



**ENHANCING THE MANAGEMENT
AND ENFORCEMENT OF
COMPLIANCE IN THE REGIME
PROHIBITING CHEMICAL WEAPONS**

RALF TRAPP & CHENG TANG
WITH FOREWORD BY AMBASSADOR AHMET ÜZÜMCÜ

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ABBREVIATIONS AND ACRONYMS

CSP	Conference of the States Parties of the CWC
CW	Chemical weapons
CWC	Chemical Weapons Convention
DAT	Declaration Assessment Team
DPRK	Democratic People’s Republic of Korea
EC	Executive Council
EU	European Union
FFM	Fact-Finding Mission
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
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
JIM	United Nations–OPCW Joint Investigative Mechanism
OPCW	Organisation for the Prohibition of Chemical Weapons
PAI	International Partnership against Impunity for the Use of Chemical Weapons
SAB	Scientific Advisory Board
UNSGM	United Nations Secretary-General’s Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons
WMD	Weapons of mass destruction



FOREWORD BY AMBASSADOR AHMET ÜZÜMCÜ

I welcome UNIDIR's publication of a report on compliance management and enforcement in the Chemical Weapons Convention (CWC) regime. The report is timely and answers several questions that many observers have in mind.



The Organisation for the Prohibition of Chemical Weapons (OPCW) has achieved remarkable progress in the implementation of the CWC in the past 25 years. The elimination of declared stockpiles of chemical weapons (CW) is nearly completed. This success was recognized by the Nobel Peace Prize Committee in 2013. The focus of the Organisation has gradually shifted towards the prevention of the re-emergence of CW. While discussions on future priorities were underway among States parties, the uses of CW in the Syrian Arab Republic, Malaysia, the United Kingdom and more recently in the Russian Federation created shockwaves within the CWC community. Upholding the international norm against the use of CWs and preventing its erosion have become an immediate priority.

The OPCW had been flexible and creative in dealing with problems which arose in Syria. It had established the Fact-Finding Mission (FFM) to determine the facts surrounding allegations of use of CW and the Declaration Assessment Team (DAT) to address the gaps and inconsistencies in the Syrian declaration. Such mechanisms were not specifically foreseen by the CWC, but they were in line with its purpose and objectives.

Lawyers specialized in criminal law suggest that the only way to deter potential criminals is to create the necessary legal and other mechanisms to ensure accountability. The use of CW is a crime and those who intend to use them would show restraint if there is certainty that they will be identified, held responsible, prosecuted and punished. Otherwise, a culture of impunity may emerge, and the CWC regime – an important pillar of the rules-based international order – may lose its credibility and integrity.

Despite political divisions among the membership, the OPCW has demonstrated considerable resilience and adaptability in meeting new challenges and has made significant efforts to preserve its credibility. It was able to take important decisions such as the establishment of the Investigation and Identification Team (IIT) to identify those responsible for the use of CW in Syria. Invoking Article XII of the CWC against Syria was another bold step.

Programmes aimed at a better implementation of the CWC as well as new projects, such as the Centre for Chemistry and Technology, that will enhance the technical capabilities of the OPCW will further strengthen the regime. The CWC regime will be able to contribute more to global peace and security.

The recommendations of this report on compliance management and enforcement are comprehensive and foresee new mechanisms or measures within and outside the OPCW. I hope that the international community will seriously consider them.

Ambassador Ahmet Üzümcü was Director-General of the OPCW between December 2009 and July 2018. He received the Nobel Peace Prize on behalf of the OPCW in December 2013.

RECOMMENDATIONS

- The Organisation for the Prohibition of Chemical Weapons (OPCW) should enhance further its scientific, technical and operational capabilities in the fields of verification, investigation, and technical assistance. It should do this through strengthening the forensic and analytical capabilities of the Technical Secretariat and the OPCW's designated laboratories.
- The OPCW Executive Council, supported by analyses regularly prepared by the Technical Secretariat, should more systematically review the status of compliance with the Chemical Weapons Convention (CWC) by States parties. This should include more extensive use of the consultative mechanisms under Articles VIII and IX to clarify uncertainties and concerns related to CWC compliance. This could also involve innovative new confidence-building approaches such as voluntary peer reviews or mutual evaluations of national implementation and enforcement systems involving States parties that wish to share good implementation practices and learn from others about effective ways of implementing the CWC.
- OPCW Member States should encourage the Director-General to commission an in-depth study that analyses the legal, institutional and operational aspects of establishing a generic attribution mechanism based on the provisions of the CWC. This should include clarifying the relationship between such a mechanism and other international and national bodies and mechanisms that have been established in the fields of inter-national humanitarian law and international criminal law.
- CWC States Parties should review the measures they have adopted to enact and enforce the CWC prohibitions on the development, production, stockpiling and use of chemical weapons to ensure that those responsible for crimes involving chemical weapons will be brought to justice. The OPCW could further enhance its implementation support programme by developing and implementing specialized training projects for law enforcement officers, prosecutors and judges with regard to crimes involving chemical weapons.
- CWC States parties should conduct a broad review, supported by the Technical Secretariat and the Scientific Advisory Board (SAB), of the design and application of the CWC industry verification regime as well as corresponding national implementation measures. This review should cover declarations, national controls and transfer controls, and measures implemented by industry and trade associations and individual companies. The review should explore ways in which the CWC industry verification regime can be further evolved to address changes in the scientific, technological and industrial environment as well as new threat scenarios such as chemical weapon capabilities with smaller footprints or illegal procurement networks for precursor as well as toxic chemicals intended to be used as chemical weapons, including by non-State actors.
- Within the broader international framework – including organizations and entities of, or associated with, the United Nations System as well as multilateral (global or regional) initiatives and mechanisms that have mandates which relate to the proliferation and use of chemical weapons – there should be a regular process of consultation and information exchanges to coordinate activities in the fields of prevention and response to violations of the norm against chemical weapons. The OPCW would be a natural actor to offer a platform for such consultations.

1 INTRODUCTION

At the heart of the international norm against chemical weapons (CW) are the prohibitions and undertakings set out in the 1997 Chemical Weapons Convention (CWC).¹ The CWC builds on the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare, set out in the 1925 Geneva Protocol. It extends these prohibitions in two ways. First, the prohibition of the use of chemical weapons is unqualified (“never under any circumstances”) and the CWC does not allow for reservations to this and other undertakings.² Second, the obligations under Article I of the CWC establish a comprehensive prohibition of the possession and acquisition of chemical weapons as well as an obligation to destroy any existing CW stockpiles and production facilities within established time frames and subject to international verification. The CWC has become a near-universal treaty with 193 States parties.³ This high degree of global adherence reflects a customary norm against chemical weapon use, which transcends the CWC and applies to all States and even to sub- or non-State actors.⁴ This was evident in the international community’s response to the use of chemical weapons in the Syrian Arab Republic – a State that was not a party to the CWC.⁵ It has also been reflected in the decision of the Fourth Special Session of the Conference of the States Parties of the CWC (CSP) on “Addressing the threat from chemical weapons use”.⁶

In addition to the prohibition of CW use, the CWC sets out other obligations of States parties. These include the adoption of national implementation measures; the fostering of international cooperation; the provision of assistance to States parties threatened by or victims of the use of chemical weapons; and the general obligation to consult and cooperate among each other and through the Organisation for the Prohibition of Chemical Weapons (OPCW) to resolve any issues related to the implementation of the CWC and compliance with its obligations.

To ensure compliance with these undertakings, the CWC establishes a sophisticated system of legal provisions and procedures that allow States parties to manage and, when necessary, enforce compliance.⁷ The OPCW Executive Council (EC) plays a key role in determining compliance. It has the power to take decisions as well as submit recommendations to the CSP to

¹ For the purpose of this paper, norms are understood as “shared (social) understandings of standards for behavior”. A Klotz, “Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions against South Africa”, *International Organization*, vol. 49, no. 3, 1995, p. 451, <https://doi.org/10.1017/S0020818300033348>. See also C. Wunderlich, H. Müller and U. Jakob, *WMD Compliance and Enforcement in a Changing Global Context*, WMD Compliance and Enforcement Series no. 11, UNIDIR, 2021, <https://doi.org/10.37559/WMD/21/WMDCE02>.

² W. Krutzsch, E. Myjer and R. Trapp (eds.), *The Chemical Weapons Convention: A Commentary*, 2014, in particular the chapters on Articles I and XXII.

³ OPCW, “Achieving Universality – Ensuring a truly global treaty”, 2021, <https://www.opcw.org/work/achieving-universality-convention>.

⁴ ICRC, “Rule 74: Chemical Weapons”, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule74.

⁵ J. Masterson, “Reinforcing the Global Norm Against Chemical Weapons Use”, Policy White Paper, Arms Control Association, 18 February 2021, <https://www.armscontrol.org/policy-white-papers/2021-02/reinforcing-global-norm-against-chemical-weapons-use>.

⁶ OPCW, “Decision addressing the threat from chemical weapons use”, C-SS-4/DEC.3, 27 June 2018, operative paragraph 2, https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/css4dec3_e_doc.pdf. Note that this list included implicit references to CW uses by terrorist organizations and in assassination attempts allegedly conducted by State operatives including a State not party to the CWC.

⁷ R. Trapp, *Compliance Management under the Chemical Weapons Convention*, WMD Compliance and Enforcement Series no. 3, UNIDIR, 2019, <https://doi.org/10.37559/WMD/19/WMDCE3>.

promote and, if necessary, re-establish compliance. Individually, States parties can make their own compliance assessments, using their own information sources as well as information they receive from the OPCW. This may include data provided by other States parties (e.g. certain data submitted in declarations or clarifications provided in response to requests made in the context of Articles VIII and IX) as well as technical assessments prepared by the Technical Secretariat as a result of its verification activities. Science and technology support for such assessments can be provided by the Scientific Advisory Board (SAB) upon request from the OPCW Director-General.

Assessing the status of compliance and responding to deficiencies in the implementation of treaty requirements or to violations of basic undertakings can be understood as a management process. The CWC requires its States parties to domesticate their undertakings by enacting or adapting laws and regulations and by applying administrative measures to implement treaty requirements. The OPCW provides a platform for information sharing, consultation, cooperation and decision-making, offers technical and legal assistance to help States parties maintain or re-establish compliance, and conducts verification measures to create the evidence base for assessing and maintaining treaty compliance. The CWC also provides several mechanisms to address non-compliance concerns, to resolve disputes between States parties, to encourage and as necessary assist States parties to re-establish compliance, and to respond to cases of non-compliance by enforcement measures, including sanctions.

In addition to the procedural framework offered by the CWC, however, other mechanisms can be used by States and the international community to manage and enforce compliance with the norm against chemical weapons. These include, first, mechanisms in the context of the United Nations system:

- Measures authorized by the Security Council, which may involve the conduct of investigations, the implementation of assistance missions, the adoption of resolutions compelling States to take certain actions, the imposition of sanctions, and other measures
- Resolutions adopted by the General Assembly, including, among others, the establishment of special investigative or assistance mechanisms
- Steps taken by the Secretary-General under the authority given to him by the General Assembly or the Security Council – notably the United Nations Secretary-General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons (UNSGM) – to investigate allegations of the use of chemical, biological and toxin weapons
- Within their respective mandates, measures implemented by other United Nations or other international entities such as the Human Rights Council, the International Court of Justice, the International Criminal Court, special tribunals, or specialized agencies.

Second, individual States as well as regional groupings and organizations can take measures in response to norm violations, in accordance with the principles and rules of international law. These measures may include, for example, economic or targeted (“smart”) sanctions, or judicial procedures within the scope of their jurisdiction.

2 THE STATUS OF COMPLIANCE WITH THE NORM AGAINST CHEMICAL WEAPONS

2.1 COMPLIANCE ASSESSMENTS UNDER THE CWC

As pointed out in a previous study of this series, compliance refers to a State meeting its obligations under a particular international treaty (here the CWC). Enforcement describes actions which States parties to a treaty – or, at times, the international community more generally – might take in order to ensure or re-establish compliance with the terms of the treaty.⁸ It follows that any assessment of compliance must be specific – related to particular obligations or undertakings entered into by the State of concern – and based on commonly accepted criteria such as, for example, the CWC deadline for the complete destruction of chemical weapons or the criteria to be applied in the conversion of former CW production facilities for purposes not prohibited. Furthermore, compliance assessments should be substantiated by factual evidence about a given situation that has been acquired independently, using agreed principles and methods of verification.

The CWC does not distinguish between “technical” and “substantive” non-compliance. The provisions of Articles VIII and IX create a procedural framework that lets the EC and the CSP decide on each case on its own merits. This case-by-case approach takes account of the need to address a range of factors in any compliance assessment, including the particular conditions in the State party concerned, its stated policy as well as actual practice, its technical and administrative capacity, the impact that the non-compliance situation has on the CWC, any assistance that the State party may require from the OPCW Technical Secretariat or peers, and so on. This approach mirrors the provisions on redressing a situation in Article XII. That article does not contain a predetermination of the types of measure the CSP may decide upon in response to different degrees of non-compliance. It lists a number of specific collective measures that the CSP may decide upon to compel a State party that was found in non-compliance to take corrective action. But it avoids establishing a correlation between a type of non-compliance and a type of sanction. Instead, it uses the concepts of failure of a State party to take corrective action prescribed by the EC and – particularly with regard to violations of provisions of Article I – of damage to the object and purpose of the CWC that may result from the act of non-compliance. This approach requires the EC and the CSP to undertake an assessment both of the willingness of the State party to correct the situation and of the damage to the norm that a failure to correct might cause.

Article XII(4) does, however, introduce the concept of non-compliance of particular gravity. This provision functions as a gateway to actions to be considered in the wider United Nations system, and it links compliance enforcement to the powers of the Security Council to impose binding sanctions on countries that pose a threat to international peace and security.

A key aspect of assessing the status of compliance with the CWC is the completeness and correctness of the declarations submitted by the States parties as well as the absence of activities that would contravene their undertakings of Article I. While some States parties have at times

⁸ T. Dunworth, *Compliance and Enforcement in WMD-related Treaties*, WMD Compliance and Enforcement Series no. 1, UNIDIR, 2019, <https://doi.org/10.37559/WMD/19/WMDCE1>.

raised questions about the compliance of other CWC parties, until recently, no formal procedure to resolve such compliance concerns has been initiated in the OPCW's policymaking organs. The Technical Secretariat has evaluated declarations received from States parties using a number of criteria, and it has offered technical assistance and evaluation to States parties in identifying potentially declarable facilities as well as clarifying the status of certain facilities if so requested. In the case of Syria, the Technical Secretariat set up a Declaration Assessment Team (DAT) to clarify inconsistencies and gaps in the Syrian CW declaration. These measures are important elements of the OPCW's well-articulated compliance-management system, but they fall short of a systematic approach aimed at assessing the correctness and completeness of State party declarations. These measures also do not lead into the regular issue of conclusions on State-level compliance with the CWC. This differs from the practice of the International Atomic Energy Agency (IAEA). Since the early 1990s, the IAEA's approach has evolved "from one focused on specific materials and facilities to a more holistic, integrated approach that views the State's nuclear programme as a whole".⁹ It involves the preparation of safeguards assessments based on declarations, verification data, and open as well as other sources. This results in regular (annual) safeguards conclusions by the IAEA Secretariat in the form of an assessment of the degree to which compliance of each State could be confirmed based on the specific legal framework in place and the verification results achieved thereunder¹⁰.

Despite the absence of formal State-level compliance assessments, the OPCW does offer technical assistance to States parties to enhance the correctness and completeness of declarations, as part of its national implementation support programme. The Technical Secretariat provides information based on open-source data to help States parties identify hitherto undeclared chemical industry facilities that might be subject to declaration and inspection requirements. But these measures are based on the explicit consent of the States parties concerned.

2.2 NATIONAL COMPLIANCE ASSESSMENTS

While the OPCW has not issued regular reports on the status of compliance with the CWC, certain States parties have conducted such assessments on a national basis. An example is the United States of America: Condition 10(c) of the US Senate's Resolution of advice and consent to ratification of the CWC requires the US President to submit annually to the Senate and the House of Representatives a report, in classified and unclassified forms, which includes a country-by-country certification of compliance with the CWC for countries that are being monitored in accordance with the United States' intelligence priorities in the field of the proliferation of weapons of mass destruction (WMD). For countries that cannot be so certified, an identification and assessment of all compliance issues arising with regard to adherence of the country to its obligations under the Convention is included in the reports.

⁹ L. Rockwood, "Legal Framework for IAEA Safeguards", International Atomic Energy Agency, p. 29.

¹⁰ For details see *ibid.*, pp. 29–30.

In addition to information collected by the United States itself or received from other countries, these Condition 10(c) compliance reports build on information received from the OPCW about its verification activities and any investigations conducted, as well as on other compliance issues, such as the status of adopting national implementation measures under Article VII.¹¹ The reports discuss in detail the compliance situation as assessed by the United States for countries it has concluded to have been in non-compliance, or where the US President was unable to certify their compliance. They also detail the measures that the OPCW and the United States have taken to resolve these compliance concerns.

While the publication of an unclassified version of such a compliance assessment may be particular to the United States, other States, too, conduct similar assessments of other countries' CWC compliance based on all the information they have at their disposal. The CWC, in fact, assumes that States parties undertake such assessments. Indeed, to provide independently verified data that States can use to conduct such assessments, the CWC provides for the Technical Secretariat to regularly disseminate to States parties relevant data that it has collected and verified.¹² However, although such national compliance assessments are a normal practice and form the basis for those countries to formulate their policy actions and other measures to respond to presumed or confirmed cases of non-compliance, such assessments are frequently contested when made public. Moreover, they cannot replace collective measures for the management and enforcement of compliance implemented in the framework of the OPCW or the United Nations.

2.3 SYRIA

The use of chemical weapons in the Syrian conflict, Syria's accession to the CWC in 2013, and the measures adopted by the United Nations and the OPCW to eliminate the Syrian chemical weapon programme and prevent further uses of chemical weapons in the armed conflict changed the way in which the OPCW has undertaken compliance assessments. The United Nations–OPCW Joint Mission and subsequently the OPCW have supported and verified the complete elimination of the CW stockpile and production facilities declared by Syria.¹³ However, several States have raised questions about the completeness of the Syrian declaration.¹⁴ Beginning in early 2014, new reports about the use of chemical weapons in Syria also emerged. A succession of investigative and assessment mechanisms was set up to clarify the situation (see table 1 on the following page).

¹¹ See for example US Department of State, "Compliance with the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction – Condition (10)(c) Report", April 2021, <https://www.state.gov/wp-content/uploads/2021/04/2021-Condition-10-c-Report.pdf>.

¹² See the CWC Confidentiality Annex, para 2(b).

¹³ For a latest report see OPCW, "Progress in the Elimination of the Syrian Chemical Weapons Programme", Report by the Director-General, EC-97/DG.2, 24 March 2021, [https://www.opcw.org/sites/default/files/documents/2021/03/ec97dg02\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/03/ec97dg02(e).pdf).

¹⁴ See, for example, Luxembourg (EU), "Statement on Behalf of the European Union Delivered by Mr Jacek Bylica, Principal Advisor and Special Envoy for Non-Proliferation and Disarmament at the Twentieth Session of the Conference of the States Parties", C-20/NAT.46, 30 November 2015, https://www.opcw.org/sites/default/files/documents/CSP/C-20/national_statements/c20nat46_e_.pdf.

TABLE 1. *Investigative and assessment mechanisms established to clarify the use of chemical weapons in the Syria conflict*

Mechanism	Date	Purpose
OPCW Fact-Finding Mission (FFM)	2014–	Investigate whether chemical weapons had been used
Declaration Assessment Team (DAT)	2014–	Map out the Syrian chemical weapon programme to identify gaps and inconsistencies in the Syrian declaration and to prompt the declaration of missing elements in accordance with Article III of the CWC
United Nations–OPCW Joint Investigative Mechanism (JIM)	2015–2017	Identify perpetrators of chemical weapon uses in Syria already confirmed by the FFM
OPCW Investigation and Identification Team (IIT)	2019–	Identifying the perpetrators of the use of chemical weapons in Syria

The factual findings reported by the DAT have resulted in formal statements by the OPCW Director-General to the effect that he could not, and still cannot today, certify the completeness and correctness of the Syrian CW declaration.¹⁵ The findings of the United Nations–OPCW Joint Investigative Mechanism (JIM) have attributed responsibility for certain CW attacks to the Syrian armed forces; the JIM also attributed responsibility for certain chemical weapon uses to the Islamic State group.¹⁶ For the first time, the OPCW explicitly pronounced a State party as being in non-compliance with its undertakings under the CWC, and specifically with provisions of Article I.

¹⁵ See paragraph 14 making reference to the “Report on the Work of the Declaration Assessment Team” in OPCW, “Progress in the Elimination of the Syrian Chemical Weapons Programme”, Report by the Director-General, EC-97/DG.2, 24 March 2021, [https://www.opcw.org/sites/default/files/documents/2021/03/ec97dg02\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/03/ec97dg02(e).pdf).

¹⁶ Security Council, S/2016/738/Rev.1, 24 August 2016, <https://undocs.org/S/2016/738/Rev.1>; Security Council, S/2017/904, 26 October 2017, <https://undocs.org/S/2017/904>; OPCW, “First Report by the OPCW Investigation and Identification Team Pursuant to Paragraph 10 of Decision C-SS04/DEC.3 ‘Addressing the Threat from Chemical Weapons Use’ LTAMENAH (Syrian Arab Republic) 24, 25, and 30 March 2017”, Note by the Technical Secretariat, S/1867/2020, 8 April 2018, [https://www.opcw.org/sites/default/files/documents/2020/04/s-1867-2020\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2020/04/s-1867-2020(e).pdf); OPCW, “Second Report by the OPCW Investigation and Identification Team Pursuant to Paragraph 10 of Decision C-SS-4/DEC.3 ‘Addressing the Threat from Chemical Weapons Use’ Saraqib (Syrian Arab Republic) – 4 February 2018”, Note by the Technical Secretariat, S/1943/2021, 12 April 2021, [https://www.opcw.org/sites/default/files/documents/2021/04/s-1943-2021\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/04/s-1943-2021(e).pdf).

2.4 NOVICHOK USES

The steps taken by the OPCW in response to these findings are discussed below. One other issue, however, that bears on the compliance status under the CWC needs to be mentioned first: the alleged uses of Novichok-type chemical agents in assassination attempts which Western States have attributed to Russian state agents.¹⁷ The Russian Federation has denied these allegations.¹⁸

The use of small quantities of toxic chemicals in assassinations – whether by State agents or non-State actors – was not discussed during the CWC negotiations in any depth. The focus had been on the elimination of “militarily significant quantities” of chemical weapons, and discussions about verification of compliance focused on types and quantities consistent with such military uses.¹⁹ Smaller-scale threat scenarios such as the possible uses of toxic chemicals by terrorists or criminals were left to the enactment and enforcement of penal legislation by individual States parties, as well as legal cooperation between them.

The nature of the chemical weapon threat has changed in recent decades. This poses the question of how the OPCW ought to deal with such smaller-scale threats. The focus so far has been on expressing grave concern, providing technical assistance to States Parties,²⁰ and adding several groups of toxic chemicals to Schedule 1 of the CWC Annex on Chemicals,²¹ thereby subjecting them and the facilities manufacturing them to the most stringent CWC restrictions and verification measures.

At the time of the attacks, the Novichok-type agents were not yet included in the CWC Schedules of Chemicals. They nevertheless qualified as chemical weapons. The general-purpose criterion of the CWC ensures that even unscheduled chemicals are considered a chemical weapon if used for purposes prohibited under the CWC.²² The OPCW Director-General, when commenting on the poisoning of Alexei Navalny, went as far as to state that “Under the Chemical Weapons Convention, any poisoning of an individual through the use of a nerve agent is considered a use of chemical weapons.”²³ After the attempts on the lives of Sergei and Yulia Skripal in Salisbury in 2018, the United Kingdom raised the matter in the OPCW’s EC, asserting that Russia, either by

¹⁷ For a discussion of the attacks on the Skripals and its relationship to the CWC, see for example R. Trapp, “Novichok, die Skripal Affäre und das Chemiewaffenübereinkommen”, *Sirius*, vol. 2, no. 3, 2018, pp. 219–238, <https://doi.org/10.1515/sirius-2018-3002>. For a discussion of the Navalny case, see for example O. Meier and A. Kelle, “The Navalny Poisoning: Moscow Evades Accountability and Mocks the Chemical Weapons Convention”, *Bulletin of the Atomic Scientists*, 19 October 2021, <https://thebulletin.org/2021/10/the-navalny-poisoning-moscow-evades-accountability-and-mocks-the-chemical-weapons-convention>.

¹⁸ See for example: The Ministry of Foreign Affairs of the Russian Federation, “Russian Foreign Ministry Statement”, 5 September 2018, https://www.mid.ru/en/press_service/spokesman/official_statement/1575433.

¹⁹ For more on militarily significant quantities see I. Anthony, *Strengthening Global Regimes: Addressing the Threat Posed by Chemical Weapons*, SIPRI, November 2020, <https://sipri.org/publications/2020/sipri-policy-papers/strengthening-global-regimes-addressing-threat-posed-chemical-weapons>.

²⁰ An example was the technical assistance provided to Malaysia after the 2017 assassination of Kim Jong Nam using VX nerve agent at Kuala Lumpur Airport. See OPCW, “Decision: Chemical Weapons Incident in Kuala Lumpur, Malaysia”, EC-84/DEC.8, 9 March 2017, https://www.opcw.org/sites/default/files/documents/EC/84/en/ec84dec08_e.pdf.

²⁰ OPCW, “Technical Change to Schedule 1(A) of the Annex on Chemicals to the Chemical Weapons Convention”, C-24/DEC.5, 27 November 2019, [https://www.opcw.org/sites/default/files/documents/2019/11/c24dec04\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2019/11/c24dec04(e).pdf).

²¹ See for example OPCW, “What is a Chemical Weapon?”, <https://www.opcw.org/our-work/what-chemical-weapon>.

²² OPCW, “Statement from the OPCW Director-General on Allegations of Chemical Weapons Use Against Alexei Navalny”, 3 September 2020, <https://www.opcw.org/media-centre/news/2020/09/statement-opcw-director-general-allegations-chemical-weapons-use-against>.

²³ OPCW, “Statement from the OPCW Director-General on Allegations of Chemical Weapons Use Against Alexei Navalny”, 3 September 2020, <https://www.opcw.org/media-centre/news/2020/09/statement-opcw-director-general-allegations-chemical-weapons-use-against>.

failure of control over the material or by design (i.e., deliberately), was implicated in the use of a chemical weapon. In either case, the United Kingdom argued, Russia had failed for many years to declare aspects of its chemical weapon programme.²⁴ Russia denied these assertions.²⁵

Despite the seriousness of the allegations, at the time of writing, the United Kingdom has not formally pursued any of the procedures under Article IX of the CWC (bilateral clarifications of non-compliance concerns, clarification procedures involving the EC or a challenge inspection). Instead, it requested technical assistance from the OPCW to independently confirm the identity of the chemical agent used, and subsequently pursued the adoption of a decision on how to address the threats associated with chemical weapon uses.²⁶ Despite references to the Salisbury incident in OPCW documents that have addressed recent cases of chemical weapon use,²⁷ the OPCW has never reached a formal conclusion that found Russia in non-compliance with the CWC.²⁸

²⁴ United Kingdom, "Statement by H.E. Ambassador Peter Wilson Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the OPCW at the Eighty-Seventh Session of the Executive Council", EC-87/NAT.5, 13 March 2018, https://www.opcw.org/sites/default/files/documents/EC/87/en/ec87nat05_e_.pdf.

²⁵ Russian Federation, "Statement by H.E. Ambassador A.V. Shulgin Permanent Representative of the Russian Federation to the OPCW at the Eighty-Seventh Session of the Executive Council (On the Chemical Incident in Salisbury)", EC-87/NAT.9, 13 March 2018, https://www.opcw.org/sites/default/files/documents/EC/87/en/ec87nat09_e_.pdf.

²⁶ OPCW, "Decision: Addressing the Threat from Chemical Weapons Use", C-SS-4/DEC.3, 27 June 2018, https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/css4dec3_e_.doc.pdf.

²⁷ Most prominently, the decision of the 4th Special Session of the Conference of the States Parties, amongst others, explicitly condemned the use on 4 March 2018 of a nerve agent in Salisbury, the United Kingdom of Great Britain and Northern Ireland, as confirmed by the OPCW technical assistance visit report, and noted that the United Kingdom Government has identified the nerve agent as a Novichok. See paragraph 13 of OPCW, "Fourth Special Session: Decision – Addressing the Threat from Chemical Weapons Use", C-SS-4/DEC.3, 27 June 2018.

²⁸ OPCW, "Note by the Technical Secretariat: 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 April 2018. https://www.opcw.org/sites/default/files/documents/S_series/2018/en/s-1612-2018_e_1_.pdf.

3 COMPLIANCE MANAGEMENT AND ENFORCEMENT UNDER THE CWC

The management and enforcement of compliance under the CWC involve a number of interconnected processes. Thus, measures to enhance transparency through information submissions and exchanges are linked with fact-finding procedures to gather evidence needed to assess compliance. In turn, these measures are linked to procedures for evaluating such information and taking decisions to respond to situations where certain requirements of the CWC had not been met.²⁹ On a routine basis, CWC compliance management therefore involves:

- The submission of declarations and reports by States parties to the OPCW on the implementation of specific requirements of the CWC
- The evaluation and transmission to all States parties of such data by the Technical Secretariat, in accordance with the provisions of the CWC³⁰
- The conduct of verification activities by the Technical Secretariat and its reporting of the results and the effectiveness of these verification measures to all States parties
- The regular review by the EC of the implementation and compliance status and the EC's decision-making to correct any problems encountered by directing, as necessary, States parties to re-establish full compliance within agreed time frames
- The reporting by the EC on its activities to the CSP to enable it to review the status of the Convention at its regular sessions as well as at Review Conferences, and to take any decisions necessary to respond to situations of non-compliance.

These activities and processes provide States parties with a general overview of the compliance situation. They highlight deficiencies in the implementation of certain requirements by individual States parties and provide the basis for decision-making by the OPCW policymaking organs to encourage steps to improve implementation as well as to render any technical, legal or other assistance that States parties may require to re-establish full compliance.

3.1 COMPLIANCE MANAGEMENT

As has been pointed out in previous papers of this series, the aim of these compliance-management measures is to encourage and support steps to return to full compliance should a State party encounter difficulties in fully implementing its obligations under the CWC. Two examples that illustrate the way this approach has worked in practice are the OPCW Action Plan on Article VII Implementation and subsequent follow-up measures taken by the OPCW to

²⁹ R. Trapp, Compliance Management under the Chemical Weapons Convention, WMD Compliance and Enforcement Series no. 3, UNIDIR, 2019, <https://doi.org/10.37559/WMD/19/WMDCE3>, p. 13.

³⁰ The specifics of this data sharing are stipulated in paragraph 2(b) of the CWC's Confidentiality Annex. In addition, States parties that have yet to complete their obligations to eliminate their chemical weapon stockpile or continue to destroy abandoned chemical weapons provide regular briefings to the EC.

enhance national implementation of CWC obligations;³¹ and the measures taken in respect to destruction activities and verification measures after the final extended destruction deadline for chemical weapons had passed in 2012.³² Both actions were set out in decisions taken by the CSP. They followed a series of reports by the States parties concerned and the Technical Secretariat about implementation deficiencies and corrective steps taken, and deliberations in facilitation processes set up by the EC leading to recommendations to the CSP.

The decisions spelled out in detail the steps that the States parties concerned were expected to take to return to full compliance, the time frames envisaged to this end, the requirements about regular progress reporting, and the respective verification, technical assistance and reporting measures to be implemented by the Technical Secretariat. While both decisions avoided terminology that would have labelled States parties as “non-compliant” with their CWC obligations, the wording of the decisions, the procedures used to prepare and adopt them, and the way in which they were being implemented were clearly designed along the lines of the provisions set out in Article VIII that deal with the assessment of compliance situations and the measures to be taken to redress non-compliance.

3.2 CONSULTATION, COOPERATION AND FACT-FINDING

This approach has worked well in situations where a State party had experienced difficulties in fully meeting its CWC obligations because of a lack of implementing capacity, expertise or resources. But the CWC also contains provisions for the resolution of compliance concerns that reach beyond such routine measures and involve clarification and fact-finding procedures to establish whether non-compliance has occurred. Detailed procedures to this end are set out in Article IX of the CWC. This article deals with consultations and cooperation among States parties to resolve compliance concerns through bilateral consultations, with clarification and fact-finding procedures involving the EC, and with the conduct of challenge inspections.³³ Such inspections can be invoked “‘any time, anywhere’ inspections with no right of refusal”.³⁴ The results of a challenge inspection would be reviewed by the EC to determine whether any non-compliance had occurred; whether the request had been within the scope of the CWC; and whether the right to request a challenge inspection had been abused. Should the EC conclude that non-compliance had occurred, it would be obliged to take measures to redress the situation and to forward specific recommendations to the CSP.

There are also procedures for the investigation of allegations of CW use under Part XI of the CWC Verification Annex. These can be initiated by a State party that has fallen victim to CW threats or actual use (Article X), or under Article IX (i.e., as a particular form of challenge inspection).

³¹ OPCW, “Decision: Plan of Action Regarding the Implementation of Article VII Obligations”, C-8/DEC.16, 25 October 2003, https://www.opcw.org/sites/default/files/documents/CSP/C-8/en/c8dec16_EN.pdf.

³² OPCW, “Decision: Final Extended Deadline of 29 April 2012”, C-16/DEC.11, 1 December 2011, https://www.opcw.org/sites/default/files/documents/CSP/C-16/en/c16dec11_e.pdf.

³³ Challenge inspections are a type of on-site inspection which any State party is entitled to invoke in relation to any facility or location of another State party “for the sole purpose of clarifying and resolving any questions concerning non-compliance with the provisions of the Convention”. CWC, Article IX(8).

³⁴ “Under the Convention’s ‘challenge inspection’ procedure, States Parties have committed themselves to the principle of ‘any time, anywhere’ inspections with no right of refusal.” See OPCW, “Chemical Weapons Convention”, <https://www.opcw.org/chemical-weapons-convention>.

The results of clarification procedures under the auspices of the EC, and of any challenge inspections conducted, are expected to lead to deliberations and action by the EC under Articles VIII and IX (including requests to a State party found in non-compliance to re-establish full compliance within specified time frames, subject to conditions established by the EC, such as additional targets or verification measures) and, in grave cases, Article XII. If Article XII is invoked, the EC may recommend that the CSP restrict or suspend certain rights and privileges of the State party concerned until it takes the measures necessary to conform with its obligations. In the case of violations that may cause serious damage to the object and purpose of the CWC, the CSP may recommend collective measures to States parties in conformity with international law (i.e., without prejudice to the powers and functions of the United Nations Security Council). In cases of particular gravity, the CWC compels the CSP to take the matter to the United Nations General Assembly and Security Council.

While there is evidence that States parties have indeed made use of the bilateral clarification provision of Article IX(2),³⁵ no formal clarification procedure in the EC has ever been requested, and nor has a challenge inspection ever been triggered. This may be the result of broader political considerations, as both the clarification procedures in the EC and a challenge inspection are invoked by an explicit accusation of non-compliance. The political threshold for such a step may be seen as too high. Certainly, some countries have stated that they consider a challenge inspection as a “measure of last resort”. Also, once formal clarification proceedings are invoked in the EC, decisions are meant to be taken by vote, given the urgency of resolving non-compliance issues. Similar to many other international organizations, the OPCW has for a long time nurtured a culture of decision-making by consensus. This approach is useful when it comes to building broad support for the evolution of a regime to respond to new challenges or change in the implementing environment. However, it does not suit situations that require firm and swift action. Another consideration may have been concerns about the implicit link to possible sanctions.

3.3 AD HOC MECHANISMS

Even when concerns about Syria’s compliance with its CWC obligations became pressing in 2014 – in particular after reports about new cases of use of chemical weapons and with reference to the completeness of its initial declaration under Article III³⁶ – no clarification requests were submitted to the EC and no challenge inspection was requested. At the same time, the OPCW could not sit idle while allegations of grave CWC violations were made in public. In this situation, the Director-General, having consulted with States parties both formally and informally, opted to use the general authority vested in him by the CWC to negotiate a set of ad hoc measures with the Syrian Government – the FFM and the DAT. These measures were subsequently endorsed

³⁵ See for example OPCW, “Report of the First Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention (First Review Conference) 28 April–9 May 2003”, RC-1/5, 9 May 2003, https://www.opcw.org/sites/default/files/documents/CSP/RC-1/en/rc105_e.pdf, paragraph 7.86. See also the US State Department’s annual CWC compliance reports, which outline the bilateral clarification efforts made by the United States to clarify outstanding compliance questions with other States parties. The 2021 report is available at US Department of State, “Compliance with the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction – Condition (10)(c) report”, April 2021, <https://www.state.gov/wp-content/uploads/2021/04/2021-Condition-10-c-Report.pdf>.

³⁶ Note that one additional CW production facility was declared by Syria, as well as three additional research and development facilities, as a result of these consultations. See the report of the Director-General in OPCW, “Opening Statement by the Director-General to the Conference of the States Parties at its Nineteenth Session”, Note by the Director General, C-19/DG.16, 1 December 2014, https://www.opcw.org/sites/default/files/documents/CSP/C-19/en/c19dg16_e_.pdf.

by the EC; findings of the FFM and the DAT and the state of cooperation of the Syrian Government were regularly reported to the EC and communicated to the United Nations Security Council.³⁷

At the same time, it was recognized that non-routine inspections (such as the FFM and the DAT) as well as technical assistance visits (such as those conducted in Syria, Iraq and the United Kingdom) called for approaches and investigation techniques that differed from routine missions. Their objectives are directly related to Article I of the CWC; the circumstances under which they are conducted are highly challenging and unpredictable; and their findings and assessments will be scrutinized in a political environment that has become increasingly polarized. To obtain advice on the technical aspects of this matter, the Director-General in 2018 established a Temporary Working Group on Investigative Science and Technology to report to the SAB on methodologies, procedures, technologies and equipment for such investigations.³⁸

But while these ad hoc mechanisms made some initial progress and enjoyed a degree of cooperation by the Syrian authorities, they increasingly encountered difficulties as time went by. For example, in the case of the FFM, deviations from the standard CWC procedures for investigating allegations of the use of CW were necessary to manage the specific risks and conditions in the Syrian armed conflict. However, Russia questioned whether these deviations affected the integrity and scientific soundness of the investigation.³⁹ As for the DAT, while interviews with Syrian officials and other investigative activities, including sampling and analysis, continue, the number of inconsistencies and gaps in the Syrian CW declaration has not diminished.⁴⁰ Moreover, according to reports by the Director-General, the level of cooperation by the Syrian authorities was insufficient to achieve certainty about the initial Syrian CW declaration.⁴¹

The mandate of the FFM has been limited to investigating whether toxic chemicals had been used as weapons. It did not, however, include a determination of who had used these chemical weapons. While individual States parties did interpret the findings of the FFM and drew their own conclusions about who was responsible for these CW uses, no collective compliance statements could be issued by the OPCW on the basis of the FFM reports. In that situation, the United Nations Security Council in 2015 unanimously adopted resolution 2235, which established the United Nations–OPCW Joint Investigative Mechanism to:

³⁷ For further details see OPCW, “Responding to the Use of Chemical Weapons”, <https://www.opcw.org/work/responding-use-chemical-weapons>. The legal basis of establishing the FFM was explained in some detail in OPCW, Note by the Technical Secretariat, “Summary Report of the Work of the OPCW Fact-Finding Mission in Syria Covering the Period from 3 to 31 May 2014”, S/1191/2014, paragraphs 1-4 of Annex 2, 16 June 2014.

³⁸ For details see OPCW Temporary Working Group on Investigative Science and Technology, “Investigative Science and Technology: Report of the Scientific Advisory Board’s Temporary Working Group”, SAB/REP/1/19, December 2019, <https://www.opcw.org/sites/default/files/documents/2020/11/TWG%20Investigative%20Science%20Final%20Report%20-%20January%202020%20%281%29.pdf>;

See also C. Astot et al., Science and Technology for WMD Compliance Monitoring and Investigations”.

WMD Compliance and Enforcement Series no. 11, UNIDIR, 2020, <https://doi.org/10.37559/WMD/20/WMDCE11>.

³⁹ Amongst others, see Russian Federation “Statement by H.E. Ambassador A.V. Shulgin, Permanent Representative of the Russian Federation to the OPCW at the Eighty-Fifth Session of the Executive Council under agenda item 6(g)”. OPCW Executive Council, EC-85/Nat.27 (2017).

⁴⁰ See OPCW Director General, “Opening Remarks by the OPCW Director-General, at the Arms Control Association and Chemical Weapons Convention Coalition Webinar “Reinforcing the Norm Against Chemical Weapons: The April 20-22 Conference of States Parties to the Chemical Weapons Convention”, 10 May 2021. https://www.opcw.org/sites/default/files/documents/2021/05/20210510_DG%20Opening%20Remarks_ACA%20and%20CWCC%20Webinar_WEB.pdf; see also OPCW, “Outcome of Consultations with the Syrian Arab Republic Regarding its Chemical Weapons Declaration”, EC-91/DG.23, 5 July 2019. <https://www.opcw.org/sites/default/files/documents/2019/07/ec91dg23%28e%29.pdf>.

⁴¹ See for example OPCW, “Progress in the Elimination of the Syrian Chemical Weapons Programme”, Report of the Director-General, EC-97/DG.2, 24 March 2021, [https://www.opcw.org/sites/default/files/documents/2021/03/ec97dg02\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/03/ec97dg02(e).pdf).

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, including chlorine or any other toxic chemical, 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, including chlorine or any other toxic chemical.⁴²

The JIM's mandate was extended once, for one year.⁴³ However, attempts to further extend its work failed given that the unanimity that had prevailed in the Security Council in 2015 no longer existed. After several weeks of debate in the Security Council and the defeat of competing resolutions on a possible extension of the JIM mandate, in November 2017, Russia vetoed a draft resolution to extend the JIM mandate by one month that Japan had tabled to buy more time for discussing the future of the JIM.⁴⁴ Russia indicated its willingness to continue "to discuss the question of improving this instrument with a view to its possible resumption of its work in the future", but noted that there must first be "a common understanding of the importance of eliminating the JIM's systemic shortcomings, which have ruined it".⁴⁵ The JIM's mandate expired that evening, and no further attempts were made in the Security Council to re-establish this mechanism, reflecting deep divisions within the Council about the matter.

3.4 THE OPCW DECISION ON ADDRESSING THE THREAT FROM CHEMICAL WEAPONS USE

The absence of a mechanism to independently investigate suspected uses of chemical weapons with the aim of attributing responsibility for such uses prompted the United Kingdom, supported by a growing number of CWC States parties, to call for a Special Session of the CSP to address the threat from CW use. This Special Session – the fourth of its kind in the history of the CWC – was convened in June 2018 and decided, among other things, to task the Technical Secretariat to:

- "put into 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"
- "preserve and provide information to the investigation mechanism established by the United Nations General Assembly in resolution 71/248 (2016), as well as to any relevant investigatory entities established under the auspices of the United Nations";
- "if requested by a State Party investigating a possible chemical weapons use on its territory, provide technical expertise to identify those who were perpetrators, organisers, sponsors or otherwise involved in the use of chemicals as weapons"⁴⁶

⁴² Security Council, S/RES/2235, 7 August 2015, [https://undocs.org/S/RES/2235\(2015\)](https://undocs.org/S/RES/2235(2015)), operative paragraph 5.

⁴³ Security Council S/RES/2319, 17 November 2016, [https://undocs.org/S/RES/2319\(2016\)](https://undocs.org/S/RES/2319(2016)).

⁴⁴ Security Council, S/2017/970, 17 November 2017, <https://undocs.org/S/2017/970>.

⁴⁵ Security Council, S/PV.8107, 17 November 2017, <https://undocs.org/en/S/PV.8107>, p. 8.

⁴⁶ OPCW, "Decision: Addressing the Threat from Chemical Weapons Use", C-SS-4/Dec.3, 27 June 2018, https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/css4dec3_e_doc.pdf, operative paragraphs 10, 12, 20.

This decision was adopted by vote, with 82 votes in favour and 24 against.⁴⁷ There were different reasons for these no votes, as is apparent from the debates before and after the Special Session. Some countries wanted to protect Syria. Others were concerned that, by giving the OPCW a role in attributing responsibility for violations of the norm against chemical weapons, the Organisation would be extending its mandate beyond that given by the CWC.⁴⁸ There was also a fear among some that the decision might undermine the sovereignty of the States parties by giving the Director-General unprecedented and unchecked powers.⁴⁹ The decision was taken in accordance with the relevant rules of the CWC and is thus valid – unless a State party were to pursue formal dispute resolution with the OPCW in accordance with the provisions of Article XIV.

This decision-making by CSP vote mirrors a trend that has evolved over some time in the EC. This signals a loss of unanimity in the OPCW with regard to how to respond to uses of chemical weapons in Syria confirmed by the Technical Secretariat. Whilst consensus in the OPCW remained strong with regard to the condemnation of any such use, political assessments about the responsibility for these acts differed (and continue to differ). Russia, the Islamic Republic of Iran and some other countries flatly deny any responsibility on the part of the Syrian Government.⁵⁰ In contrast, Western countries and some other States parties were calling for strong action against Syria – a party to the CWC that had been found in violation of most basic treaty obligations. These positions also reflect the nature of the involvement of different States in the Syrian conflict: Russia and Iran were directly supporting the Syrian Government politically as well as militarily with troops on the ground;⁵¹ they attributed CW uses to terrorist and opposition groups. Western countries – while acknowledging that the Islamic State group had also used chemical weapons – put the blame for CW uses squarely on Syria.⁵²

⁴⁷ OPCW, "Report of the Fourth Special Session to the Conference of States Parties", C-SS-4/3, 27 June 2018, https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/css403_e.pdf; and I. Anthony, Strengthening Global Regimes: Addressing the Threat Posed by Chemical Weapons, SIPRI, November 2020, <https://sipri.org/publications/2020/sipri-policy-papers/strengthening-global-regimes-addressing-threat-posed-chemical-weapons>.

⁴⁸ For example, Cuba stated: "The Convention clearly establishes that cases of a grave violation thereof are to be brought directly to the attention of the General Assembly and the United Nations Security Council, complete with relevant information and conclusions (paragraph 36 of Article VIII). The OPCW was conceived as a purely technical Organisation, and it should continue to be that." Venezuela stated: "We cannot rule out that in future, a certain group of countries would be tempted to assign an "attribution function" to other international structures in a similar manner, or to attempt to legitimise, without the consent of the United Nations Security Council, coercive, unilateral, and illicit measures against any State whose politics do not suit them for whatever reason." See: Cuba, "Statement by the Cuban Delegation to the OPCW at the Fourth Special Session of the Conference of the States Parties", C-SS-4/NAT.32, 27 June 2018, <https://www.opcw.org/sites/default/files/documents/2018/07/css4nat32%28e%29.pdf> and Venezuela, "Statement by H.E. Ambassador Haifa Aissami Madah Permanent Representative of Bolivarian Republic of Venezuela to the OPCW at the Fourth Special Session of the Conference of the States Parties - Explanation of Vote", C-SS-4/NAT.54, 27 June 2018, <https://www.opcw.org/sites/default/files/documents/2019/04/css4nat54%28e%29.pdf>.

⁴⁹ For example, India remarked that "This draft decision would imperil this indispensable finely crafted balance in the Convention by endowing powers to the Technical Secretariat headed by the Director-General under operative paragraphs 10 and 20. This poses difficulties for my delegation". India, "Statement by H.E. Ambassador Venu Rajamony Permanent Representative of the Republic of India to the OPCW at the Fourth Special Session of the Conference of the States Parties Explanation of Vote", C-SS-4/NAT.45, 26 June 2018, <https://www.opcw.org/sites/default/files/documents/2018/08/css4nat45%28e%29.pdf>.

⁵⁰ See for example The Ministry of Foreign Affairs of the Russian Federation, 2020, "Comment by the Information and Press Department on the Release of the first report by the OPCW Investigation and Identification Team ("Syrian Chemical Dossier")", 9 April 2020. https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4097437.

⁵¹ See for example The Ministry of Foreign Affairs of the Russian Federation, 2021, "Joint Statement by the Representatives of Iran, Russia and Turkey on the 16th International Meeting on Syria in the Astana Format, Nur-Sultan, 7–8 July 2021", 8 July 2021, https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/4809709.

⁵² OPCW, "Bulgaria Statement on Behalf of the European Union delivered by Ms Judit Koromi, Chair of the Working Party on Non-Proliferation (CONOP) of the Council of the European Union European External Action Service at the Fourth Special Session of the Conference of the States Parties", C-SS-4/NAT.5, June 2018, <https://www.opcw.org/sites/default/files/documents/2018/07/css4nat05%28e%29.pdf>.

The partial shift in the practice of the EC from decision-making by consensus to voting has been portrayed by some countries and observers as politicizing the work of the OPCW. However, it should be recalled that it was with a view to enabling effective responses to non-compliance that the CWC requires the EC to take decisions by vote.⁵³ This ensures that non-compliance situations will be addressed with the necessary urgency and determination. For the same reason, the CWC does not provide for a special veto right for certain States parties. Consequently, neither delaying tactics nor the casting of a veto by privileged States parties could be used to block efforts by a majority of the States parties to compel a violator to correct a situation and re-establish compliance.

Inevitably, this shift towards taking decisions on compliance by vote when consensus could not be achieved has resulted in increasing tensions within the policymaking organs of the OPCW. Despite these tensions, however, the decision of the Fourth Special Session of the CSP provided a legal basis for the Director-General to set up the Investigation and Identification Team. As observed in its second report, the IIT has no authority to assign individual criminal responsibility, nor can it make final findings of non-compliance with the CWC.⁵⁴ Its mandate is strictly limited to establishing facts that would enable the policymaking organs of the CWC to draw such conclusions. Also, it is tasked to facilitate the work of external mechanisms that have jurisdiction over investigating violations of the norm against chemical weapons, such as the International, Impartial and Independent Mechanism (IIIM),⁵⁵ as well as domestic, regional or international tribunals or courts. Reports of the IIT are provided to the EC as well as to the United Nations Security Council.

In line with this mandate, in its first and second reports, the IIT provided factual evidence and findings regarding incidents in 2017 and 2018. These two IIT reports concluded that the Syrian Arab Republic had used chemical weapons on several occasions.⁵⁶ The IIT took care to describe in detail its investigation methodology,⁵⁷ to present the evidence on which it based its findings in detail, and to clarify the standard of certainty it had used when formulating these findings ("reasonable grounds"). The use of this standard of certainty is common practice in international fact-finding bodies and commissions of inquiry, and it is consistent with the standards used in domestic and international criminal prosecutions.

⁵⁴ W. Krutzsch and T. Dunworth. "Article VIII: The Organization", in W. Krutzsch, E. Myjer and R. Trapp (eds.), *The Chemical Weapons Convention: A Commentary*, 2014, pp. 275–276.

⁵⁴ OPCW, "Second Report by the OPCW Investigation and Identification Team Pursuant to Paragraph 10 of Decision C-SS-4/DEC.3 'Addressing the Threat from Chemical Weapons Use' Saraqib (Syrian Arab Republic) – 4 February 2018", Note by the Technical Secretariat, S/1943/2021, 12 April 2021, [https://www.opcw.org/sites/default/files/documents/2021/04/s-1943-2021\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/04/s-1943-2021(e).pdf), paragraph 2.

⁵⁵ "Decides that the Secretariat shall preserve and provide information to the investigation mechanism established by the United Nations General Assembly in resolution 71/248 (2016), as well as to any relevant investigatory entities established under the auspices of the United Nations". OPCW, "Decision: Addressing the Threat from Chemical Weapons Use", C-SS-4/DEC.3, 27 June 2018, https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/css4dec3_e_doc.pdf, operative paragraph 12.

⁵⁶ See OPCW, "Second Report by the OPCW Investigation and Identification Team Pursuant to Paragraph 10 of Decision C-SS-4/DEC.3 'Addressing the Threat from Chemical Weapons Use' Saraqib (Syrian Arab Republic) – 4 February 2018", Note by the Technical Secretariat, S/1943/2021, 12 April 2021, [https://www.opcw.org/sites/default/files/documents/2021/04/s-1943-2021\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/04/s-1943-2021(e).pdf); see also OPCW, "First Report by the OPCW Investigation and Identification Team Pursuant to Paragraph 10 of Decision C-SS04/DEC.3 'Addressing the Threat from Chemical Weapons Use' LTAMENAH (Syrian Arab Republic) 24, 25, and 30 March 2017", Note by the Technical Secretariat, S/1867/2020, 8 April 2018, [https://www.opcw.org/sites/default/files/documents/2020/04/s-1867-2020\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2020/04/s-1867-2020(e).pdf).

⁵⁷ OPCW, "First Report by the OPCW Investigation and Identification Team Pursuant to Paragraph 10 of Decision C-SS04/DEC.3 'Addressing the Threat from Chemical Weapons Use' LTAMENAH (Syrian Arab Republic) 24, 25, and 30 March 2017", Note by the Technical Secretariat, S/1867/2020, 8 April 2018, [https://www.opcw.org/sites/default/files/documents/2020/04/s-1867-2020\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2020/04/s-1867-2020(e).pdf).

The IIT also stressed that this standard would “not be inconsistent with the requirement for the Secretariat to inform the Council of ‘doubts, ambiguities or uncertainties’ about compliance with the Convention by States Parties”.⁵⁸ This observation highlights the fact that the IIT mandate directs it to identify “perpetrators” – whether they be State or non-State actors, natural or legal persons including individuals, entities or groups, or governments. This may not be the same as the OPCW drawing conclusions about (non-)compliance by a State party and this intersection of arms control law and international criminal law needs further study.

3.5 SANCTIONS UNDER THE CWC

In practice, the question of whether the factual findings of the IIT would lead to a conclusion that Syria had been in violation of one of the basic prohibitions of the CWC was discussed by the EC throughout 2020. Finally, at its ninety-fourth session, in July 2020, the EC adopted the decision on “Addressing the possession and use of chemical weapons by the Syrian Arab Republic”.⁵⁹ This decision closely followed the procedures set out in Article VIII and, after condemning the use of chemical weapons by Syria, demanded that Syria immediately cease all use of chemical weapons; that it cooperate fully with the Technical Secretariat and ensure the necessary access to the IIT to conduct its work in Syria; and that Syria within 90 days declare hitherto undeclared CW production facilities and CW stockpiles related to the uses identified by the IIT, and any other such stockpiles and facilities it still had, and that it resolve all outstanding issues regarding its initial declaration of its chemical weapon stockpile and programme. The Director-General was requested to report to the EC and all States parties within 100 days on whether Syria has completed all these measures, and to continue reporting to the EC thereafter in case Syria had not fully implemented them. Should Syria fail to redress the situation, the EC would recommend that the CSP take appropriate action pursuant to Article XII(2) (i.e., to suspend or restrict certain rights and privileges until Syria had re-established full compliance).

When the Director-General submitted his report in October 2020, he informed the EC that Syria had not submitted any of the declarations requested, nor had it resolved any of the outstanding issues regarding its initial CW declaration. Taking these developments into consideration, the CSP at its twenty-fifth session decided to suspend a number of rights and privileges of the Syrian Arab Republic, including its voting rights in the CSP and the EC, its right to stand for election to the EC, and its right to hold any office of the CSP, the EC or any subsidiary body.⁶⁰

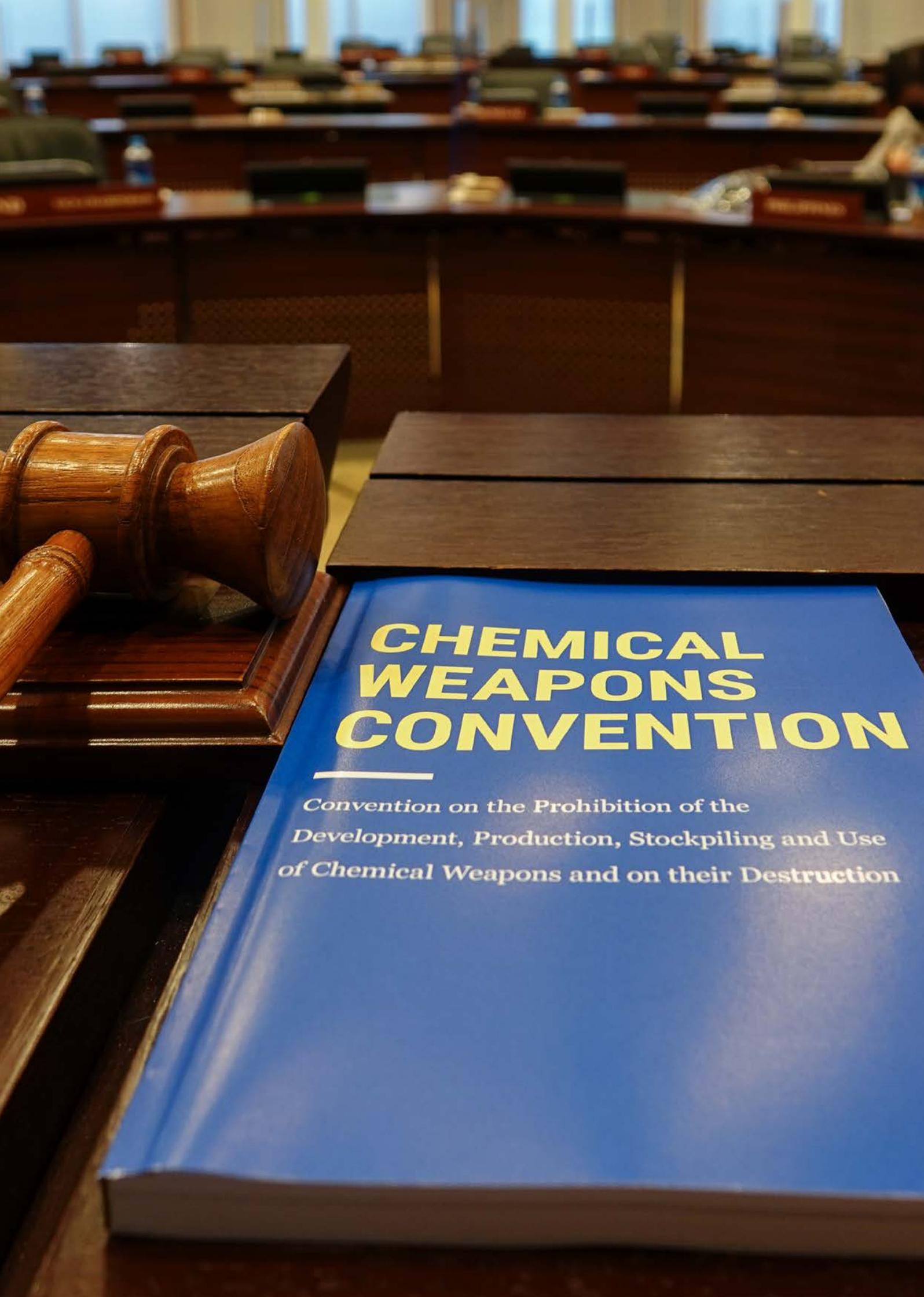
⁵⁸ Ibid., paragraph 2.19.

⁵⁹ OPCW, “Decision: Addressing the Possession and Use of Chemical Weapons by the Syrian Arab Republic”, EC-94/DEC.2, 9 July 2020, [https://www.opcw.org/sites/default/files/documents/2020/07/ec94dec02\(e\)\(2\).pdf](https://www.opcw.org/sites/default/files/documents/2020/07/ec94dec02(e)(2).pdf).

⁶⁰ OPCW, “Decision: Addressing the Possession and Use of Chemical Weapons by the Syrian Arab Republic”, C-25/DEC.9, 21 April 2021, [https://www.opcw.org/sites/default/files/documents/2021/04/c25dec09\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/04/c25dec09(e).pdf), paragraph 7. The decision was taken by vote (85 votes in favour, 15 against and 34 abstentions). See OPCW, “Report of the Twenty-Fifth Session of the Conference of the States Parties”, C-25/5, 22 April 2021, [https://www.opcw.org/sites/default/files/documents/2021/04/c2505\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/04/c2505(e).pdf), paragraph 9.24.

This was the first time that the OPCW has taken action under Article XII of the CWC. This shift from a “managerial” to a “coercive” approach to compliance management sent a strong signal, making it clear that the violation of fundamental obligations under the CWC will have consequences if the State party in question refuses to take timely action to redress the situation and fails to implement the measures requested in this regard by the EC. In the case of a serious breach of fundamental obligations under the CWC, in particular Article I, the strongest possible action under Article XII is not only the proper way to protect the object and purpose of the CWC but also a way to avoid the risk that States parties seek unilateral “solutions” to the detriment of the Convention.⁶¹

⁶¹ G. Den Dekker, “Art. XII Measures to Redress a Situation and to Ensure Compliance, Including Sanctions”, in W. Krutzsch, E. Myjer and R. Trapp (eds.), *The Chemical Weapons Convention: A Commentary*, 2014, p. 380.

A wooden gavel with a light-colored handle and a darker head, resting on a dark wooden desk. To the right of the gavel is a blue book cover with white and yellow text. The background is a blurred conference room with rows of dark wooden desks and chairs.

CHEMICAL WEAPONS CONVENTION

*Convention on the Prohibition of the
Development, Production, Stockpiling and Use
of Chemical Weapons and on their Destruction*

4 COMPLIANCE MECHANISMS OUTSIDE THE CWC MECHANISMS

The sanctions that the OPCW can impose on a State party that is in flagrant violation of its undertakings under the CWC are limited in scope and impact. Article XII of the CWC provides for internal procedural and administrative sanctions that may deprive a violator of certain rights and privileges within the OPCW, and for sanctions implemented by States parties collectively. However, they neither infringe on the prerogative of the United Nations Security Council, nor do they have the quality of mandatory sanctions imposed by the Security Council. This is why Article XII creates a link between OPCW measures to redress a situation and the responsibilities of the United Nations General Assembly and Security Council. The assumption implicit in these provisions, of course, is that these bodies will respond to violations of a particular gravity in a firm and swift manner, as expected of them under the United Nations Charter.

4.1 UNITED NATIONS SECURITY COUNCIL ACTION INCLUDING UNITED NATIONS SANCTIONS

Under the United Nations Charter, primary responsibility for the maintenance of international peace and security falls to the Security Council. This includes the authority of the Security Council to impose binding political, economic and military sanctions, subject to the decision-making rules of the Security Council, including the veto rights of the five permanent members. In the case of Syria, unity in the Security Council was essential during the initial efforts to eliminate the Syrian chemical weapon programme, as well as the initial investigations aimed at attributing responsibility for the confirmed uses of chemical weapons. The Security Council endorsed and further extended the OPCW decision on the elimination of Syrian chemical weapons.⁶² It then decided to establish the United Nations–OPCW Joint Mission to implement this plan,⁶³ and subsequently established the United Nations–OPCW Joint Investigative Mechanism.

Another example of the measures that the Security Council has taken to respond to threats of the spread and potential use of WMD, including chemical weapons, are the sanctions against the Democratic People's Republic of Korea (DPRK). In 1993, the Security Council called upon the DPRK to reconsider its intention to withdraw from the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and to honour its non-proliferation obligations under the treaty and comply with its safeguards agreement with the IAEA.⁶⁴ The DPRK instead intensified its missile, nuclear weapon and other WMD programmes. In 2006, the Security Council responded to these developments by requiring all Member States to take measures to prevent transfers of missiles and missile-related items, materials, goods and technology to the DPRK and to prevent the transfer of any financial resources related to the DPRK's missile or WMD programmes.⁶⁵ In the same year, the Security Council decided that all Member States shall prevent the direct or indirect supply, sale or transfer to the DPRK of a range of weapons as well as of items, materials, equipment, goods and technology which could contribute to the DPRK's nuclear-related, ballistic

⁶² OPCW, "Decision: Destruction of Syrian Chemical Weapons", EC-M-33/DEC.1, 27 September 2013, https://www.opcw.org/sites/default/files/documents/EC/M-33/ecm33dec01_e.pdf.

⁶³ Security Council, S/RES/2118, 27 September 2013, [https://undocs.org/S/RES/2118\(2013\)](https://undocs.org/S/RES/2118(2013)).

⁶⁴ Security Council, S/RES/825, 11 May 1993, [https://undocs.org/S/RES/825\(1993\)](https://undocs.org/S/RES/825(1993)).

⁶⁵ Security Council, S/RES/1695, 15 July 2006, [https://undocs.org/S/RES/1695\(2006\)](https://undocs.org/S/RES/1695(2006)).

missile-related or other WMD programmes⁶⁶ The resolution also detailed a series of targeted sanctions against individuals and entities. It established a Security Council committee to oversee and support the implementation of this decision. Since 2009, the committee has been supported by a panel of experts, which has been submitting reports to the Security Council on a regular basis.⁶⁷ On several occasions, it has reported about activities apparently related to the DPRK's chemical weapon programme, including with regard to the assassination of Kim Jong Nam in Malaysia in 2017,⁶⁸ and with the DPRK's military cooperation with Syria on chemical weapons.⁶⁹

United Nations sanctions are considered most effective when applied as part of a comprehensive strategy encompassing peacekeeping, peacebuilding and peacemaking. There are currently 14 ongoing sanctions regimes which focus on supporting the political settlement of conflicts, nuclear non-proliferation and counterterrorism. Each regime is administered by a sanctions committee, and 11 of them are supported by 10 monitoring groups, teams and panels. Sanctions may be seen as punitive, but in fact many are designed to support governments and regions working towards peaceful transition.⁷⁰ The underlying concept is thus not different from the mechanisms of compliance management under the CWC: persuade governments to adapt behaviour in order for full compliance with the norm to be re-established within a realistic time frame. To this end, the Security Council has been called upon to ensure that fair and clear procedures are in place for the imposition and lifting of sanctions measures.⁷¹

The disagreements between the permanent members of the Security Council about the responsibility for chemical weapon uses in Syria has paralysed decision-making in the Security Council on this matter in recent years. As such, despite the submission of the findings by the JIM and subsequently the IIT to the Security Council that there were "reasonable grounds" to conclude that Syrian military forces had conducted some of the confirmed chemical weapons uses in Syria,⁷² the Security Council has been unable to agree on any sanctions. One can only hope that the Strategic Stability Dialogue that has been initiated between the Russian Government and the new US administration will help re-establish a degree of trust and cooperation on arms control issues between the two countries, and that this will affect not only the climate in the field of bilateral US–Russian nuclear arms control but also multilateral arms control measures such as the CWC. If that were the case, a return to pragmatism and a willingness to find common solutions in the Security Council on issues related to protecting and strengthening the norm against chemical weapons and their use may indeed become a possibility.

⁶⁶ Security Council, S/RES/1718, 14 October 2006, [https://undocs.org/S/RES/1718\(2006\)](https://undocs.org/S/RES/1718(2006)).

⁶⁷ Its most recent mid-term report is dated 8 September 2021. See Security Council, S/2021/777, 8 September 2021, <https://undocs.org/S/2021/777>.

⁶⁸ Security Council, S/2017/742, 5 September 2017, <https://undocs.org/S/2017/742>.

⁶⁹ Security Council, S/2018/171, 5 March 2018, <https://undocs.org/S/2018/171>.

⁷⁰ Security Council, "Sanctions", <https://www.un.org/securitycouncil/sanctions/information>.

⁷¹ Examples include the focal point for de-listing, and the Office of the Ombudsperson to the ISIL (Da'esh) & Al-Qaida Sanctions Committee. See Security Council, "Sanctions", <https://www.un.org/securitycouncil/sanctions/information>.

⁷² See for example Security Council, S/PV.8785, 3 June 2021, <https://undocs.org/en/S/PV.8785>.

4.2 ACTION BY THE UNITED NATIONS GENERAL ASSEMBLY AND THE HUMAN RIGHTS COUNCIL

The United Nations General Assembly also has responsibility to promote disarmament and the prevention of the use of WMD, including chemical weapons. In the framework of its First Committee, United Nations Member States promote arms control and disarmament and pass regular resolutions on issues related to disarmament, the effective implementation of relevant international conventions, and new initiatives in the field of arms control and disarmament. The General Assembly has also addressed grave human rights violations. Relevant to the use of chemical weapons in Syria, it has established a dedicated mechanism to investigate and secure evidence related to major human rights crimes in the Syrian conflict – 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 2011.⁷³ The mandate of the IIIM is 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.⁷⁴

This allows the IIIM to compile case files on the use of chemical weapons in the Syrian armed conflict, and the IIIM has begun gathering evidence regarding such confirmed cases of use of chemical weapons.⁷⁵ It has put in place arrangements with other organizations, including the Independent International Commission of Inquiry on the Syrian Arab Republic (that was established by the United Nations Human Rights Council), the OPCW, and other partners to ensure that evidence gathered by them will be secured, preserved and protected for future judicial processes. The OPCW Technical Secretariat has signed a memorandum of understanding with the IIIM regarding the sharing of information and has finalized the modalities for the transfer of FFM materials to the IIIM.⁷⁶ In response to a request by the IIIM, the OPCW started transferring relevant materials to the IIIM in October 2020.⁷⁷

4.3 THE UNITED NATIONS SECRETARY-GENERAL'S MECHANISM

The United Nations Secretary-General has authority to conduct investigations of the alleged use of chemical, as well as biological and toxin weapons. This authority emanates from resolution 42/37 C adopted by the United Nations General Assembly in 1987 and subsequently reaffirmed

⁷³ General Assembly, A/RES/71/248, 11 January 2017, <https://undocs.org/A/RES/71/248>.

⁷⁴ Ibid., operative paragraph 4.

⁷⁵ In July 2020, the FFM finalized a first (pilot) transfer of FFM material to the IIIM. See OPCW, "Draft Report of the OPCW on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction in 2020", EC-97/2 C-26/CRP.1, 7 July 2021, [https://www.opcw.org/sites/default/files/documents/2021/07/ec9702_c26crp01\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/07/ec9702_c26crp01(e).pdf).

⁷⁶ OPCW, "Progress in the Implementation of Decision C-SS-4/Dec.3 on Addressing the Threat from Chemical Weapons Use", Report by the Director-General, EC-94/DG.17, 1 July 2020, [https://www.opcw.org/sites/default/files/documents/2020/07/ec94dg17\(e\)\(1\).pdf](https://www.opcw.org/sites/default/files/documents/2020/07/ec94dg17(e)(1).pdf).

⁷⁷ OPCW, "Opening Statement by the Director General to the Executive Council at its Ninety-Sixth Session (Full Version)", EC-96/DG.19, 9 March 2021, [https://www.opcw.org/sites/default/files/documents/2021/04/ec96dg19+\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/04/ec96dg19+(e).pdf), p. 3, paragraph 25.

by the Security Council in resolution 620. The UNSGM enables the Secretary-General to dispatch missions to investigate reports by individual United Nations Member States about suspected uses of chemical, biological or toxin weapons, following a set of agreed procedures and guidelines (endorsed by the General Assembly in 1990⁷⁸ and updated by a group of experts in 2007⁷⁹) and using resources made available to the Secretary-General by Member States.

In respect to the uses of chemical weapons in Syria, in 2013, the Secretary-General dispatched a mission to investigate alleged chemical weapon uses that had been reported to him by Syria and subsequently by a number of Western countries. The UNSGM was used because, at the time, Syria was not a State party to the CWC. Despite near-universal adherence to the CWC, the UNSGM may also have a role to play in future investigations into chemical weapon use. Specifically, the UNSGM would be permitted to investigate allegations of the use of chemical weapons in countries that have not joined the CWC. Although there remain very few countries that are not a party to the CWC, some of them have been associated with past or present CW programmes and are situated in regions of tension: the possible use of chemical weapons calls for swift and effective investigation by the international community.

Since the 2013 UNSGM mission to Syria, efforts have been increased to strengthen the operational capacity of the UNSGM. These have included training and exercises; the development of a UNSGM laboratory network for the identification and characterization of biological agents; and more formalized cooperation arrangements between the United Nations Office for Disarmament Affairs (UNODA) and relevant international organizations, including the OPCW and the World Health Organization (WHO). This is partly in recognition of gaps in the international tool kit for investigating allegations of the use of biological weapons. At the same time, some of these efforts aim at enhancing the technical capabilities for toxin analysis, which complements the work of the OPCW in this field.⁸⁰ The Technical Secretariat has conducted several interlaboratory confidence-building tests for ricin and aims to set up a dedicated network of designated laboratories for toxins.⁸¹ The SAB, for example, also established a temporary working group on the analysis of biotoxins in February 2021.⁸² The efforts of the OPCW and the United Nations to strengthen the operational capacity of the UNSGM augment the international community's fact-finding capability and thereby strengthen the overall ability to assess compliance with the prohibition of chemical as well as biological weapons.

⁷⁸ General Assembly, A/45/57 C, 15 December 1990, <https://undocs.org/A/RES/45/57>. The mechanism was endorsed by the Security Council in resolution 620 of 26 August 1988.

⁷⁹ General Assembly, "Appendices to the Secretary General's Mechanism", <https://www.un.org/disarmament/wmd/secretary-general-mechanism-old/appendices>.

⁸⁰ For a recent summary of activities in this field see Swiss Federal Department of Defence and Federal Office for Civil Protection, "(Fifth) UNSGM Designated Laboratories Workshop Report", Spiez, 11–13 September 2019. A report on the 6th UNSGM Workshop, held in September 2021, is in preparation at the time of writing.

⁸¹ An invitation for the 6th exercise on the analysis of biotoxins was published by the OPCW Director-General in July 2021. OPCW, "Call for nominations for the sixth exercise on the analysis of biotoxins", Note by the Director-General, S/1971/2021, 16 July 2021, [https://www.opcw.org/sites/default/files/documents/2021/07/s-1971-2021\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/07/s-1971-2021(e).pdf).

⁸² OPCW, Scientific Advisory Board, "Summary of the First Meeting of the Scientific Advisory Board's Temporary Working Group on the Analysis of Biotoxins", SAB-32/WP.1, 6 May 2021, [https://www.opcw.org/sites/default/files/documents/2021/07/sab-32-wp01\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/07/sab-32-wp01(e).pdf).

5 ACTION TAKEN BY STATES INDIVIDUALLY, INCLUDING LAW ENFORCEMENT AND SANCTIONS

5.1 CRIMINALIZATION AND LAW ENFORCEMENT

States parties have an obligation to enforce CWC prohibitions on natural and legal persons that are subject to their jurisdiction – within their territory and any other place under their jurisdiction or control – as well as in relation to natural persons that possess their nationality, irrespective of where they are or where the violation has taken place. They may request assistance from other CWC States parties as well as the OPCW, and the OPCW provides a platform for cooperation and consultation on these issues.⁸³

In addition to these legislative and enforcement measures emanating directly from CWC obligations, several States have claimed jurisdiction over the act of using chemical weapons. An example is Sweden, where in April 2021 victims from Syria as well as several non-governmental organizations submitted criminal complaints against the Syrian Government for its use of chemical weapons in two chemical attacks: in Al-Ghouta in August 2013 and in Khan Shaykhun in April 2017.⁸⁴ Certain other countries have taken similar steps to prosecute chemical weapon-related war crimes committed in the Syrian armed conflict.⁸⁵

States may request technical assistance for such investigations from the OPCW. Examples include national investigations of the use of improvised chemical weapons in Iraq, as well as of attacks on individuals with chemical agents, such as the attacks against the Skripals in Salisbury, Navalny in Russia, and Kim in Malaysia. The response by the OPCW is based on the provisions of Article VIII(38)(e) – the Technical Secretariat being tasked to provide technical assistance and technical evaluation to States parties in CWC implementation, including evaluations of scheduled and unscheduled chemicals – and more recently the decision of the Fourth Special Session of the CSP.

⁸³ See also OPCW, "Decision: Addressing the Threat Posed by the Use of Chemical Weapons by Non-State Actors", EC-86/DEC.09, 13 October 2017, https://www.opcw.org/sites/default/files/documents/EC/86/en/ec86dec09_e.pdf.

⁸⁴ Open Society Justice Initiative et al., "Universal Jurisdiction in Sweden: Victims of Syria's Chemical Weapons Attacks Demand Justice – Q&A on Complaints Filed before Sweden's Specialized War Crimes Units and the Legal Campaign for Criminal Accountability in Europe", Open Society Justice Initiative, April 2021, https://www.justiceinitiative.org/uploads/c3cda961-388f-4d50-b8b7-e28e5598d1e2/faq_chemical-weapons-criminal-complaints-in-sweden_04192021.pdf. The legal basis for the judicial process is Sweden's Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (Lag 2014:406 om straff för folkmord, brott mot mänskligheten och krigsförbrytelser), <https://rkrattsbaser.gov.se/sfst?bet=2014:406>, which entered into force on 1 July 2014. Crimes that were committed before 1 July 2014 may instead be prosecuted as crimes against international law under Chapter 22, Section 6 of the Swedish Criminal Code, in the provision's wording before 1 July 2014.

⁸⁵ New York Times, 2021, "Criminal Inquiries Loom Over al-Assad's Use of Chemical Arms in Syria", 2 Mar 2021 <https://www.nytimes.com/2021/03/02/world/europe/syria-chemical-weapons-assad.html> see also: Jennifer Triscone, "Universal Jurisdiction, the Only Hope for Prosecuting International Crimes Committed in Syria?", Trial International, 6 October 2021, <https://trialinternational.org/latest-post/universal-jurisdiction-the-only-hope-for-prosecuting-international-crimes-committed-in-syria>.

In addition, the IIIM has authority to make evidence available to national prosecution services of countries that have judicial power to prosecute and punish individuals and legal entities responsible for such crimes (as well as to any international tribunal that may be established in the future). It conducts its investigations and evidence-gathering against the standards of international criminal law, as well as standards common in national criminal prosecutions.⁸⁶

Similarly, the Human Rights Council's Independent Commission of Inquiry on Syria has included in its investigation cases of chemical weapon use. The Commission has reported on several occasions about its findings on chemical weapon uses in the Syrian conflict, thus contributing to the available evidence base for possible future judicial processes on the basis of international human rights law.⁸⁷ The evidence it has collected has been made available to the IIIM, and State prosecution services can gain access to the IIIM evidence collection.

One issue that deserves further study and elaboration is how to deal with CW crimes committed by non-State actors. Under Article VII of the CWC, such acts fall squarely within the jurisdiction of individual CWC States parties. However, there are serious issues that complicate the enforcement of laws against CW acquisition and use in certain scenarios. In 2016, Russia proposed to negotiate a new convention for the suppression of acts of chemical terrorism.⁸⁸ The proposal was directed at the Conference on Disarmament, in Geneva, and aimed at addressing a number of gaps in the international system to deal with the threats posed by terrorists acquiring and using chemical weapons. While there were a number of flaws in the proposed draft that would have made it incompatible with the CWC (and might have created problems with regard to a further fragmentation in legal coverage and implementation tools),⁸⁹ the proposal had some merit. International cooperation in the area of prevention, investigation and prosecution of such cases needs to be enhanced: there are shortcomings in interactions among security services and there remain obstacles to effective intergovernmental legal cooperation. The challenge posed by groups and individuals attacking civilians using improvised chemical weapons should be addressed. Rather than an additional international treaty, which would entail considerable negotiation and could potentially create uncertainties with regard to the existing chemical weapons prohibition, the best way to do so would be by taking steps within the framework of the CWC. This could be done by strengthening CWC implementation; expanding on the work done in the EC to address the threat posed by CW use by non-State actors;⁹⁰ through technical assistance; and, if need be, by designing additional legal constructs such as a special protocol under the CWC framework.

⁸⁶ See IIIM, Mandate of the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011, <https://iiim.un.org/mandate>.

⁸⁷ See for example Human Rights Council, A/HRC/36/55, 8 August 2017, <https://undocs.org/en/A/HRC/36/55>.

⁸⁸ See Russian Ministry of Foreign Affairs, "Elements of the Draft International Convention for the Suppression of Acts of Chemical Terrorism", 6 April 2016, https://archive.mid.ru/foreign_policy/international_safety/crime/-/asset_publisher/3F5IZsLVSx4R/content/id/2211492?p_p_id=101_INSTANCE_3F5IZsLVSx4R&_101_INSTANCE_3F5IZsLVSx4R_languageId=en_GB.

⁸⁹ For a discussion see O. Meier and R. Trapp, "Russia's Chemical Terrorism Proposal: Red Herring or Useful Tool?", Bulletin of the Atomic Scientists, 7 June 2016, <https://thebulletin.org/2016/06/russias-chemical-terrorism-proposal-red-herring-or-useful-tool/#>.

⁹⁰ OPCW, "Decision: Addressing the Threat Posed by the Use of Chemical Weapons by Non-State Actors", EC-86/DEC.9, 13 October 2017, https://www.opcw.org/sites/default/files/documents/EC/86/en/ec86dec09_e.pdf.

5.2 SANCTIONS

The absence of unity in the United Nations Security Council over the responsibility for the use of chemical weapons in Syria was one reason why certain States have chosen to impose unilateral sanctions on certain individuals and entities for their involvement in chemical weapon uses and proliferation (see table 2). An example is the International Partnership against Impunity for the Use of Chemical Weapons (PAI), which was initiated in 2018 by France and today includes 40 States and the European Union (EU).⁹¹ The Declaration of Principles issued by the foreign ministers of countries participating in the PAI deplores the fact that the norm against chemical weapons has been seriously undermined by the confirmed uses of chemical weapons by Syria as well as the Islamic State group. It called for those responsible for these uses to be held accountable, expressed support for the victims and stressed the need to prevent such abhorrent attacks from happening again. To this end, the PAI members have agreed to a series of measures including:

- The collection, preservation and sharing of information regarding the proliferation or use of chemical weapons
- The designation and publication of the names of individuals, entities, groups and governments involved in such acts
- The enhancement of the legal and operational capabilities of countries to identify and sanction or prosecute individuals and entities involved in such acts and
- The development of common positions in such forums as the OPCW, the United Nations General Assembly and the United Nations Security Council.

These measures follow the concept of “smart sanctions”, which target individuals, legal entities, and State and non-State organizations that have been identified as culpable for the use of chemical weapons or acts in preparation or support of such use. They may include financial assets freezes and travel bans – the most commonly used types of sanction in the EU tool kit⁹² – as well as trade, financial and diplomatic restrictions, and arms embargoes.⁹³ Examples include bans on financial transactions and investment restrictions, cultural and sports restrictions, and air traffic restrictions.⁹⁴ These types of sanctions aim at influencing the behaviour of the targeted individuals and entities while avoiding the negative and at times devastating effects of non-targeted sanctions on the civilian population.⁹⁵

⁹¹ International Partnership Against Impunity for the Use of Chemical Weapons, “Fighting Impunity: International Partnership against Impunity for the Use of Chemical Weapons – Declaration of Principles”, 23 January 2018, https://www.noimpunitychemicalweapons.org/IMG/pdf/180119_declaration_ppes_vf_en_post_draftin_24_janvier.pdf.

⁹² For a detailed discussion of the EU sanctions regime see for example K.M. Saed, “International Sanctions: Evolution, Policy, and Impact with Special Reference to the European Union and Syria”, Comparative Law Working Papers, vol. 5, no. 2, 2021, Hallgatói különszám, https://www.ojji.u-szeged.hu/images/dokumentumok/CLWP/Kara_Syria.pdf.

⁹³ F. Giumelli, F. Hoffmann and A. Książczaková, “The When, What, Where and Why of European Union Sanctions”, European Security, vol. 30, no. 1, 2021, <https://doi.org/10.1080/09662839.2020.1797685>, p. 11.

⁹⁴ Swiss State Secretariat for Economic Affairs, “Smart Sanctions – Targeted Sanctions”, 2017, https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/exportkontrollen-und-sanktionen/sanktionen-embargos/smart-sanctions--gezielte-sanktionen.html.

⁹⁵ J. Gordon, “Smart Sanctions Revisited”, Ethics & International Affairs, vol 25, no. 3, 2011, pp. 315–335, <https://doi.org/10.1017/S0892679411000323>.

TABLE 2. *Illustrative examples of unilateral sanctions imposed in the context of chemical weapon proliferation or use*

Year	Sanctioning State/ Organization	Sanctioned State	Purpose
2013	United States	Syria	Under the CBW Act pursuant to the 1991 US Chemical and Biological Weapons Control and Warfare Elimination Act ⁹⁶
2018	United States	DPRK	Under the CBW Act pursuant to the 1991 US Chemical and Biological Weapons Control and Warfare Elimination Act
2019	United States	Russia	US sanctions on Russia for the poisoning of the Skripals in Salisbury pursuant to the 1991 US Chemical and Biological Weapons Control and Warfare Elimination Act (CBW Act; title III, P.L. 102-182; 22 U.S.C. 5601 et seq.) ⁹⁷
2019	EU	Russia	For the poisoning of the Skripals
2019	EU	Syria	For the chemical attack on Douma ⁹⁸
2021	United States	Russia	For the poisoning and imprisonment of Aleksey Navalny pursuant to the 1991 US Chemical and Biological Weapons Control and Warfare Elimination Act ⁹⁹
2021	EU	Russia	For the poisoning of Navalny ¹⁰⁰

⁹⁶ U. Friedman, "Smart Sanctions: A Short History", Foreign Policy, 23 April 2012, <https://foreignpolicy.com/2012/04/23/smart-sanctions-a-short-history/>.

⁹⁷ D.E. Rennack and C. Welt, "Russia, the Skripal Poisoning, and U.S. Sanctions", Congressional Research Service, 14 August 2019, <https://crsreports.congress.gov/product/pdf/IF/IF10962>.

⁹⁸ European Views, "EU Slaps First Ever Chemical Weapons Sanctions on Russians, Syrians over Skripal Case, Douma Attack", European Views, 21 January 2019, <https://www.european-views.com/2019/01/eu-slaps-first-ever-chemical-weapons-sanctions-on-russians-syrians-over-skripal-case-douma-attack>; and Reuters, "EU Extends for 12 Months Sanctions on GRU Chiefs over Skripal Poisoning", UNAIN Information Agency, 12 October 2020, <https://www.unian.info/world/skripal-poisoning-eu-extends-for-12-months-sanctions-on-gru-chiefs-11178560.html>.

⁹⁹ A.J. Blinken, "Imposing Sanctions on Russia for the Poisoning and Imprisonment of Aleksey Navalny", US Department of State, 2 March 2021, <https://www.state.gov/imposing-sanctions-on-russia-for-the-poisoning-and-imprisonment-of-aleksey-navalny>; and US Department of State, "U.S. Sanctions and Other Measures Imposed on Russia in Response to Russia's Use of Chemical Weapons", 2 March 2021, <https://www.state.gov/u-s-sanctions-and-other-measures-imposed-on-russia-in-response-to-russias-use-of-chemical-weapons>.

¹⁰⁰ Reuters "EU Sanctions Russian Officials over Navalny Poisoning", 15 October 2020, <https://www.reuters.com/article/russia-politics-navalny-eu/eu-sanctions-russian-officials-over-navalny-poisoning-idINL8N2H62KO>.

6 IMPROVING TOOLS FOR COMPLIANCE MANAGEMENT AND ENFORCEMENT

Managing and enforcing compliance with the norm against chemical weapons requires adequate and effective tools, both within the institutional and political framework created by the CWC and in the broader international framework. These tools need to be adaptable to respond to changes in the political and security environment and the changing nature of the chemical weapons threat. This changing threat landscape reflects advances in science and technology, changing geopolitical conditions, and different forms of armed conflict involving actors and scenarios that differ from the interstate conflict that the CWC was designed to address. Both States and non-State actors have been associated with chemical weapon uses in recent years. Moreover, chemical weapons have been used in insurgencies and civil wars; as military weapons and to terrorize civilian populations; and outside of conflict scenarios, in targeted attacks against individuals.

Compliance with the norm against chemical weapons is no longer simply a question of a State's compliance with its undertakings not to use chemical weapons in armed conflict. It also raises questions of deterrence and enforcement in relation to criminal and terrorist groups and organizations as well as private actors such as companies, traders and individuals involved in acts of chemical weapon proliferation or use. More generally speaking, there is the question of whether and how compliance enforcement of international arms control laws can interface with legal proceedings related to individual criminal responsibility. For example, the OPCW's IIT has no prosecutorial or judicial mandate, but it has been given authority to make factual evidence it has collected available to the IIIM.¹⁰¹ The IIIM in turn is mandated, amongst other things 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."¹⁰²

This opens a way, in principle, for evidence collected in the course of investigations of compliance under arms control treaties to become available for legal proceedings under other bodies of law, including national criminal laws. If this approach were to be replicated in the future, issues such as investigative methodology, standards of proof, due process and the like would require careful elaboration.

¹⁰¹ See paragraph 12 of C-SS-4/DEC.3.

¹⁰² Paragraph 11 of the terms of reference of the IIIM. See UN, Report by the Secretary-General "Implementation of the resolution establishing 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/71/755, 19 January 2017.

Several proposals have been put forward by policy-makers and arms control experts with regard to how the set of tools available to manage and enforce compliance with the norm against chemical weapons can be strengthened. They included:

- Measures to further enhance the investigative and forensic capacity of the OPCW
- Steps to extend the mandate of the IIT to conduct investigations to identify perpetrators of CW proliferation and use beyond Syria
- The further development of measures related to attribution and prosecution of violations of the norm against chemical weapons
- Training and exercises to better link the chemical weapon community of experts with law enforcement
- The development and adoption of supplementary verification measures to address clandestine CW programmes with a small footprint
- The use of challenge inspections as an investigative tool and enhancements of the OPCW capacity to implement such inspections
- Steps that the OPCW policymaking organs should take to increase the effectiveness of the CWC sanctions mechanisms and to create an “almost automatic” mechanism to compile and refer attribution findings for prosecution by relevant international tribunals or national courts, and
- The prosecution of individuals involved in ordering or carrying out chemical weapon attacks as war criminals, and an expansion of the International Partnership against Impunity for the Use of Chemical Weapons.¹⁰³

Some of these proposals are essentially a continuation and enhancement of measures already under way at the OPCW or elsewhere, others may require more study and potentially negotiations to expand existing instruments or create additional legal mechanisms. In the light of the analysis presented in this paper, the following recommendations are offered.

¹⁰³ J. Masterson, “Reinforcing the Global Norm Against Chemical Weapons Use”, Policy White Paper, Arms Control Association, 18 February 2021, <https://www.armscontrol.org/policy-white-papers/2021-02/reinforcing-global-norm-against-chemical-weapons-use>, p. 8; and I. Anthony, Strengthening Global Regimes: Addressing the Threat Posed by Chemical Weapons, SIPRI, November 2020, <https://sipri.org/publications/2020/sipri-policy-papers/strengthening-global-regimes-addressing-threat-posed-chemical-weapons>, pp. 21–25, 33.

1. The OPCW should **enhance further its scientific, technical and operational capabilities** in the fields of verification, investigation, fact-finding and technical assistance. It should do this through strengthening the forensic and analytical capabilities of the Technical Secretariat and the OPCW's designated laboratories as well as other national science and technology centres that collaborate with the OPCW. This should be supported through knowledge management and training and exercises in areas critical to the conduct of investigations, including challenge inspections and investigations of alleged CW use. The OPCW Centre for Chemistry and Technology should be developed as a global centre of excellence and innovation in the field of verification and investigation of chemical weapon arms control and as a global repository of knowledge as well as reference standards and data for analysis of chemical agents. The centre should make effective use of the SAB and the OPCW's links with the international scientific community.
2. The OPCW Executive Council, supported by analyses regularly prepared by the Technical Secretariat, should **more systematically review the status of compliance with the CWC by States parties**. This should include more extensive use of the consultative mechanisms under Articles VIII and IX to clarify uncertainties and concerns related to CWC compliance.¹⁰⁴ This could also involve innovative new confidence-building approaches such as voluntary peer reviews or mutual evaluations of national implementation and enforcement systems involving States parties that wish to share good implementation practices and learn from others about effective ways of implementing the CWC. This review could also include a consideration of additional measures under the CWC framework to develop and apply common principles in the fight against chemical terrorism, for example with regard to information sharing for investigation purposes, extradition rules or principles for the prosecution of individuals involved in CW crimes abroad.
3. OPCW Member States should request the Director-General to commission an in-depth study that **analyses the legal, institutional and operational aspects of establishing a generic attribution mechanism** based on the provisions of the CWC. This should include clarifying the relationship between such a mechanism and other international and national bodies and mechanisms that have been established in the fields of international humanitarian law, human rights law, and criminal law. Such a study could also address issues related to operationalizing the CWC provisions under Article VII on legal cooperation between States parties, including by formalizing mechanisms under the framework of the CWC that would facilitate measures such as information exchanges, cooperation between law enforcement or prosecutorial services, and extradition, with regard to uses or acts of proliferation of chemical weapons by criminal or terrorist actors.

¹⁰⁴ Note that at the time of writing, 45 countries submitted "a series of questions to the Russian Federation, pursuant to Article IX (nine), paragraph 2, of the Convention. Article IX, paragraph 2 allows states to request clarification of any matter relating to the implementation of the Convention and for a response to be provided within 10 days". See OPCW, "Bulgaria: 'Addressing the threat from Chemical Weapons Use'", Statement under Agenda Item 6(g) on behalf of 45 States parties, 5 October 2021, <https://www.opcw.org/sites/default/files/documents/2021/10/EC-98%20Item%206g%20Statement.pdf>. The text of these questions was circulated on the same date in United Kingdom of Great Britain and Northern Ireland, "Note Verbale No. 093/2021 from the Permanent Representation of the United Kingdom of Great Britain and Northern Ireland to the Technical Secretariat, Dated 5 October 2021", EC-98/NAT.7, 5 October 2021, [https://www.opcw.org/sites/default/files/documents/2021/10/ec98nat07\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/10/ec98nat07(e).pdf). Russia responded by submitting its own national paper, which set forth its own view regarding the situation around the Navalny incident, and raised a series of questions to the Technical Secretariat as well as Germany, France, the United Kingdom and Sweden. See Russian Federation, "Note Verbale No. 44 From the Permanent Representation of the Russian Federation to the Technical Secretariat, Dated 7 October 2021", EC-98/NAT.8, 7 October 2021, [https://www.opcw.org/sites/default/files/documents/2021/10/ec98nat08\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2021/10/ec98nat08(e).pdf). This prompted responses by these four States parties on 18 October 2021, also published as national papers to the EC and available at the OPCW website.

4. CWC States parties should **conduct a broad review, supported by the Technical Secretariat and the SAB, of the design and application of the CWC industry verification regime** as well as corresponding national implementation measures. This review should cover declarations, national controls and transfer controls, and measures implemented by industry and trade associations and individual companies. The review should explore ways in which the CWC industry verification regime can be further evolved to address changes in the scientific, technological and industrial environment as well as new threat scenarios such as chemical weapon capabilities with smaller footprints or illegal procurement networks for precursor as well as toxic chemicals intended to be used as chemical weapons, including by non-State actors. In line with past SAB recommendations, the OPCW should review the Schedules of Chemicals in light of these changes.¹⁰⁵ The OPCW should also consider evolving the regime for other chemical production facilities to better focus inspections under Part X of the Verification Annex on facilities that employ materials and technologies of particular relevance to the objectives of the CWC. Measures not stipulated under the CWC itself might take the form of an additional protocol or voluntary measures.
5. Within the broader international framework – including organizations and entities of, or associated with, the United Nations as well as multilateral (global or regional) initiatives and mechanisms that have mandates which relate to the proliferation and use of chemical weapons – there should be a **regular informal process of consultation and information exchanges to coordinate activities** in the fields of prevention and response to violations of the norm against chemical weapons. The OPCW would be the natural actor to offer a platform for such consultations. This could be prepared in coordination with the United Nations Office for Disarmament Affairs. At the policy level, such a consultation process could be arranged alongside the annual sessions of the CSP, perhaps similar to the National Authority Forum. Working-level processes could be set up as and when required, based on a project approach to ensure focus and efficiency.

¹⁰⁵ See the Report of the SAB to the 4th CWC Review Conference, which included a recommendation to assess whether: (a) the chemicals currently listed are in the appropriate schedule, and (b) any toxic chemicals or specific precursors should be added to or removed from the schedules. In this connection, it should be considered whether it is technically feasible to accurately monitor Schedule 3 chemicals that are produced in very large quantities (e.g. over 100,000 tons/year). See OPCW, "Report of the Scientific Advisory Board on Developments in Science and Technology for the Fourth Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention", RC-4/DG.01, 30 April 2018, https://www.opcw.org/sites/default/files/documents/CSP/RC-4/en/rc4dg01_e_.pdf.

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