witness testimonies and other open source information. Human Rights Watch has also compiled data on chemical attacks.<sup>18</sup> All these bodies attribute most of the attacks to the Syrian Government and its military.

<sup>17</sup> Syrian Archive, as of 24 Apr. 2018, <<https://syrianarchive.org/en/collections/chemical-weapons>>; and Schneider, T. and Lütkefend, T., ‘Nowhere to hide: the logic of chemical weapons use in Syria’, Global Public Policy Institute, Berlin, Feb. 2019.

<sup>18</sup> Human Rights Watch, ‘Data used in Human Rights Watch’s reporting on chemical weapons attacks in Syria’, 30 Apr. 2018.

The Commission of Inquiry (CoI) established in 2011 by the UN Human Rights Council has looked into chemical weapons use as part of its broader mandate to investigate alleged human rights violations in Syria. In March 2019, it published a list covering the period 2012–18, which contained 37 chemical weapons attacks that ‘met the required standard of proof’ to be reported publicly.<sup>19</sup> In 32 of these cases, the CoI held the Syrian Government responsible; in 5 cases it could not identify the perpetrators.

Between April and November 2013, the UNSGM team investigated seven cases of possible chemical weapon use in Syria that allegedly occurred between March and August of that year. The team found that the use of chemical weapons could be confirmed or was highly likely in four cases, including Ghouta. According to the report, there was one additional possible case

<sup>19</sup> UN Independent International Commission of Inquiry on the Syrian Arab Republic, ‘Chemical weapons attacks (as of March 12, 2019)’, infographic, UN Human Rights Council. This infographic does not contain all the attacks that were mentioned in previous commission reports or graphics.

**Table 2.1.** Mechanisms investigating alleged chemical weapons use in Syria

| Name                            | Period  | Mandate                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|---------------------------------|---------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| CoI, Geneva                     | 2011–   | <i>‘to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view to ensuring that perpetrators ... are held accountable’</i>                                                                                                                            |
| UNSGM, New York                 | 2013    | <i>‘to carry out investigations ... concerning the possible use of chemical ... weapons that may constitute a violation of the 1925 Geneva Protocol or any other relevant rules of customary international law in order to ascertain the facts of the matter’</i>                                                                                                                                                                                                                         |
| FFM, The Hague                  | 2014–   | <i>‘to establish facts surrounding allegations of the use of toxic chemicals, reportedly chlorine, for hostile purposes in the Syrian Arab Republic’</i>                                                                                                                                                                                                                                                                                                                                  |
| OPCW–UN JIM, The Hague/New York | 2015–17 | <i>‘to identify to the greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organisers, sponsors or otherwise involved in the use of chemicals as weapons, ... in the Syrian Arab Republic where the OPCW FFM determines or has determined that a specific incident in the Syrian Arab Republic involved or likely involved the use of chemicals as weapons’</i>                                                                                 |
| IIIM, New York                  | 2016–   | <i>‘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 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’</i>            |
| IIT, The Hague                  | 2018–   | <i>‘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’</i> |

CoI = Commission of Inquiry; UNSGM = United Nations Secretary-General’s Mechanism; FFM = Organization for the Prohibition of Chemical Weapons Fact-finding Mission; OPCW–UN JIM = OPCW–United Nations Joint Investigative Mechanism; IIIM = 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; IIT = Investigation and Identification Team.

Note: Italics = emphasis added.

Sources: Human Rights Council Resolution S-17/1 (22 Aug. 2011); United Nations General Assembly Resolution A/RES/42/37C (30 Nov. 1987); OPCW, ‘Fact-finding Mission’; United Nations Security Council Resolution 2235 (7 Aug. 2015); United Nations General Assembly Resolution 71/248 (19 Dec. 2016); OPCW, ‘Decision: addressing the threat from chemical weapons’, C-SS-4/DEC.3, 27 June 2018.

and in two instances the evidence was inconclusive.<sup>20</sup> In accordance with its mandate, the UNSGM team made no claim as to the possible perpetrators, and the question of responsibility in particular for the Ghouta attacks is disputed.<sup>21</sup>

The former OPCW Director-General, Ahmet Üzümcü, set up the Fact-finding Mission (FFM) to investigate alleged chemical weapon attacks in 2014. The OPCW Executive Council and the UN Security Council subsequently supported this decision.<sup>22</sup> The

<sup>20</sup> UN, Security Council, ‘Final report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic’, A/68/663–S/2013/735, 13 Dec. 2013.

<sup>21</sup> Western states consider Syria responsible for the attack, whereas Syria and Russia blame opposition fighters, and the West for concealing this. For a controversy among non-governmental actors see e.g. Hersh, S., ‘Whose sarin?’ *London Review of Books*, vol. 35, no. 24 (19 Dec. 2013),

pp. 9–12, versus Higgins, E. and Kaszeta, D., ‘It’s clear that Turkey was not involved in the chemical attack on Syria’, *The Guardian*, 22 Apr. 2014.

<sup>22</sup> OPCW, ‘Decision: reports of the OPCW Fact-finding Mission in Syria’, EC-M-48/DEC., 4 Feb. 2015; and UN Security Council Resolution 2209, 6 Mar. 2015.

FFM has investigated more than 80 allegations.<sup>23</sup> It has confirmed the use of chemical weapons or considered such use highly likely in 41 cases.<sup>24</sup> Like the UNSGM, the FFM is not mandated to identify perpetrators.

Between 2015 and 2017, the task of identifying the perpetrators fell to the OPCW–UN Joint Investigative Mechanism (JIM), which was established pursuant to UN Security Council Resolution 2235.<sup>25</sup> The JIM investigated 11 cases. It found that the Islamic State (IS) had used sulphur mustard twice and that the Syrian army was responsible for three uses of chlorine as a weapon and for the sarin attack on Khan Shaykhun in April 2017. In the other five cases its findings were inconclusive.<sup>26</sup> The mandate of the JIM expired in November 2017 because the UN Security Council could not agree on the terms of its extension. Russia had initially supported the JIM's establishment and agreed to its first one-year extension in 2016 through UN Security Council Resolution 2319.<sup>27</sup> However, after Russia intensified its involvement in the Syrian civil war, it began to question the JIM's impartiality and professionalism. These criticisms culminated in Russia vetoing a second extension in November 2017.<sup>28</sup> Efforts to reach a compromise failed. Russia favoured an alternative mechanism that would have included a more active role for the UN Security Council in composing investigation teams and in determining the perpetrators after the investigation.<sup>29</sup> This was unacceptable to most members of the UN Security

Council and, given the divisions among the permanent members, would not have been conducive to effective investigation of and reaction to chemical weapon use.

### ADDRESSING CHEMICAL WEAPONS USE: OPTIONS AND OBSTACLES

Several options to address such use exist in theory, through the CWC, the UN Security Council or international criminal law. The CWC contains provisions for handling cases of possible non-compliance.<sup>30</sup> States parties can take cooperative steps to clarify and redress compliance concerns, bilaterally or through the OPCW Executive Council.<sup>31</sup> They can also request a challenge inspection 'for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention'.<sup>32</sup> Concerning chemical weapons use, states parties can request the director-general to initiate an investigation of alleged use pursuant to Part XI of the Verification Annex. With regard to follow-up measures in cases of non-compliance, Article XII provides for 'measures to redress a situation and to ensure compliance, including sanctions' to be taken by the Conference of the States Parties.<sup>33</sup> Such measures may include restricting or suspending the concerned state's rights and privileges under the CWC, or recommending collective measures in accordance with international law. In particularly grave cases—such as chemical weapon use—the CSP may bring the issue to the attention of the UN General Assembly and the UN Security Council.

None of these provisions has been invoked in the Syrian case. Instead, ad hoc instruments were designed such as the FFM, the JIM, the Declaration Assessment Team tasked with clarifying ambiguities in the Syrian declarations to the OPCW and, most recently, the Investigation and Identification Team (IIT), which is being set up to identify the perpetrators of chemical weapon attacks (see below). Except for the JIM, which is based on a UN Security Council resolution, these mechanisms lie within the purview of the OPCW Technical Secretariat and do not immediately involve the organization's policymaking organs. Moreover,

<sup>23</sup> United Nations, *Securing Our Common Future: An Agenda for Disarmament* (Office for Disarmament Affairs: New York, 2018), p. 25.

<sup>24</sup> The reports of the Fact-finding Mission that are publicly available can be found at <<https://www.opcw.org/fact-finding-mission>>. On the sulphur mustard attack in Marea in 2015, see Deutsch, A., 'Exclusive: chemical weapons used by fighters in Syria, sources', Reuters, 6 Nov. 2015, which quotes a confidential OPCW report dated 29 Oct. 2015.

<sup>25</sup> UN Security Council Resolution 2235, 7 Aug. 2015.

<sup>26</sup> UN, Security Council, 'Third report of the Organization for the Prohibition of Chemical Weapons–United Nations Joint Investigative Mechanism', S/2016/738, 24 Aug. 2016; UN, Security Council, 'Fourth report of the Organization for the Prohibition of Chemical Weapons–United Nations Joint Investigative Mechanism', S/2016/888, 21 Oct. 2016; UN, Security Council, 'Seventh report of the Organisation for the Prohibition of Chemical Weapons–United Nations Joint Investigative Mechanism', S/2017/904, 26 Oct. 2017.

<sup>27</sup> UN Security Council Resolution 2319, 17 Nov. 2016.

<sup>28</sup> UN, 'Security Council fails to renew mandate of Joint Investigative Mechanism on chemical weapons use in Syria, as permanent member casts veto', Security Council, 8073rd meeting, SC/13040, 24 Oct. 2017.

<sup>29</sup> See e.g. UN, 'Following three draft texts on chemical weapons attack in Syria, Security Council fails to agree upon Independent Investigative Mechanism', Meetings coverage, 8228th meeting, 10 Apr. 2018, SC/13288.

<sup>30</sup> CWC (note 1), 'Part XI: Investigations in cases of alleged use of chemical weapons'.

<sup>31</sup> CWC (note 1), Article IX, para. 1–7.

<sup>32</sup> CWC (note 1), Article IX, para. 8–25, Verification Annex Part X.

<sup>33</sup> CWC (note 1), Article XII.

they do not entail any follow-up procedures to redress the situation.

Since the UN Security Council has recognized the proliferation of chemical weapons as a threat to international peace and security, as in Resolution 1540, it could also act on its own behalf.<sup>34</sup> According to the UN Charter, the UN Security Council could place a chemical weapons proliferator under sanctions or even initiate military action to restore international peace and security (Chapter VII of the UN Charter). In practice, however, this right can only be exercised if the five permanent members of the UN Security Council are united in their wish to punish past (and deter future) violations of the CWC—in other words, when no veto is to be expected. However, due mainly to Russian obstruction, the UN Security Council has been unable to agree on any collective action regarding chemical weapons in Syria since it renewed the JIM for one year in 2016. Any route through the UN Security Council that includes punitive measures against Syria appears blocked for the time being.

The use of chemical weapons also represents a war crime according to the Rome Statute of the ICC and international humanitarian law.<sup>35</sup> International legal prosecutions would hence be one possibility to address such use. However, since Syria has not ratified the Rome Statute, and since a Russian veto prevented the UN Security Council from referring the case to the ICC, the ICC currently has no jurisdiction.

Anticipating eventual international prosecution, the UN General Assembly in 2016 nonetheless decided by majority vote 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’ (IIIM).<sup>36</sup> The IIIM collects, analyses and preserves evidence of violations of international humanitarian law and human rights committed in Syria since 2011, and is intended to support possible future trials by national or international courts

<sup>34</sup> UN Security Council Resolution 1540, 28 Apr. 2004.

<sup>35</sup> See Crowley (note 4).

<sup>36</sup> United Nations, General Assembly, Resolution 71/248, 21 Dec. 2016; see also the website of the International, Impartial and Independent Mechanism, accessed 1 Apr. 2019, < [www.iiim.un.org/](http://www.iiim.un.org/)>. For its most recent report see 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’, A/73/741, 13 Feb. 2019.

or tribunals, including by preparing case files to ‘facilitate and expedite’ such trials. Its ultimate goal is to ensure accountability for said violations as one element of a process to bring about settlement of the crisis, reconciliation and peace. UN General Assembly resolutions are non-binding on UN member states, and not all UN member states recognize the IIIM as legitimate. Its establishment nonetheless sends a clear signal that a majority of states consider that the crimes committed in the Syrian civil war are unacceptable and should not go unpunished. Moreover, the IIIM is currently the only international institution that can collect and systematically review the body of evidence that will ultimately be needed to hold the perpetrators of war crimes to account.

### **DEVELOPMENTS IN 2018: NEW PROBLEMS, NEW SOLUTIONS?**

In 2018 there were significant developments for both the OPCW and the CWC regime. The work of the JIM to identify perpetrators of chemical weapon attacks had come to an end but reports of new chemical attacks in Syria persisted. The FFM continued its investigations, and the Declaration Assessment Team continued to address the open questions regarding Syria’s declarations to the OPCW.<sup>37</sup> However, options for collective follow-up such as by the UN Security Council, which had been scarce anyway, were rapidly diminishing in the increasingly tense international political climate. Two incidents involving chemical weapons—in Salisbury, UK, and in Douma, Syria—cast a particular shadow over the three major CWC conferences held in 2018: the 4th Special Session of the CSP in June, and the 23rd regular CSP and the 4th CWC Review Conference in November.

#### **The incidents in Salisbury and Douma**

##### *Salisbury*

The poisoning of Sergey and Yulia Skripal with a novichok agent in the British town of Salisbury in March 2018 provoked a diplomatic crisis between the UK, which held Russia responsible for the attempted assassinations, and Russia, which denied any

<sup>37</sup> OPCW, ‘Syria and the OCPW’, accessed 1 Apr. 2019.

involvement.<sup>38</sup> Their bilateral relations deteriorated to a point where cooperative efforts to address chemical weapons issues were rendered almost impossible. The OPCW confirmed the results of the UK's analysis, which was that the substance used was a novichok agent, but made no statement regarding the possible origin of the agent.<sup>39</sup> Novichoks are nerve agents developed in the 1980s by the Soviet Union.<sup>40</sup> Little is known publicly about this element of the Soviet Union's chemical weapons programme; the pertinent chemicals are not listed in any of the CWC schedules and hence did not have to be declared. Their production, possession and use as a weapon would nonetheless violate the CWC. The incident was therefore not merely a bilateral affair but could affect the CWC regime as a whole.<sup>41</sup>

In early 2019, the OPCW Executive Council adopted a US-Canadian-Dutch proposal to add novichok-related chemicals to Schedule 1 of the CWC.<sup>42</sup> Once the adopted changes take effect, the newly listed chemicals will have to be declared to the OPCW according to the relevant provisions of the CWC. However, in early April, Russia objected to the proposal.<sup>43</sup> In accordance with CWC Article XV, the issue will now be tabled and is likely to be put to a vote at the next CSP in November 2019.

<sup>38</sup> See e.g. UN, 'Moscow "highly likely" behind Salisbury chemical attack, Prime Minister of United Kingdom says in letter to Security Council', Meetings coverage, SC/13247, 14 Mar. 2018.

<sup>39</sup> See OPCW, 'Summary of the report on activities carried out in support of a request for technical assistance by the United Kingdom of Great Britain and Northern Ireland', S/1612/2018, 12 Apr. 2018. On the merit of involving the OPCW in such a case, which neither side had done to the extent possible, see Meier, O., 'Salisbury: a case for the Chemical Weapons Convention', SWP Comments, Stiftung Wissenschaft und Politik, 27 Mar. 2018.

<sup>40</sup> Tucker, J. (note 8); Trapp, R. 'Novičok, die Skripal Affäre und das Chemiewaffenübereinkommen' [Novichok, the Skripal affair and the Chemical Weapons Convention], *Sirius*, vol. 2, no. 3 (Sep. 2018), pp. 219–38.

<sup>41</sup> See Trapp (note 40).

<sup>42</sup> OPCW, 'Report of the sixty-second meeting of the Executive Council', EC-M-62/2, 14 Jan. 2019; Sanders-Zakre, A., 'OPCW moves to update banned chemicals list', *Arms Control Today*, Mar. 2019. Schedule I lists known chemical weapons agents and their precursors; listed substances are strictly regulated and subject to declaration requirements. Russia had also proposed changes but these were rejected by the Executive Council in February 2019.

<sup>43</sup> See Global Affairs Canada, 'Canada alarmed by Russia's objection to banning novichoks under Chemical Weapons Convention', 11 Apr. 2019.

## *Douma*

Shortly after the Salisbury incident, in early April 2018, a new major chemical attack was reported in Douma, Syria. Based on their national assessments, the USA, the UK and France quickly confirmed that chemical weapons had indeed been used and reacted by carrying out airstrikes (see below).<sup>44</sup> Russia and Syria denied that a chemical attack had occurred and called into question the impartiality and professionalism of the FFM.<sup>45</sup> According to their narrative, opposition groups and the volunteer Syria civil defence organization known as the White Helmets had staged the incident with Western support.<sup>46</sup> The FFM carried out on-site investigations but was able to do so only two weeks after the alleged attack had occurred. Its highly detailed and carefully drafted final report of March 2019 states that '[c]asualty levels ranging from 40 to 70 deaths, including large numbers of children, and hundreds of chemical-related injuries, were reported'.<sup>47</sup> It concludes that 'the evaluation and analysis of all the information gathered by the FFM ... provide reasonable grounds that the use of a toxic chemical as a weapon took place' and that this involved chlorine.<sup>48</sup> This does not amount to a definitive affirmation of a chlorine attack, which was not to be expected given the nature of chlorine and the difficulty in confirming its use as a weapon after an alleged attack. However, the particular phrasing used by the FFM is common jargon in international law and closely resembles the terminology that designates the evidentiary threshold at which ICC prosecutors may initiate investigations.<sup>49</sup> It is also a common standard of proof

<sup>44</sup> See e.g. 'National assessment: chemical attack of 7 April 2018 (Douma, Eastern Ghouta, Syria): Syria's clandestine chemical weapons programme', Ministry of Foreign Affairs of the French Republic, 14 Apr. 2018.

<sup>45</sup> See e.g. Eyon, M., 'Syria categorically rejects conclusions of OPCW Fact-finding Mission about using chemical substances in Douma', Syrian Arab News Agency, 7 Mar. 2019; and Russia Today, "'Pressured" chemical watchdog afraid to contradict US on Douma chemical incident, Russian envoy', 12 Mar. 2019; TASS, 'Russia's defense ministry: OPCW missions in Syria violate Chemical Weapons Convention', 22 June 2018.

<sup>46</sup> TASS (note 45).

<sup>47</sup> OPCW, 'Report of the Fact-finding Mission regarding the incident of alleged use of toxic chemicals as a weapons in Douma, Syrian Arab Republic, on 7 April 2018', S/1731/2019, 1 Mar. 2019, p. 5.

<sup>48</sup> OPCW (note 47), pp. 31–32.

<sup>49</sup> Rome Statute of the ICC (note 3), Article 53.1: 'In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis



for UN investigations.<sup>50</sup> Thus, it is to be assumed that a chlorine attack did occur in Douma on 8 April 2018.<sup>51</sup>

### **'No impunity', sanctions and military action**

In the deteriorating diplomatic climate, several efforts were made in 2018 to support the chemical weapons regime from outside and from within. In January, concerned that the ongoing use of chemical weapons might go unpunished, France initiated the International Partnership against Impunity for the Use of Chemical Weapons. The members of this informal coalition have undertaken to 'use relevant mechanisms to designate individuals, entities, groups and governments involved in the proliferation or use of chemical weapons for sanctions, as appropriate'.<sup>52</sup> Members have also pledged to publish the names of those placed under sanctions on a dedicated website and to collect and share information that might help hold the perpetrators to account.<sup>53</sup> As of March 2019, the initiative has 41 members.<sup>54</sup> The European Union (EU), Australia, Canada, France, the UK and the USA have published their sanctions lists and the names of those targeted on the initiative's website. The EU has imposed sanctions on Syria,

to believe that a crime within the jurisdiction of the Court has been or is being committed'.

<sup>50</sup> According to the Office of the United Nations High Commissioner for Human Rights (OHCHR), '[m]eeting this standard means that factual information has been collected which would satisfy an objective and ordinarily prudent observer that the incident has occurred as described with a reasonable degree of certainty'. OHCHR, *Who's Responsible? Attributing Individual Responsibility For Violations of International Human Rights and Humanitarian Law in United Nations Commissions Of Inquiry, Fact-finding Missions and Other Investigations* (UN: New York and Geneva, 2018), p. 37.

<sup>51</sup> Russia presented witnesses who claimed, inter alia, that no chemical attack had taken place and that they were wrongly treated for chemical exposure. See e.g. 'No attack, no victims, no chem weapons: Douma witnesses speak at OPCW briefing at The Hague', *Russia Today*, 26 Apr. 2018. According to the FFM, interviewees reported 'many fatalities caused by suffocation from dust and rubble as a consequence of the heavy shelling' (para. 8.48) and 'inappropriate treatment' in a panic that followed warnings of a chemical attack (para. 8.50), but interviewees also described how casualties were treated for symptoms consistent with chlorine exposure in a separate incident. OPCW, S/1731/2019 (note 47), pp. 31–32.

<sup>52</sup> International Partnership against Impunity for the Use of Chemical Weapons, 'Declaration of Principles', 23 Jan. 2018.

<sup>53</sup> For a discussion of the initiative's potential role in countering chemical weapons use see Hersman, R., 'Resisting impunity for chemical-weapons attacks', *Survival*, vol. 60, no. 2 (Mar. 2018), pp. 73–90.

<sup>54</sup> International Partnership against Impunity for the Use of Chemical Weapons (note 52), accessed 1 Apr. 2019.

as well as on more than 270 individuals and 70 entities connected with the 'violent repression of the civilian population' and with the country's chemical weapons programme.<sup>55</sup> In October 2018, the EU set up a new sanctions regime specifically to address the proliferation and use of chemical weapons. As the first measure under this regime, the EU imposed sanctions on nine individuals and one entity in January 2019.<sup>56</sup>

Military intervention as one response to chemical weapons use has hovered in the background since 2012. Collective military action approved by the UN Security Council cannot be expected in the foreseeable future. The chemical attacks in Khan Shaykhun and Douma were followed by unilateral military strikes. In response to Khan Shaykhun, the USA carried out airstrikes against a Syrian airfield; following Douma, the USA, France and the UK targeted facilities believed to be connected with the Syrian chemical weapons programme. In both cases, the airstrikes were carried out before the FFM had investigated the incidents and reported its results. According to Richard Price, military measures may serve the purpose of affirming a norm, in this case the norm of the non-use norm of chemical weapons.<sup>57</sup> However, this potentially positive effect must be weighed against the possible repercussions of acting against international law and risking escalation in an already protracted war. It is unclear whether the attacks had any impact on the capabilities or motivation of the Syrian Government to use chemical weapons.<sup>58</sup>

### **The 4th Special Session of the Conference of the States Parties**

The establishment of the IIT within the OPCW Technical Secretariat was a significant development within the CWC regime, but it came at a price.<sup>59</sup> In

<sup>55</sup> Council of the European Union, 'Syria: Council response to the crisis', accessed 2 Apr. 2019; Council of the European Union, 'Chemical weapons: the Council adopts a new sanctions regime', Press release, 15 Oct. 2018.

<sup>56</sup> Council of the European Union, 'Chemical weapons: the EU places nine persons and one entity under new sanctions regime', Press release, 21 Jan. 2019.

<sup>57</sup> Price (note 7).

<sup>58</sup> For a critical legal perspective on the airstrikes after Douma in 2018 see Barber, R., 'Uniting for peace not aggression: Responding to chemical weapons in Syria without breaking the law', *Journal of Conflict and Security Law*, vol. 24, no. 1 (Dec. 2018), p. 39.

<sup>59</sup> For a critical discussion of the IIT see Meier, O., 'Chemical weapons attacks: the end of anonymity', SWP Comment no. 32, Stiftung Wissenschaft und Politik, Aug. 2018.

June 2018, the CSP held a special session at the request of the UK and 10 other states parties. The CSP voted on a draft decision tabled by the UK and supported by 30 other states parties to equip the Technical Secretariat with a mandate to identify the perpetrators of chemical weapon attacks in Syria.<sup>60</sup> Five amendments proposed by other states parties were also put to a vote but rejected. The UK draft was adopted by 82 votes to 24, and all EU member states voted in favour. The most outspoken opponents were Russia, Syria and Iran. The decision now binds all states parties and requests the Technical Secretariat to ‘put in place arrangements to identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic’ (see table 2).<sup>61</sup> It also requires the Technical Secretariat to share information with the IIIM. Although the mandate is explicit concerning the cases that can be investigated, it is vague in terms of the identification process. It specifically refers to ‘perpetrators’, which might imply that the IIT is expected to actively identify individuals or entities that could subsequently be subject to a criminal investigation. It also focuses on the origin of the weapons, which places the IIT closer to the realm of disarmament and treaty compliance. Thus it could be read as attributing the IIT a supporting role insofar as the perpetrators will be identified through knowledge of the origins of the weapons, which the IIT is to provide. How exactly the Technical Secretariat will implement this decision remains to be seen. Despite its implicit ties to the IIIM and international criminal law, in the view of the UK and its supporters the IIT falls squarely within the scope of the CWC. Their opponents, however, question the decision’s legitimacy for procedural and substantive reasons.

### The 23rd Conference of the States Parties

The 4th Special Session was able to equip the Technical Secretariat of the OPCW with a political mandate to establish the new team. Its operationalization, however, depended on the approval of an increased budget by the CSP at its 23rd regular session on 19–20 November 2018.<sup>62</sup> The draft budget included

<sup>60</sup> OPCW, ‘Report of the fourth special session of the Conference of the States Parties’, C-SS-4/3, 27 June 2018.

<sup>61</sup> OPCW, ‘Decision: addressing the threat from chemical weapons use’, C-SS-4/DEC.3, 27 June 2018.

<sup>62</sup> For detailed reporting on the Conference of the States Parties see Guthrie, R., ‘The Conference of States Parties & the Review Conference: Setting the scene’, CWC Review Conference, Report no. 1, CBW Events for the CWC Coalition, 19 Nov. 2018; Guthrie, R., ‘The opening day of

posts for eight additional staff members and costs covering relevant equipment, services and travel.<sup>63</sup> For the first time, an OPCW annual budget required a vote, as the opponents of the June decision opposed the budget increase necessary for its implementation. The increased budget was approved by 99 votes to 27.<sup>64</sup> With the financial means secured, the Technical Secretariat was able to proceed with setting up the IIT, a process that as of April 2019 was still ongoing.<sup>65</sup> The discussions revealed deep divisions among states parties over the budget and, relatedly, the question of whether the OPCW should be given a more robust role in attributing responsibility for chemical weapon use.

### The 4th Chemical Weapons Convention Review Conference

As might be expected, the difficult atmosphere carried over to the 4th CWC Review Conference, which was held on 21–30 November 2018.<sup>66</sup> Review conferences are held every five years. Their purpose is to review the operation of the CWC since the previous review, record current interpretations and guide the work for the next five years. The 4th Review Conference had been intensively prepared by the Open-Ended Working Group on Future Priorities of the OPCW.<sup>67</sup> There was some convergence of views, as recorded in the chair’s report.<sup>68</sup> Nonetheless, states parties were unable

the Conference of States Parties: divergences of views’, CWC Review Conference Report no. 2, CBW Events for the CWC Coalition, 20 Nov. 2018; Guthrie, R., ‘The second day of the Conference of States Parties: voting and suspension’, CWC Review Conference Report no. 3, CBW Events for the CWC Coalition, 21 Nov. 2018; and Guthrie, R., ‘The penultimate day of the Review Conference and closure of the CSP’, CWC Review Conference Report no. 10, CBW Events for the CWC Coalition, 30 Nov. 2018. See also Sanders-Zakre, A., ‘Covering the CWC Conference of States Parties and 4th Review Conference’, *Arms Control Now*, 3 Dec. 2018; OPCW, ‘Report of the twenty-third session of the Conference of States Parties, 19, 20 and 29 November 2018’, C-23/5, 29 Nov. 2018.

<sup>63</sup> OPCW, ‘Decision: Programme and budget of the OPCW for 2019’, C-23/DEC.10, Annex, 20 Nov. 2018, pp. 36–38.

<sup>64</sup> OPCW (note 63). See also Guthrie (note 62); and Sanders-Zakre (note 62).

<sup>65</sup> OPCW (note 15).

<sup>66</sup> On the following and for detailed reporting of the Review Conference see Guthrie (note 62); and Sanders-Zakre (note 62).

<sup>67</sup> OPCW, ‘Open-Ended Working Group on future priorities of the OPCW: Recommendations to the Fourth Special Session of States Parties to Review the Operation of the Chemical Weapons Convention’, RC-4/WP.1, 16 July 2018.

<sup>68</sup> OPCW, ‘Chairperson’s report of the proceedings of the Fourth Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention (Fourth Review Conference)’, RC-4/3/Rev.1, 30 Nov. 2018. Moreover, 57 states parties

to agree an outcome document. The main reasons for this were the contentious positions on the IIT, disagreements over how events in Syria and the JIM's findings could or should be reflected in the consensual document—many states insisted on explicit references, which Syria, Russia and others rejected—and the US position on the status of Palestine as a CWC member.<sup>69</sup> The failure to agree a final document did not put the OPCW or the CWC regime in immediate danger, as Richard Guthrie argues, since '[t]he practical day-to-day operations of the OPCW would be unaffected if there was no substantive report from the Review Conference. There would be political consequences, however'.<sup>70</sup> The inability of the CWC community to collectively condemn and effectively address a grave treaty violation once more exposed deep divisions. This does not bode well for future multilateral endeavours to counter chemical weapon use.

## THE NON-USE NORM, IDENTIFICATION AND ACCOUNTABILITY, AND THE FUTURE OF THE OPCW

### The future of the international norm against the use of chemical weapons

Given the high number of alleged and proven cases of chemical weapon use in Syria—and their use as an assassination instrument—states have frequently expressed concern that the norm against use of chemical weapons might be losing its potency.<sup>71</sup> However, a norm is not automatically rendered less

issued a political declaration in which, inter alia, they expressed their commitment to a number of steps to support and strengthen the OPCW and the CWC regime. OPCW, 'Joint statement delivered by H.E. Ambassador Philippe Lalliot, permanent representative of France to the OPCW, at the Fourth Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention', RC-4/NAT.37, 30 Nov. 2018.

<sup>69</sup> The USA took the position that since it does not recognize Palestine as an independent state, it would not accept any reference to it as a state party to the CWC.

<sup>70</sup> Guthrie, R., 'The sixth day: a committee of the whole or a committee of three parts?', CWC Review Conference Report no. 9, CBW Events for the CWC Coalition, 29 Nov. 2018.

<sup>71</sup> This section is based on a presentation by the author to the 7th Consultative Meeting of the EU Non-Proliferation and Disarmament Consortium, 4 Sep. 2018. On the current state of the chemical weapons non-use norm see also Price (note 7); and Rosert, E., 'Warum wir im Fall Syrien nicht von einer Erosion der Chemiewaffennorm sprechen sollten' [Why we should not speak of the erosion of the chemical weapons norm in the case of Syria], Peace Research Institute Frankfurt (PRIF) Blog, 11 Oct. 2018.

valid when it is violated. International norms are constituted and shaped by words as well as actions. Hence, verbal affirmation and the condemnation of violations can contribute to upholding a norm. If suspected norm violators or their allies deny such violations or shift the blame elsewhere, this implies that they accord significant importance to the norm even if they do not respect it—otherwise there would be no need to deny the violation.<sup>72</sup>

Thus far, no actor has admitted using chemical weapons in the Syrian civil war, and no one has justified such use or claimed it to be legitimate. Rather, Syria and Russia have gone to considerable lengths to present alternative narratives even where the use of chemical weapons has been independently confirmed and attributed to the Syrian Government. Moreover, although the sheer frequency of norm violations in Syria represents a serious problem, not the least in humanitarian terms, such use does not seem to have become more widely accepted or to have been repeated elsewhere.<sup>73</sup> While states should not be complacent about the norm's future validity, there remains a solid normative basis from which those willing to do so can address the problem of chemical warfare. It would therefore appear unwarranted, unnecessary and, as Elvira Rosert argues, even counterproductive to emphasize the threat to the non-use norm over its continued saliency.<sup>74</sup>

### Options for identifying perpetrators and holding them accountable

The identification of those responsible for chemical weapon attacks is one precondition for holding perpetrators to account and thereby demonstrating that the violation of the CWC and the non-use norm will not go unpunished. Accountability would support the norm and may help deter future chemical weapon use. The establishment of the IIT may fill the 'identification void' left when the JIM expired. However, unlike the JIM, the IIT is not based on a consensus decision by major actors but rather the result of a highly contentious process. This does not diminish its technical capability to conduct effective,

<sup>72</sup> On the relevance of reactions to norm violations see Price (note 7).

<sup>73</sup> For a similar assessment see Chapman, G., Elbahtimy, H. and Martin, S. B., 'The future of chemical weapons: Implications from the Syrian civil war', *Security Studies*, vol. 27, no. 4 (13 Aug. 2018), pp. 704–33. For a different view see Hersman (note 53).

<sup>74</sup> Rosert (note 71).

impartial and professional investigations, but is likely to affect the way in which some states, especially Russia and Syria, receive and react to the results. It may also have repercussions for the work of the OPCW.<sup>75</sup> It will be helpful for designing follow-up action if the OPCW applies the highest professional standards available, and if the results thus achieved receive the broadest and most explicit support possible. After all, identifying the perpetrators is only one step; holding the perpetrators to account, which lies beyond the scope and mandate of the IIT, is another.

The IIT was established under the CWC, which is a disarmament treaty. The OPCW Technical Secretariat, which houses the IIT, is tasked with collaborating with the IIIM in relation to international criminal law. The CWC is an interstate treaty, and states are the subject of any action taken under the convention. Measures to address CWC non-compliance, be they legal or political in nature, would thus be directed at the state party in question. Prosecuting perpetrators of chemical weapon attacks under international—or, for that matter, national—criminal law shifts the focus to individuals and requires different, judicial procedures. Both approaches have their merits, but the distinction is important. From a chemical disarmament perspective, a state-centred approach might be adequate to address non-compliance and enforce the non-use provision of the CWC—although prosecuting individuals for their role in CWC violations might add a deterrent effect. Addressing chemical weapon use as one of numerous war crimes as part of international legal proceedings might be particularly relevant in the broad context of post-conflict settlement and transitional justice.

As outlined above, there is currently no international accountability mechanism available, because all the options depend on the support or at least tolerance of the five veto powers in the UN Security Council. National judicial measures that hold perpetrators to account are a positive step, even though few cases have been prosecuted, and those that have mostly addressed low-ranking actors as it is difficult to apprehend those with the most responsibility.<sup>76</sup>

<sup>75</sup> On the risks of politicization associated with the UK draft decision see Meier, O. and Trapp, R., 'Playing politics with chemical weapons? The UK's initiative on chemical weapons accountability', *Bulletin of the Atomic Scientists*, 20 June 2018; for a different perspective see Walker, J. R., 'Why the OPCW should attribute responsibility for chemical attacks', *Bulletin of the Atomic Scientists*, 21 June 2018.

<sup>76</sup> Human Rights Watch (HRW), *These Are the Crimes we are Fleeing: Justice for Syria in Swedish and German Courts*, (HRW: USA, 2017), pp. 4 and 36.

In addition, states have relied on like-minded coalitions or national action such as unilateral and coordinated sanctions (including through naming and shaming by way of targeted sanctions) and limited military strikes.<sup>77</sup> Such political or military coercive measures are not accountability measures in the strict sense. If designed carefully, targeted sanctions can contribute positively to curbing and deterring proliferation, but they treat individuals as guilty without judicial proceedings. Unless approved by the UN, military strikes as punitive measures are mostly illegal or at best fall within a grey area of legality, and hence are extremely problematic.<sup>78</sup> As a potential deterrent, they also face considerable problems. The possible scale of chemical weapon use ranges from low-key improvised attacks with few, if any, casualties to large-scale attacks that produce mass casualties. It is hardly possible to draw a 'red line' on this continuum that would not entail ethical or other problems. Any use of toxic chemicals as a weapon is of course highly reprehensible and illegal, but military action would hardly be taken as a result of one improvised chlorine device, especially in a war in which many atrocities are being committed by other illegal means and which carries such potential for escalation. How, and by whom, could a threshold be defined?

Similarly, for ethical reasons, it is impossible to draw a red line using the number of casualties, since clearly no number of casualties can be more acceptable than another. Moreover, the type of agent cannot serve as an indicator either, since chlorine is no less a chemical weapon, if used as such, than sulphur mustard or sarin. Military deterrence in the classic sense is thus difficult to apply to chemical warfare in Syria. Fear of detection and individual legal prosecution, as well as strong political repercussions for proven non-compliance might actually be more credible and effective as deterrents—even more so if they are realistic and tangible, anchored in multilateral settings and supported by independent and technically sound investigations. Accountability through national or, better yet, international criminal law should thus remain an important goal. However, it is the OPCW

<sup>77</sup> For a critical view on unilateral military measures in the Syrian context see e.g. Barber (note 58).

<sup>78</sup> For a more benign view on unilateral measures in this context see Hersman (note 53).

as ‘the world’s trusted authority in chemical weapons’ that needs immediate support.<sup>79</sup>

### The future role and viability of the OPCW

The OPCW plays a crucial role in addressing all kinds of violations of the CWC, including chemical weapon use, and in providing rigorous technical analyses of alleged attacks. It is therefore a cause for concern that its integrity, impartiality and professionalism in carrying out investigations and producing credible results are increasingly being questioned by Russia, among others. This polarization, which increased with the demise of the JIM and intensified after Douma and Salisbury, is already affecting the proceedings of the CWC regime, as the recent conferences showed. If the same dynamic led to public questioning or discrediting of the IIT’s results, this could undermine not only the OPCW’s work, but also eventual legal prosecutions based on the results. It is therefore imperative to halt the downward spiral of polarization and prevent the OPCW’s credibility from falling victim to the national interests of a few.

### RECOMMENDATIONS<sup>80</sup>

As argued above, the non-use norm for chemical weapons is solid. Even if there is no immediate cause for concern for its well-being, however, several precautionary measures can be taken to ensure its continued strength. One such measure is discursive support: unequivocal condemnation of the use of chemical weapons and verbal affirmation that these violations do not reduce the non-use norm’s validity play a significant part in bolstering the norm. By contrast, evoking the norm’s impending demise, which is currently not in the offing anyway, could be counterproductive. Therefore, EU member states and CWC states parties should emphasize the continued strength and validity of the non-use norm in their statements.

A second option is to make use of the ‘Uniting for Peace’ concept as developed in UN General Assembly Resolution 377, with chemical weapons use as the

<sup>79</sup> OPCW, ‘OPCW Director-General meets Russian Foreign Minister’, Press release, 5 Apr. 2019.

<sup>80</sup> The author presented the core ideas of this section to the 7th Consultative Meeting of the EU Non-Proliferation and Disarmament Consortium in Brussels on 4 Sep. 2018.

sole focus or as part of the broader war context.<sup>81</sup> Determined international, UN-induced or ICC-induced action aimed at restoring compliance, punishing violations and holding perpetrators to account would of course be the most effective way to counter the use of chemical weapons. However, as outlined above, such measures are currently the least likely to be implemented. Invoking Uniting for Peace could be a viable alternative under current circumstances. Possible actions by the UN General Assembly in this context could include collectively condemning Syria for its war crimes and human rights violations, or recommending the establishment of an ad hoc tribunal for serious crimes committed during the war. Of the other possible recommendations listed by Rebecca Barber, sanctions and a referral of the Syrian case to the ICC may be the most pertinent to consider.<sup>82</sup> The EU and all interested states should explore the possibilities regarding Syria offered under the Uniting for Peace principle and urge the UN General Assembly to pursue that route.

In the absence of international criminal jurisdiction, national prosecution of crimes committed during the Syrian civil war currently represents the most feasible option for creating accountability. Strengthening national prosecution capabilities, which is also listed among the No Impunity initiative’s principles, would be a useful step to this end. EU member states should thus build up their own capabilities and offer support with strengthening others’ capabilities. If they have not done so already, they should also consider adopting or re-establishing universal jurisdiction for war crimes, including chemical weapon use.<sup>83</sup>

Unilateral action, although possibly helpful under certain circumstances, needs to be carefully devised and checked against possible unintended and counterproductive consequences. States should generally aim to create the broadest and most inclusive

<sup>81</sup> United Nations, General Assembly, A/RES/5/377, 3 Nov. 1950. The resolution stipulates that in cases where the UN Security Council ‘fails to exercise its primary responsibility for the maintenance of international peace and security’ when there is a threat to or breach of the peace, the General Assembly shall ‘consider the matter immediately with a view to making appropriate recommendations to Members for collective measures’. See e.g. Binder, C., ‘Uniting for Peace Resolution (1950)’, *Max Planck Encyclopedia of Public International Law*, May 2017.

<sup>82</sup> Barber (note 58).

<sup>83</sup> Universal jurisdiction refers to the legal principle that certain serious crimes can be prosecuted regardless of the perpetrators’ nationalities or where they were committed. See e.g. Advisory Service on International Humanitarian Law, ‘Universal jurisdiction over war crimes’, International Committee of the Red Cross, Mar. 2014.

multilateral backing possible for all their efforts and actions to counter chemical weapon use. Military action without a UN mandate would be neither a legal nor a credible deterrent. Nor is it sensible given the protracted nature of the war. Sanctions, as enacted by the EU among others, should be applied as carefully and as transparently as possible. They should not be construed as a substitute for judicial accountability measures but should be framed as political measures, and the EU should review the effects of its sanctions regime critically on a regular basis.

A broad basis of support is also needed to uphold the effectiveness of the OPCW, safeguard it against attempts to weaken its credibility and help contain the current polarization within the OPCW's policymaking organs.<sup>84</sup> As Ahmet Üzümcü has suggested, lobbying for cross-regional acceptance and support for the OPCW's work and its findings, such as through diplomatic demarches, would be an important first step, and one the EU would be well placed to take.<sup>85</sup> Similarly, EU member states should intensify cross-regional cooperation in less contentious areas and in the routine operations of the OPCW. They should also emphasize and exploit possibilities for pragmatic and constructive cooperation in the CWC regime beyond the question of chemical weapon use.

Regarding the situation in Syria, it is critical that the dedicated OPCW mechanisms, including the new IIT, receive as much political and material support as possible. Once it is operational, the IIT will be the only available identification mechanism able to base its conclusions on comprehensive expertise and primary independent analysis. The EU should thus provide every support necessary to the IIT and the Technical Secretariat as a whole.

In general, EU member states should ensure that their actions, including coercive measures, do not, however inadvertently, undermine the OPCW or the CWC. They should prioritize OPCW mechanisms and CWC provisions over national action wherever feasible. This might at times slow down diplomatic action and thus not always be politically palatable. Yet it would demonstrate support for and confidence in the OPCW if the existing procedures and mechanisms were exploited to the maximum.

Like so many arms control, non-proliferation and disarmament regimes, the international chemical weapons regime is currently being tested by those who violate basic principles and provisions, and by those who stand in the way of determined and collective reactions to these violations. The OPCW has proved flexible and resilient enough to address even the most serious, unprecedented and unexpected situations. To exploit its potential fully and to remain functional in the face of strong opposition, however, it needs the support of its states parties. The OPCW provides the unique possibilities of an independent and impartial institution with immense technical expertise. These possibilities must be maintained and the OPCW prevented from becoming yet another blocked and polarized multilateral disarmament forum. The EU has proved that it can play a constructive role and achieve valuable results in the area of non-proliferation and disarmament even in intricate negotiations. It should use this potential and seize every available opportunity to counter the use of chemical weapons, to create accountability for those who use them and to support the OPCW in its important work to these ends.

<sup>84</sup> See Hart, J. and Trapp, R., 'Collateral damage? The Chemical Weapons Convention in the wake of the Syrian civil war', *Arms Control Today*, Apr. 2018; and Trapp (note 40).

<sup>85</sup> Communication with the author, Jan. 2019.

**ABBREVIATIONS**

|       |                                                                                                                                                                                                                                                       |
|-------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| CoI   | Commission of Inquiry                                                                                                                                                                                                                                 |
| CSP   | Conference of the States Parties                                                                                                                                                                                                                      |
| CWC   | 1993 Chemical Weapons Convention                                                                                                                                                                                                                      |
| EU    | European Union                                                                                                                                                                                                                                        |
| FFM   | OPCW Fact-finding Mission                                                                                                                                                                                                                             |
| ICC   | International Criminal Court                                                                                                                                                                                                                          |
| IIIM  | International, Impartial and<br>Independent Mechanism to Assist in the<br>Investigation and Prosecution of Persons<br>Responsible for the Most Serious Crimes<br>under International Law Committed in<br>the Syrian Arab Republic since March<br>2011 |
| IIT   | Investigation and Identification Team.                                                                                                                                                                                                                |
| IS    | Islamic state                                                                                                                                                                                                                                         |
| OPCW  | Organisation for the Prohibition of<br>Chemical Weapons                                                                                                                                                                                               |
| JIM   | OPCW–United Nations Joint<br>Investigative Mechanism                                                                                                                                                                                                  |
| UNSGM | UN Secretary-General’s Mechanism                                                                                                                                                                                                                      |



This document has been produced with the financial assistance of the EU. The contents are the sole responsibility of the EU Non-Proliferation and Disarmament Consortium and can under no circumstances be regarded as reflecting the position of the EU.

## A EUROPEAN NETWORK

In July 2010 the Council of the European Union decided to support the creation of a network bringing together foreign policy institutions and research centers from across the EU to encourage political and security-related dialogue and the long-term discussion of measures to combat the proliferation of weapons of mass destruction (WMD) and their delivery systems. The Council of the European Union entrusted the technical implementation of this Decision to the EU Non-Proliferation Consortium. In 2018, in line with the recommendations formulated by the European Parliament the names and the mandate of the network and the Consortium have been adjusted to include the word 'disarmament'.

## STRUCTURE

The EU Non-Proliferation and Disarmament Consortium is managed jointly by six institutes: La Fondation pour la recherche stratégique (FRS), the Peace Research Institute Frankfurt (HSFK/ PRIF), the International Affairs Institute in Rome (IAI), the International Institute for Strategic Studies (IISS), the Stockholm International Peace Research Institute (SIPRI) and the Vienna Center for Disarmament and Non-Proliferation (VCDNP). The Consortium, originally comprised of four institutes, began its work in January 2011 and forms the core of a wider network of European non-proliferation and disarmament think tanks and research centers which are closely associated with the activities of the Consortium.

## MISSION

The main aim of the network of independent non-proliferation and disarmament think tanks is to encourage discussion of measures to combat the proliferation of weapons of mass destruction and their delivery systems within civil society, particularly among experts, researchers and academics in the EU and third countries. The scope of activities shall also cover issues related to conventional weapons, including small arms and light weapons (SALW).

[www.nonproliferation.eu](http://www.nonproliferation.eu)

## EU Non-Proliferation and Disarmament Consortium

*Promoting the European network of independent non-proliferation and disarmament think tanks*

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