

# Crossing the red line: The use of chemical weapons in Syria and what should happen now

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## Abstract

*The use of chemical weapons in the armed conflict in Syria has attracted universal and widespread condemnation and has led to unified responses by various international bodies. This article examines the international community's responses to chemical weapons use in Syria from the perspective of international law. It also analyzes the potential options for accountability that are available for chemical weapons-related crimes. The intention is ultimately to make the case that*

\* The views expressed are those of the author alone and do not necessarily reflect the views of the International Residual Mechanism for Criminal Tribunals or the United Nations in general.

*the special status the international community has ascribed to chemical weapons crimes could be harnessed to create an accountability mechanism, such as an ad hoc tribunal, that could help pave the complex road towards a negotiated peace.*

**Keywords:** chemical weapons, unnecessary suffering, superfluous injury, Chemical Weapons Convention, Rome Statute, Organisation for the Prohibition of Chemical Weapons, United Nations, accountability, investigation, fact-finding, customary international law, political.

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## Introduction

There have been a myriad of international humanitarian law violations committed during the war in Syria. The United Nations (UN) Special Envoy for Syria estimated that 400,000 people had been killed during hostilities by May 2016.<sup>1</sup> Many of these deaths have reportedly been the result of war crimes, such as indiscriminate attacks, disproportionate civilian harm, targeting of medical facilities and murder.<sup>2</sup> Other atrocities such as systematic rape, torture, persecution and inhumane acts have been widely documented and reported.<sup>3</sup> The crisis has led to a humanitarian disaster of massive proportions, with an estimated 13.5 million people in need of humanitarian assistance, more than 5 million refugees, 6 million internally displaced people and 4.5 million people in need trapped in besieged and hard-to-reach areas.<sup>4</sup>

But it is the use of chemical weapons in this armed conflict that has arguably attracted the most universal and widespread condemnation – despite reportedly killing less than 2,000 people<sup>5</sup> – and has led to the only unified

1 “Syria Death Toll: UN Envoy Estimates 400,000 Killed”, *Al Jazeera*, 23 April 2016, available at: [www.aljazeera.com/news/2016/04/staffan-de-mistura-400000-killed-syria-civil-war-160423055735629.html](http://www.aljazeera.com/news/2016/04/staffan-de-mistura-400000-killed-syria-civil-war-160423055735629.html) (all internet references were accessed in September and October 2017).

2 The UN Independent International Commission of Inquiry on the Syrian Arab Republic (CoI) has documented serious violations of human rights and international humanitarian law committed in Syria since 2011. See the more than twenty reports available at: [www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/Documentation.aspx](http://www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/Documentation.aspx). For detailed analysis of which international crimes may have been committed, see Beth Van Schaak, “Mapping War Crimes in Syria”, *International Legal Studies*, Vol. 92, No. 1, 2016, available at: <http://stockton.usnwc.edu/ils/vol92/iss1/9/>.

3 See, for example, Amnesty International, *Syria: “It Breaks the Human”*: Torture, Disease and Death in Syria’s Prisons, 18 August 2017, available at: [www.amnesty.org/en/documents/mde24/4508/2016/en/](http://www.amnesty.org/en/documents/mde24/4508/2016/en/).

4 UN Office for the Coordination of Humanitarian Affairs, “About the Crisis”, available at: <http://www.unocha.org/syrian-arab-republic/syria-country-profile/about-crisis>; Office of the UN High Commissioner for Refugees, “Syria Regional Refugee Response”, available at: <http://data.unhcr.org/syrianrefugees/regional.php>.

5 Colum Lynch, “To Assuage Russia, Obama Administration Backed Off Syria Chemical Weapons Plan”, *Foreign Policy*, 19 May 2017, available at: <http://foreignpolicy.com/2017/05/19/to-assuage-russia-obama-administration-backed-off-syria-chemical-weapons-plan/> (“Indeed, the number of Syrians killed by chemical weapons – more than nearly 1,500 by the end of 2015, according to the Syrian American Medical Society – amounts to only a fraction of the country’s dead.”)

responses by international bodies.<sup>6</sup> The international response to the use of chemical weapons in 2013 – the crossing of US president Barack Obama’s famous “red line” – led to the removal and destruction of Syria’s declared stockpile of chemical weapons, implemented and overseen jointly by the Organisation for the Prohibition of Chemical Weapons (OPCW) and the UN. This operation was widely seen as one of the only “positive” aspects of the deadly war.<sup>7</sup> Continued use of chemical weapons in Syria prompted the OPCW director-general to take the unprecedented step of establishing a Fact-Finding Mission (FFM) to determine the facts surrounding allegations of chemical weapons use in Syria. The UN Security Council took further action in 2015 by creating the OPCW–UN Joint Investigative Mechanism (JIM), mandated with attributing responsibility for those chemical weapons attacks in Syria confirmed by the FFM.<sup>8</sup> This mandate meant that the large-scale attack in Ghouta in 2013, discussed below, was not part of the JIM’s investigations. Both the European Union and the United States have issued sanctions against Syrian individuals and government entities alleged to have been directly or indirectly involved in chemical weapons crimes in Syria.<sup>9</sup> The use of chemical weapons in Syria is also the only violation of international humanitarian law committed during the armed conflict that has triggered direct military interventions by the United States and allied States.<sup>10</sup>

This article examines the international community’s responses to chemical weapons use in Syria from the perspective of international law.<sup>11</sup> This examination

- 6 Other international responses, such as the Human Rights Council-appointed CoI and the General Assembly-appointed International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM) (UN Doc. A/71.L.48, 19 December 2016), mandated to collect information about international crimes committed in Syria, have not garnered unified support. The resolution establishing the CoI (UN Doc. A/HRC/RES/S-17/1) was adopted by thirty-three votes in favour, four against and nine abstentions, while the IIIM was adopted with 105 votes in favour, fifteen against (including the Russian Federation, China and Iran) and fifty-two abstentions.
- 7 See, for example, Paul F. Walker, “Syrian Chemical Weapons Destruction: Taking Stock and Looking Ahead”, Arms Control Association, December 2014, available at: [www.armscontrol.org/ACT/2014\\_12/Features/Syrian-Chemical-Weapons-Destruction-Taking-Stock-And-Looking-Ahead](http://www.armscontrol.org/ACT/2014_12/Features/Syrian-Chemical-Weapons-Destruction-Taking-Stock-And-Looking-Ahead).
- 8 UNSC Res. 2235, 7 August 2015.
- 9 Council of the European Union, “List of Persons and Entities under EU Restrictive Measures over the Situation in Syria”, 28 October 2016, available at: <http://docplayer.net/51135994-List-of-persons-and-entities-under-eu-restrictive-measures-over-the-situation-in-syria.html>; US Department of the Treasury, “Treasury Sanctions Syrian Officials in Connection with OPCW-UN Findings of Regime’s Use of Chemical Weapons on Civilians”, 12 January 2017, available at: [www.treasury.gov/press-center/press-releases/Pages/j10701.aspx](http://www.treasury.gov/press-center/press-releases/Pages/j10701.aspx). The sanctions instituted by various countries against Syrian officials are compiled on the International Partnership against Impunity for the Use of Chemical Weapons website, available at: [www.noimpunitychemicalweapons.org/en.html](http://www.noimpunitychemicalweapons.org/en.html).
- 10 Dan Lamothe, Missy Ryan and Thomas Gibbons-Neff, “U.S. Strikes Syrian Military Airfield in First Direct Assault on Bashar al-Assad’s Government”, *Washington Post*, 6 April 2017, available at: <https://tinyurl.com/ydbet8wg>; Helene Cooper, Thomas Gibbons-Neff and Ben Hubbard, “U.S., Britain and France Strike Syria over Suspected Chemical Weapons Attack”, *The New York Times*, 13 April 2018, available at: [www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html](http://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html).
- 11 This article focuses on the events that occurred from 2012 to the end of April 2018. For an analysis of the reasons for the disparate international responses to atrocities committed in the crisis in Syria, see Tim McCormack, “Chemical Weapons and Other Atrocities: Contrasting Responses to the Syrian Crisis”, *International Law Studies*, Vol. 92, 2016.

is followed by an analysis of the potential options for accountability that are available for chemical weapons-related crimes. The intention is ultimately to make the case that the special status the international community has ascribed to chemical weapons crimes in Syria could be harnessed to create an accountability mechanism, such as an *ad hoc* tribunal, that could help pave the complex road towards a negotiated peace.

## Chemical weapons use in Syria and international responses

Allegations of chemical weapons use in Syria began to surface in 2012.<sup>12</sup> Up to this time, the Syrian government had given mixed information about its chemical weapons capability. In 2005, the Syrian government had reported to the UN Resolution 1540 Committee that it “does not possess any chemical weapons, their means of delivery, or any related material”.<sup>13</sup> But in a 2009 interview, President Bashar al-Assad made the following ambiguous statement in response to a question about Syria’s intention to produce chemical weapons: “Chemical weapons, that’s another thing. But you don’t seriously expect me to present our weapons program to you here? We are in a state of war.”<sup>14</sup>

In July 2012, the Syrian government implicitly admitted for the first time that it had stocks of chemical weapons, stating that they would never be used “inside Syria” and would only be used against an external attack.<sup>15</sup> On 20 August 2012, in response to a question about whether the US military would become directly involved in the crisis in Syria at a White House press briefing, President Obama famously stated:

We cannot have a situation where chemical or biological weapons are falling into the hands of the wrong people. We have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation.<sup>16</sup>

12 The UN received reports concerning alleged incidents in Salquin on 17 October 2012 and Homs on 23 December 2012. The UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic (UN Mission) ultimately found that it did not have sufficient evidence to make findings on these alleged incidents. See UN Mission, *Final Report*, UN Doc. A/68/663-S/2013/735, 13 December 2013 (UN Mission Final Report), paras 12–13, 18, 27, 45.

13 “Annex to the *Note Verbale* Dated 7 November 2005 from the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Chairman of the Committee”, Note No. S/AC.44/2005/DDA/OC.S, 15 June 2005.

14 “*Spiegel* Interview with Syrian President Bashar Assad: ‘Peace Without Syria is Unthinkable’”, *Spiegel*, 19 January 2009, available at: [www.spiegel.de/international/world/spiegel-interview-with-syrian-president-bashar-assad-peace-without-syria-is-unthinkable-a-602110-2.html](http://www.spiegel.de/international/world/spiegel-interview-with-syrian-president-bashar-assad-peace-without-syria-is-unthinkable-a-602110-2.html).

15 “Syria Chemical Weapons Allegations”, *BBC News*, 31 October 2013, available at: [www.bbc.com/news/world-middle-east-22557347](http://www.bbc.com/news/world-middle-east-22557347).

16 “Remarks by the President to the White House Press Corps”, 20 August 2012, available at: <https://obamawhitehouse.archives.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>.

On 19 March 2013, the Syrian government reported to the UN the alleged use of chemical weapons in the Khan Al-Asal area of the Aleppo Governorate.<sup>17</sup> The following day Syria asked the UN Secretary-General to launch an urgent investigation under the auspices of his Mechanism for Investigation of Alleged Use of Chemical, Biological or Toxin Weapons (Secretary-General's Mechanism).<sup>18</sup> On 21 March 2013, the Secretary-General established the UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic and contacted the OPCW and the World Health Organization (WHO) requesting their cooperation in mounting an investigation. The same day, the governments of France and the United Kingdom requested an investigation into the events that took place in the two locations of Khan Al-Asal and Otaybah in the vicinity of Damascus on 19 March 2013, as well as in Homs on 23 December 2012.

## The Secretary-General's Mechanism

The origin of the Secretary-General's Mechanism for Investigation of the Alleged Use of Chemical, Biological or Toxin Weapons may be traced to the authority of the Secretary-General under Article 99 of the UN Charter, on which basis the then UN Secretary-General carried out *ad hoc* investigations of alleged use of chemical weapons in the 1980s.<sup>19</sup> The Mechanism was formalized in 1987.<sup>20</sup>

A year later, the UN Security Council endorsed the Mechanism.<sup>21</sup> The Security Council encouraged the Secretary-General to carry out these

17 UN Mission Final Report, above note 12, para. 5. The Syrian government informed the UN of its allegation that armed terrorist groups had fired a rocket from the Kfar De'il area towards Khan Al-Asal in the Aleppo governorate, resulting in twenty-five deaths and more than 110 civilians and soldiers injured. France, the UK and the United States all subsequently reported the same incident to the UN, as well as other incidents. In a letter of 14 June 2013, the United States reported to the UN Secretary-General its assessment alleging that Syrian governmental forces had used sarin in the attack in Khan Al-Asal on 19 March 2013. *Ibid.*, paras 7–8.

18 *Ibid.*, para. 6.

19 Article 99 of the UN Charter provides: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." Secretary-General Javier Pérez de Cuéllar indirectly justified his independent investigations of Iraqi chemical weapons use in the 1980–88 Iran–Iraq War using the Article 99 authority. See *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq*, UN Doc. S/17911, 12 March 1986.

20 In 1982, the UN General Assembly adopted a resolution that requested the UN Secretary-General "to investigate, with the assistance of qualified experts, information that may be brought to his attention by any Member State concerning activities that may constitute a violation of the [1925] Protocol or of the relevant rules of customary international law": UN Doc. A/RES/37/98, 13 December 1982, section E, para. 4. However, the resolution was not adopted unanimously, and the UN Secretary-General preferred to conduct such activities under the authority of Article 99 of the UN Charter. In UNGA Res. 42/37, 30 November 1987, the UN General Assembly requested the Secretary-General to "carry out investigations in response to reports ... brought to his attention by any Member State concerning the possible use of chemical ... weapons that may constitute a violation of the 1925 Geneva Protocol or other relevant rules of customary international law in order to ascertain the facts of the matter, and to report promptly the results of any such investigation to all Member States".

21 The UN Security Council resolution, UNSC Res. 620, was adopted following the Secretary-General's reports in July and August 1988 investigating allegations of the use of chemical weapons in the Iran–Iraq War (including the chemical weapons attack in Halabja in northern Iraq on 16 March 1988, which killed between 3,200 and 5,000 people).

investigations into violations of the 1925 Geneva Protocol<sup>22</sup> or “other relevant rules of customary international law”, and to report the results.<sup>23</sup> The Security Council further decided that it would take “appropriate and effective measures in accordance with the Charter of the United Nations, should there be any future use of chemical weapons in violation of international law, wherever and by whomever committed”.<sup>24</sup>

The reference to customary international law in the UN resolutions was important because the 1925 Geneva Protocol only applies during “war”, which, when the Protocol was drafted in 1925, meant only international armed conflict.<sup>25</sup> Therefore, it could be argued that the Geneva Protocol did not apply to the use of chemical weapons by Iraq against its own people.<sup>26</sup> This aspect of the Secretary-General’s Mechanism was also important for the ability of the Mechanism to apply with regard to Syria, which in early 2013 was party to the 1925 Geneva Protocol but not the 1993 Chemical Weapons Convention (CWC).<sup>27</sup> Since the armed conflict in Syria in 2013 was internal in character,<sup>28</sup> it could be argued that the Geneva Protocol was not applicable. Hence, the prohibitions in relation to chemical weapons derived from customary international law – which applied in both international and non-international armed conflicts – took on enhanced importance.<sup>29</sup>

22 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 UNTS 65, 17 June 1925 (entered into force 9 May 1926). The Protocol prohibits “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices”, and extends this prohibition to bacteriological weapons.

23 UNSC Res. 620, 26 August 1988.

24 *Ibid.*

25 See Masahiko Asada, “A Path to a Comprehensive Prohibition of the Use of Chemical Weapons under International Law: From The Hague to Damascus”, *Journal of Conflict & Security Law*, Vol. 21, No. 2, 2016, pp. 163–165, noting that “[i]t is ... unthinkable that the Geneva Protocol was intended to prohibit the use of prescribed gases in internal war before the adoption of common Article 3 [of the 1949 Geneva Conventions]”.

26 *Ibid.*, pp. 189–192, citing the diverging views of States on this point.

27 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1974 UNTS 45, 3 September 1993 (entered into force 19 April 1997).

28 In a statement released on 17 July 2012, the International Committee of the Red Cross (ICRC) expressly described the violence in Syria as constituting a “non-international armed conflict”. ICRC, “Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting”, Operational Update, 17 July 2012, available at: [www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm](http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm). The CoI concluded in its third report of 15 August 2012 that the intensity and duration of the conflict, combined with the increased organizational capabilities of anti-government armed groups, had met the legal threshold for a non-international armed conflict: UN Doc. A/HRC/21/50, para. 12.

29 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 74, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul). Rule 74 finds that “[t]he use of chemical weapons is prohibited” both in international and non-international armed conflicts. The International Criminal Tribunal for the former Yugoslavia (ICTY) had declared in the 1995 *Tadić* case that “there undisputedly emerged a general consensus in the international community on the principle that the use of [chemical] weapons is also prohibited in internal armed conflicts”. ICTY, *Prosecutor v. Dusko Tadić aka “Dule”*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 121.

Although the Mechanism had been almost<sup>30</sup> unused for more than twenty years, until it was triggered in regard to Syria, the legal basis for OPCW resources to be used for such an investigation by the UN had been built into the CWC<sup>31</sup> and into the Relationship Agreement between the UN and the OPCW, along with its Supplementary Arrangement.<sup>32</sup>

The UN team – composed mostly of OPCW and WHO experts – arrived in Damascus on 18 August 2013. Its original task was to investigate the reported allegations of the use of chemical weapons in Khan Al-Asal, Saraqueb and Sheik Maqsood (which were deemed credible), to discuss other allegations and to visit the related sites in parallel.<sup>33</sup> The mandate did not include attributing responsibility for any use of chemical weapons. Just three days after the team arrived in Damascus, on 21 August 2013, a large chemical weapons attack was reported in the Ghouta area of the city. Dozens of requests from UN member States were made to the Secretary-General to investigate, and the team was instructed by the Secretary-General to investigate this incident as a priority.

The team confirmed the large-scale use of chemical weapons (sarin) in the Ghouta area on 21 August 2013.<sup>34</sup> The death toll estimates range from 281 to more than 1,400.<sup>35</sup> The team also concluded that chemical weapons (again, sarin) had also

30 Apart from the extensive use of the Secretary-General's Mechanism during the Iran–Iraq War, there were two other instances of use: a 1992 investigation in Azerbaijan in relation to alleged weapons use by Armenia (UN Doc. S/24344, 24 July 1992, in which the experts determined that no evidence of the use of chemical weapons had been presented to the team), and a 1992 investigation in Mozambique (UN Doc. S/24065, 12 June 1992, in which the experts concluded that it was not possible to determine whether chemical weapons had been used against the Mozambican government by the non-State group RENAMO).

31 Article 27 of Part XI of the Verification Annex to the CWC provides: “In the case of alleged use of chemical weapons involving a State not Party to this Convention or in territory not controlled by a State Party, the Organization shall closely cooperate with the Secretary-General of the United Nations. If so requested, the Organization shall put its resources at the disposal of the Secretary-General of the United Nations.”

32 Agreement Concerning the Relationship between the United Nations and the Organisation for the Prohibition of Chemical Weapons, Annex to OPCW Executive Council Decision EC-MXI/DEC.1, 1 September 2000, Art. II(c), requiring the OPCW to closely cooperate with the Secretary-General in cases of the alleged use of chemical weapons involving a State not party to the Convention or in a territory not controlled by a State party to the Convention and to put its resources at the disposal of the Secretary-General. See Supplementary Arrangement Concerning the Implementation of Article II (2)(c) of the Relationship Agreement between the UN and the OPCW, September 2012.

33 UN Mission Final Report, above note 12, para. 34. Alleged incidents in the following locations had been reported by States to the UN in the preceding months: Salquin, 17 October 2012; Homs, 23 December 2012; Darayya, 13 March 2013; Khan Al-Asal, 19 March 2013; Otaybah, 19 March 2013; Adra, 24 March 2013; Sheik Maqsood, 13 April 2013; Jobar, 12–14 April 2013; Darayya, 25 April 2013; Saraqueb, 29 April 2013; Qasr Abu Samrah, 14 May 2013; and Adra, 23 May 2013.

34 See *Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013*, UN Doc. A/67/997–S/2013/553, 16 September 2013 (UN Mission First Report), para. 27, concluding that chemical weapons (sarin) were used on relatively large scale, resulting in numerous casualties, particularly among civilians, including many children.

35 See “Syria/Syrian Chemical Programme – National Executive Summary of Declassified Intelligence”, France Diplomatie – Ministry of Foreign Affairs and International Development, 3 September 2013, available at: [www.diplomatie.gouv.fr/IMG/pdf/Syrian\\_Chemical\\_Programme.pdf](http://www.diplomatie.gouv.fr/IMG/pdf/Syrian_Chemical_Programme.pdf); Joby Warrick, “More than 1,400 Killed in Syrian Chemical Weapons Attack, U.S. Says”, *Washington Post*, 30 August 2013, available at: <https://tinyurl.com/y78nuuvq>.

been used on a smaller scale in Khan Al-Asal, Saraqueb, Jobar and Ashrafiah Sahnaya in March, April and August 2013 respectively.<sup>36</sup>

## The OPCW–UN Joint Mission

The issuance of the UN team’s report on Ghouta was the first official UN confirmation that the “red line” of using chemical weapons in Syria had been crossed. However, even while the investigation was in progress, the Russian Federation and the United States had been involved in influencing President Assad to accede to the CWC. Since Russia had demonstrated that it would block any UN Security Council authorization of forceful measures against the Syrian government, the United States was moving towards a unilateral military intervention.<sup>37</sup> On 31 August 2013, President Obama announced that he would seek congressional authorization for a use of force.<sup>38</sup> Desirous of avoiding being drawn into the civil war, the White House draft legislative wording to the House and Senate leaders authorized actions designed only to neuter the threat of chemical weapons or to prevent their proliferation. On 9 September, Secretary of State John Kerry made a rhetorical remark in response to questioning at a press conference that to avoid a military attack, President Assad could hand over the entire stock of Syrian chemical weapons within a week, adding: “but he isn’t about to do it, and it can’t be done”.<sup>39</sup> Russia seized upon this as a means to prevent US military action, and pressured Syria into acceding to the CWC. On 12 September, Syria stated that it would accede to the CWC, and it deposited its instrument of accession two days later.<sup>40</sup> The same day, the United States and Russia agreed to the Framework for Elimination of Syrian Chemical Weapons. The Framework – which was provided to the OPCW Executive Council for consideration – set out an accelerated plan for the removal and destruction of the Syrian chemical weapons stockpile under joint OPCW–UN supervision.

On 27 September 2013, the OPCW Executive Council adopted the Decision on the Destruction of Syrian Chemical Weapons (Executive Council Decision), which required Syria to swiftly declare the location and quantity of its stockpile, and established an ambitious timeline for the removal<sup>41</sup> and destruction of the chemical

36 UN Mission Final Report, above note 12, para. 34.

37 See White House Office of the Press Secretary, “Government Assessment of the Syrian Government’s Use of Chemical Weapons on August 21, 2013”, 30 August 2013, available at: <https://obamawhitehouse.archives.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21>.

38 See White House, Office of the Press Secretary, “Statement by the President on Syria”, 31 August 2013, available at: <https://obamawhitehouse.archives.gov/the-press-office/2013/08/31/statement-president-syria>.

39 Patrick Wintour, “John Kerry Gives Syria Week to Hand over Chemical Weapons or Face Attack”, *The Guardian*, 9 September 2013, available at: [www.theguardian.com/world/2013/sep/09/us-syria-chemical-weapons-attack-john-kerry](http://www.theguardian.com/world/2013/sep/09/us-syria-chemical-weapons-attack-john-kerry).

40 UN Mission First Report, above note 34, Note by the Secretary-General, para. 3.

41 Significantly, UN Security Council Resolution 2118 authorized the transfer of Syrian chemical weapons across international borders for the purpose of destruction. This was done in consideration of Article 1 of the CWC, which prohibits the transfer of chemical weapons “in any circumstances”.



agents, material and equipment by June 2014.<sup>42</sup> Within hours of the adoption of the Executive Council Decision, the UN Security Council unanimously adopted Resolution 2118, endorsing the decision of the OPCW Executive Council and demanding that Syria cooperate fully. In addition, the Security Council determined that any use of chemical weapons constitutes a threat to international peace and security, expressed its strong conviction that those responsible for the use of chemical weapons in Syria should be held accountable, and vowed to impose measures under Chapter VII of the UN Charter in the event of non-compliance with the resolution, including any use of chemical weapons by anyone in Syria.<sup>43</sup>

The implementation of the plan involved a coordinated international effort.<sup>44</sup> By the end of September 2014, just a year later, the OPCW–UN Joint Mission on the elimination of Syrian chemical weapons announced that it had completed its mandate, with 96% of the declared stockpile destroyed.<sup>45</sup> The OPCW announced on 4 January 2016 that all chemical weapons declared by Syria had been destroyed.<sup>46</sup>

The apparent success of the destruction operation – carried out in a complex and difficult security environment – was marred, however, by continuing allegations of the use of chemical weapons, mainly chlorine, in Syria in 2014.<sup>47</sup> Any use of a toxic chemical – such as chlorine – as a weapon is prohibited under Article 1 of the CWC.<sup>48</sup> However, as chlorine (which has many legitimate uses) is not one of the toxic chemicals specifically listed in the Schedules annexed to the CWC, it is not subject to the verification regime established by the Convention.<sup>49</sup> In addition, doubts or ambiguities about the Syrian declaration of its stockpile led the OPCW director-general to establish in 2014 a team of experts (known as the Declaration Assessment Team or DAT) mandated to verify the accuracy or completeness of Syria’s declaration. In March 2018, the director-general informed the Executive

42 OPCW, “Destruction of Syrian Chemical Weapons”, Executive Council Decision EC-M-33/DEC.1, 27 September 2017.

43 UNSC Res. 2118, 27 September 2013.

44 Cargo ships were supplied by Norway and Denmark, naval escorts came from China, Denmark, Norway, Russia and the UK, and a Field Deployable Hydrolysis System (FDHS) on board a US naval ship destroyed toxic chemicals. Other chemicals were destroyed in the UK and United States, and effluent from the FDHS was destroyed in Germany and Finland.

45 OPCW, “Closure of the OPCW-UN Joint Mission”, available at: <https://opcw.unmissions.org/>. On 1 October 2014, the OPCW, in partnership with the UN Office for Project Services, continued the plan with respect to destroying the twelve remaining chemical weapons production facilities.

46 OPCW, “Destruction of Syrian Chemical Weapons Completed”, press release, 4 January 2016, available at: [www.opcw.org/news/article/destruction-of-syrian-chemical-weapons-completed/](http://www.opcw.org/news/article/destruction-of-syrian-chemical-weapons-completed/).

47 See CoI, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/27/60, 13 August 2014, paras 115–118, finding that “[r]easonable grounds exist to believe that chemical agents, likely chlorine, were used on Kafr Zeita, Al-Tamana’a and Tal Minnis in eight incidents within a 10-day period in April ... [and] that those agents were dropped in barrel bombs from government helicopters flying overhead”.

48 CWC, Art. I(b). See also Art. II(1)(a), defining chemical weapons as “[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes”.

49 See CWC, Art. VI(2), providing that “each State Party shall subject toxic chemicals and their precursors listed in Schedules 1, 2 and 3 of the Annex on Chemicals, facilities related to such chemicals, and other facilities as specified in the Verification Annex, that are located on its territory or in any other place under its jurisdiction or control, to verification measures as provided in the Verification Annex”.

Council that the DAT was still not able to resolve all identified gaps, inconsistencies and discrepancies in Syria's declaration and therefore could not fully verify that Syria had submitted a declaration which could be considered accurate and complete.<sup>50</sup>

## The OPCW Fact-Finding Mission

Once Syria became a party to the CWC, the Secretary-General's Mechanism no longer had a mandate to investigate allegations of chemical weapons use on Syrian government-controlled territory.<sup>51</sup> Under the CWC, there are essentially two ways in which allegations of the use of chemical weapons may be investigated, although these have never been used. Under Article IX, a challenge inspection can be requested by a State Party if it suspects another State Party of non-compliance through the use of chemical weapons.<sup>52</sup> Under Article X, the director-general must initiate an investigation if a State Party has requested assistance and protection against the use or threat of use of chemical weapons.<sup>53</sup> The OPCW Technical Secretariat may also assist a national investigation into chemical weapons use pursuant to its mandate to provide technical assistance to States Parties in the implementation of the provisions of the CWC.<sup>54</sup>

When further allegations of chemical weapons use (chlorine) in Syria began to be reported in 2014, neither an Article IX or Article X investigation was requested. Instead, the director-general of the OPCW established the FFM, which was tasked with establishing the facts surrounding allegations of the use of toxic chemicals, particularly chlorine, for hostile purposes in Syria.<sup>55</sup>

50 OPCW Executive Council, "Note by the Director-General: Progress in the Elimination of the Syrian Chemical Weapons Programme", EC/88/DG.1, 23 March 2018, para. 10.

51 As noted above, pursuant to Article 27 of Part XI of the Verification Annex to the CWC, the Secretary-General's Mechanism only applies in a "State not Party to this Convention or in territory not controlled by a State Party".

52 The Executive Council may, not later than twelve hours after having received the inspection request, decide by a three-quarter majority of all its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention. CWC, Art. IX.

53 *Ibid.*, Art. X(8)(a).

54 *Ibid.*, Art. VIII(38)(e). On this basis, the OPCW Technical Secretariat has assisted the Iraqi government with its investigation of the use of chemical weapons on its territory. See OPCW, "Director-General Expresses Concern over Alleged Recent Chemical Attacks in Iraq", press release, 23 March 2016, available at: [www.opcw.org/news/article/director-general-expresses-concern-over-alleged-recent-chemical-attacks-in-iraq/](http://www.opcw.org/news/article/director-general-expresses-concern-over-alleged-recent-chemical-attacks-in-iraq/).

55 OPCW, "OPCW to Undertake Fact-Finding Mission in Syria on Alleged Chlorine Gas Attacks", press release, 29 April 2014, available at: [www.opcw.org/news/article/opcw-to-undertake-fact-finding-mission-in-syria-on-alleged-chlorine-gas-attacks/](http://www.opcw.org/news/article/opcw-to-undertake-fact-finding-mission-in-syria-on-alleged-chlorine-gas-attacks/). The first report of the FFM explained that its establishment was based on the general authority of the OPCW director-general to seek to uphold at all times the object and purpose of the CWC, as reinforced by the relevant decisions of the OPCW Executive Council and UNSC Res. 2118, the general endorsement by the Executive Council of the FFM, and its acceptance by Syria through an exchange of letters on the subject between the director-general and the government of the Syrian Arab Republic, dated 1 and 10 May 2014. See OPCW, *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, 16 June 2014, available at: [www.opcw.org/fileadmin/OPCW/Fact\\_Finding\\_Mission/s-1191-2014\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1191-2014_e_.pdf). UNSC Res. 2118 required that OPCW personnel have "immediate and unfettered access to and the right to inspect, in discharging their functions, any and all sites, and ... immediate and unfettered access to individuals that the OPCW has grounds to believe to be of importance for the purpose of its mandate."

Access of the FFM to the affected sites, as well as hospitals and other places of interest, was guaranteed through an exchange of letters between the OPCW director-general and the Syrian government, as well as UN Security Council Resolution 2118.<sup>56</sup>

Like the Secretary-General's Mechanism, the FFM does not have a mandate to attribute responsibility.<sup>57</sup> However, in its third report of December 2014, the FFM concluded with "a high degree of confidence that chlorine ha[d] been used as a weapon" in the villages of Talmenes, Al Tamanah and Kafr Zita.<sup>58</sup> It was the first time that there had been a confirmed use of chemical weapons on the territory of a State party to the CWC. The OPCW Executive Council responded by adopting a decision in February 2015 which condemned the use of chemical weapons as a violation of international law, expressed the conviction that those responsible should be held accountable, and supported the continuation of the work of the FFM, in particular the study of all available information relating to allegations of the use of chemical weapons (i.e. not just chlorine, but also allegations related to sarin and mustard gas) in Syria.<sup>59</sup> The UN Security Council subsequently adopted a resolution that endorsed the OPCW Executive Council's decision, demanded that those responsible be held accountable, and reiterated that it would use measures under Chapter VII of the UN Charter in the event of non-compliance.<sup>60</sup>

Despite these decisions, chemical weapons attacks continued to take place in the ensuing months, most notably in the Idlib Governorate.<sup>61</sup> This prompted further UN Security Council action, discussed below. From 1 December 2015 to 20 November 2016, the FFM recorded sixty-five potential incidents of the use of chemical weapons reported in open sources, and actively investigated six of these incidents.<sup>62</sup> In

56 UNSC Res. 2118, para. 7.

57 EC-M-48/DEC.1, preambular para. 5; EC-M-50/DEC.1, preambular para. 6; UNSC Res. 2235, preambular para. 8.

58 OPCW, *Third Report of the OPCW Fact-Finding Mission in Syria*, S/1230/2014, 18 December 2014, available at: [www.opcw.org/fileadmin/OPCW/Fact\\_Finding\\_Mission/s-1230-2014\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1230-2014_e_.pdf).

59 OPCW, "Reports of the OPCW Fact-Finding Mission in Syria", Executive Council Decision EC-M-48/DEC.1, 4 February 2015, available at: [www.opcw.org/fileadmin/OPCW/EC/M-48/ecm48dec01\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/EC/M-48/ecm48dec01_e_.pdf). The OPCW Executive Council reiterated its support for the continuation of the FFM in its decision entitled "Further Reports of the OPCW Fact-Finding Mission in Syria", EC-M-50/DEC.1, 23 November 2016, available at: [www.opcw.org/fileadmin/OPCW/EC/M-50/en/ecm50dec01\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/EC/M-50/en/ecm50dec01_e_.pdf).

60 UNSC Res. 2209, 6 March 2015.

61 OPCW, *Report of the OPCW Fact-Finding Mission in Syria Regarding Alleged Incidents in the Idlib Governorate of the Syrian Arab Republic between 16 March and 20 May 2015*, S/1319/2015, 29 October 2015, available at: [www.opcw.org/fileadmin/OPCW/Fact\\_Finding\\_Mission/s-1319-2015\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1319-2015_e_.pdf).

62 OPCW, *Summary Update of the Activities Carried Out by the OPCW Fact-Finding Mission in Syria in 2016*, S/1445/2016, 27 December 2016, available at: [www.opcw.org/fileadmin/OPCW/Fact\\_Finding\\_Mission/s-1445-2016\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1445-2016_e_.pdf).

addition, the FFM investigated a number of alleged incidents reported by the Syrian government to the OPCW.<sup>63</sup>

The FFM investigated the widely reported large-scale use of chemical weapons in the Khan Shaykhun area of southern Idlib in April 2017 and concluded that “a large number of people, some of whom died, were exposed to sarin or a sarin-like substance”.<sup>64</sup> This incident – which reportedly resulted in over eighty deaths and 300 wounded, including many children – prompted US president Donald Trump to authorize a military strike on 7 April on Shayrat Airbase, based on US intelligence which determined that it was the base for the aircraft which carried out the chemical attack.<sup>65</sup> This was the first time that the United States had taken unilateral action and the first intentional strike against the Syrian government.

Responsibility for the Khan Shaykhun attack was strenuously denied both by the Syrian government and by Russia; both countries suggested that the chemical gas may have been released through an air strike by Syrian aircraft on a warehouse containing ammunition and equipment belonging to rebels near Khan Shaykhun,<sup>66</sup> or was staged by anti-Assad forces to look like a chemical weapons attack.<sup>67</sup> In an interview on 13 April, President Assad said the attack was “100 per cent fabrication” by the United States “working hand-in-glove with the terrorists”, intended to provide a pretext for the air strike on Shayrat Airbase.<sup>68</sup> He added: “You have a lot of fake videos now... We don’t know whether those dead children were killed in Khan Sheikhun. Were they dead at all?”

Unlike with the Ghouta attack in August 2013, since the FFM investigated the Khan Shaykhun incident, the JIM had a mandate to determine responsibility for the attack, which, at the time of writing, is the second-largest known use of chemical

63 With regard to an incident reported in the area of Al-Awamid in Aleppo on 2 August 2016, the FFM concluded that it could not confidently determine whether or not a specific chemical was used as a weapon in the incident. OPCW, *Report of the OPCW Fact-Finding Mission in Syria regarding the Incident of 2 August 2016 as Reported in the Note Verbale of the Syrian Arab Republic Number 69 Dated 16 August 2016*, S/1444/2016, 21 December 2016, available at: [www.opcw.org/fileadmin/OPCW/Fact\\_Finding\\_Mission/s-1444-2016\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1444-2016_e_.pdf). In another reported incident, the FFM confirmed that two female casualties were exposed to sulphur mustard in Um-Housh, Aleppo, on 16 September 2016, and that a recovered 217-mm mortar contained sulphur mustard. OPCW, *Report of the OPCW Fact-Finding Mission in Syria regarding the Incident of 16 September 2016 as Reported in the Note Verbale of the Syrian Arab Republic Number 113 Dated 29 November 2016*, S/1491/2017, 1 May 2017, available at: [www.opcw.org/fileadmin/OPCW/Fact\\_Finding\\_Mission/s-1491-2017\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1491-2017_e_.pdf).

64 OPCW, *Report of the OPCW Fact-Finding Mission in Syria Regarding an Alleged Incident in Khan Shaykhun, Syrian Arab Republic, April 2017*, S/1510/2017, 29 June 2017, available at: [www.opcw.org/fileadmin/OPCW/Fact\\_Finding\\_Mission/s-1510-2017\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1510-2017_e_.pdf).

65 “Syria War: US Launches Missile Strikes Following Chemical ‘Attack’”, *BBC News*, 7 April 2017, available at: [www.bbc.co.uk/news/world-us-canada-39523654](http://www.bbc.co.uk/news/world-us-canada-39523654).

66 “‘Chemical Weapons’: The Pipedream Excuse Used in Syria by Two US Administrations”, *Sputnik News*, 9 April 2017, available at: <https://sputniknews.com/politics/201704091052469244-us-syria-chemical-weapons-war-pretext/>.

67 Ben Kamisar, “Russia: Syrian Chemical Weapons Attack Could Be ‘Staged’”, *The Hill*, 14 April 2017, available at: <http://thehill.com/policy/international/328808-russia-questions-whether-syria-chemical-attack-was-staged>.

68 Josie Ensor, “‘Were the Children Dead at All?’ Assad Says Syria Chemical Attack ‘100 Per Cent Fabrication’”, *The Telegraph*, 13 April 2017, available at: [www.telegraph.co.uk/news/2017/04/13/chemical-weapons-experts-sent-turkey-investigate-alleged-syrian/?WT.mc\\_id=tmgoff\\_fb\\_tmg](http://www.telegraph.co.uk/news/2017/04/13/chemical-weapons-experts-sent-turkey-investigate-alleged-syrian/?WT.mc_id=tmgoff_fb_tmg).

weapons in Syria after the 2013 Ghouta incident. The JIM's conclusion – that Assad's forces were responsible for the attack – is discussed further below. Syria and Russia put pressure on the FFM to visit the town as part of its investigation, but the security conditions (the town was not under Syrian government control), together with other available credible evidence, weighed against an on-site visit.<sup>69</sup> The decision not to carry out an on-site inspection was used by certain pro-Russian media elements to put the FFM's findings in doubt.<sup>70</sup> A draft decision of the OPCW Executive Council proposed by Russia and Iran in November 2017 suggested that the OPCW should withhold "findings that are not based on the results of on-site investigations".<sup>71</sup> For its part, the JIM carried out an on-site inspection of Shayrat Airbase.<sup>72</sup>

Another large-scale use of chemical weapons was widely reported to have taken place on 7 April 2018 in the town of Douma in the Eastern Ghouta region.<sup>73</sup> More than forty persons were reported to have died in the attack. The FFM immediately began to investigate the attack, and this time it conducted two site visits. At the time of writing, it had not yet concluded what chemical agent, if any, was used.<sup>74</sup> Since the JIM's mandate had ended by the time of the Douma attack, the FFM's findings will not form the basis of a JIM conclusion on responsibility.

## The OPCW–UN Joint Investigative Mechanism

In the wake of the FFM's reports of 2014 determining that chemical weapons (chlorine) had been used repeatedly in Syria, as well as graphic reports in the news media and human rights groups depicting the aftermath of such attacks (including video footage shown during a meeting of the Security Council<sup>75</sup>), the Security Council on 7 August 2015 adopted Resolution 2235 establishing the JIM. The JIM had the mandate to identify "to the greatest extent feasible" individuals,

69 OPCW, above note 64, para. 7.

70 "Khan Shaykhun: We Must Establish the Truth", *RT*, 27 July 2017, available at: [www.rt.com/op-edge/397696-khan-shaykhun-syria-incident-investigation/](http://www.rt.com/op-edge/397696-khan-shaykhun-syria-incident-investigation/).

71 Anthony Deutsch, "After U.N. Veto, Russia Moves against Chemical Weapons Watchdog", *Reuters*, 21 November 2017, available at: [www.reuters.com/article/us-mideast-crisis-chemicalweapons/after-u-n-veto-russia-moves-against-chemical-weapons-watchdog-idUSKBN1DLIUF](http://www.reuters.com/article/us-mideast-crisis-chemicalweapons/after-u-n-veto-russia-moves-against-chemical-weapons-watchdog-idUSKBN1DLIUF). See "Statement by H. E. Ambassador A. V. Shulgин Permanent Representative of the Russian Federation to the OPCW at the Fifty-Sixth Meeting of the Executive Council Under Agenda Item 4", EC-M-56/NAT.7, 9 November 2017 (Russian Statement), p. 1, stating that "when conducting investigations, inspectors must visit the sites of the incidents. Otherwise, all material evidence finds its way to the FFM via 'third parties'. And that means a lack of compliance with the basic chain-of-custody principle for safeguarding evidence."

72 "U.N. and OPCW Investigators to Visit Syria Air Base in Gas Attack Probe", *NRT*, 13 October 2017.

73 "Syria War: What We Know about Douma 'Chemical Attack'", *BBC News*, 16 April 2018, available at: [www.bbc.com/news/world-middle-east-43697084](http://www.bbc.com/news/world-middle-east-43697084).

74 OPCW, "Update by the Director-General on the Deployment of the OPCW Fact-Finding Mission to Douma, Syrian Arab Republic, to the Executive Council at its Fifty-Ninth Meeting", EC-M-59/DG.2, 18 April 2018.

75 "Syria War: 'Chlorine' Attack Video Moves UN to Tears", *BBC News*, 17 April 2015, available at: [www.bbc.co.uk/news/world-middle-east-32346790](http://www.bbc.co.uk/news/world-middle-east-32346790).

entities, groups or governments perpetrating, organizing, sponsoring or otherwise involved in incidents involving the use of chemicals as weapons in Syria that have been the subject of findings by the FFM.<sup>76</sup> The Security Council reaffirmed that it would impose measures under Chapter VII of the UN Charter. The mandate of the JIM, initially created for just one year, was extended by the Security Council in Resolution 2319 until November 2017.<sup>77</sup> The new resolution required the JIM to place more emphasis on the use of chemical weapons by non-State actors by, *inter alia*, consulting with and briefing UN counterterrorism and non-proliferation bodies.<sup>78</sup>

In its reports of August and October 2016, the JIM found that Syrian armed forces used chemical weapons on 21 April 2014 at Talmenes (chlorine), on 16 March 2015 at Sarmin (chlorine) and on 16 March 2015 at Qmenas (chlorine).<sup>79</sup> It also found that Islamic State had used sulphur mustard in one incident on 21 August 2015, in the town of Marea.<sup>80</sup>

As noted above, the JIM concluded that the Syrian Air Force was responsible for the Khan Shaykhun sarin attack.<sup>81</sup> The JIM also found that Islamic State militants had carried out an attack using sulphur mustard in Um-Housh in Aleppo Province on 16 September 2016.<sup>82</sup> These findings came with high political stakes. The British foreign secretary, Boris Johnson, accused Russia of trying to cover up the use of sarin by the Syrian government, which he stated “can only undermine the global consensus against the use of chemical weapons”.<sup>83</sup> The US ambassador to the UN, Nikki Haley, stated that the report further “confirms what we have long known to be true”.<sup>84</sup> The day before the JIM report was released, the US secretary of State, Rex Tillerson, commented that the “reign of the Assad family” in Syria was coming to an end, and that the “only

76 UNSC Res. 2235, 7 August 2015, para. 5.

77 UNSC Res. 2319, 17 November 2016.

78 The Security Council encourages the JIM to consult appropriate UN counterterrorism and non-proliferation bodies, in particular the 1540 Committee and the ISIL (Da'esh) and Al-Qaida Sanctions Committee, in order to exchange information on non-State actor perpetration, organization, sponsorship or other involvement in use of chemicals as weapons in Syria, and requests the JIM to brief these bodies on relevant results of its work. UNSC Res. 2319, paras 4, 9.

79 *Third Report of the Organization for the Prohibition of Chemical Weapons—United Nations Joint Investigative Mechanism*, UN Doc. S/2016/738, 21 August 2016 (JIM Third Report), paras 54, 56; *Fourth Report of the Organization for the Prohibition of Chemical Weapons—United Nations Joint Investigative Mechanism*, UN Doc. S/2016/888, 21 October 2016, para. 19.

80 JIM Third Report, above note 79, para. 58.

81 According to media reports, the JIM report states that the JIM “is confident that the Syrian Arab Republic is responsible for the release of sarin at Khan Shaykhun”. “UN-OPCW Investigators ‘Confident’ Damascus Is to Blame for April Sarin Attack”, *RT*, 28 October 2017, available at: [www.rt.com/news/407901-opcw-jim-syria-chemical-attack/](http://www.rt.com/news/407901-opcw-jim-syria-chemical-attack/).

82 Rick Gladstone, “U.N. Panel Points Finger at Syria in Chemical Attack on Village”, *The New York Times*, 26 October 2017, available at: [www.nytimes.com/2017/10/26/world/middleeast/syria-chemical-khan-shekhoun.html](http://www.nytimes.com/2017/10/26/world/middleeast/syria-chemical-khan-shekhoun.html).

83 “Russia Undermining Action against Chemical Weapons, Says UK, Citing Syria ‘Cover Up’”, *Reuters*, 27 October 2017, available at: <https://uk.reuters.com/article/uk-mideast-crisis-syria-un-britain/russia-undermining-action-against-chemical-weapons-says-uk-citing-syria-cover-up-idUKKBN1CW1AN>.

84 “UN-OPCW Investigators ‘Confident’ Damascus Is to Blame for April Sarin Attack”, above note 81.

issue is how that can be brought about”.<sup>85</sup> Russia, for its part, stated that it had “started a thorough study of this paper, which is of very complex technical nature. Such work should be conducted with the involvement of relevant specialists from various departments.”<sup>86</sup>

On 24 October and 16 November 2017, Russia used its veto, for the ninth and tenth times respectively in relation to Syria, to block resolutions that would have extended the mandate of the JIM.<sup>87</sup> In explanation, the Russian ambassador stated that “[w]e need a robust, professional mechanism that will help to prevent the proliferation of the threat of chemical terrorism in the region and [the United States] need[s] a puppet-like structure to manipulate public opinion”, while the US ambassador commented that “Russia has killed the Joint Investigative Mechanism”.<sup>88</sup>

The end of the JIM meant that there was no international body – apart from the OPCW<sup>89</sup> – mandated to determine responsibility for the alleged chemical weapons attack that took place in Douma in April 2018. The United States, the United Kingdom, France and other governments quickly attributed the attack on the rebel-held town to the Syrian government, an accusation that was vehemently denied by Syria and its allies, leading to fractious exchanges at the UN Security Council and the OPCW. Each side voted against the other’s proposals to establish a new body mandated to investigate chemical attacks in Syria.<sup>90</sup> The United States, the United Kingdom and France launched punitive air strikes on 13 April 2018 against three Syrian research, storage and military targets.<sup>91</sup>

It remains to be seen whether the Security Council will make good on its pledge to take action under Chapter VII of the UN Charter, should chemical weapons be used in Syria in violation of Resolution 2118.<sup>92</sup> This is undoubtedly a question of politics, not law. As noted by the UN Secretary-General in his remarks on the subject:

85 “Tillerson: Assad Family Reign Coming to End, Only Issue Is How to Bring It About”, *RT*, 26 October 2017, available at: [www.rt.com/news/407855-tillerson-syria-assad-russia/](http://www.rt.com/news/407855-tillerson-syria-assad-russia/).

86 “UN-OPCW Investigators ‘Confident’ Damascus Is to Blame for April Sarin Attack”, above note 81.

87 Rodrigo Campos, “Russia Vetoes UN Resolution to Find Out Who Carried Out Chemical Weapons Attacks in Syria”, *The Independent*, 24 October 2017, available at: [www.independent.co.uk/news/world/europe/russia-syria-chemical-weapons-attack-sarin-un-resolution-china-moscow-assad-rebels-war-latest-a8017511.html](http://www.independent.co.uk/news/world/europe/russia-syria-chemical-weapons-attack-sarin-un-resolution-china-moscow-assad-rebels-war-latest-a8017511.html); “Syria: Russia Blocks Extension of Chemical Attacks Probe”, *BBC News*, 16 November 2016.

88 Michelle Nichols, “Russia Casts 10th U.N. Veto on Syria Action, Blocking Inquiry Renewal”, *Reuters*, 16 November 2017, available at: <https://ca.reuters.com/article/topNews/idCAKBN1DG31I-OCATP>.

89 Pursuant to the CWC, the Conference of States Parties is required to “review compliance with the Convention” and to “[t]ake the necessary measures to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of the Convention, in accordance with Article XII”: CWC, Art. VIII, paras 20, 21(k). See also Article VIII(35–36), requiring the Executive Council to consider concerns regarding compliance”, and Article XII.

90 Julian Borger, “Syria Chemical Attack: US and Russia Fail to Reach UN Agreement as Tensions Rise”, *The Guardian*, 20 April 2018, available at: [www.theguardian.com/world/2018/apr/10/russia-hits-back-over-syria-chemical-attack-with-call-for-un-inquiry](http://www.theguardian.com/world/2018/apr/10/russia-hits-back-over-syria-chemical-attack-with-call-for-un-inquiry).

91 H. Cooper, T. Gibbons-Neff and B. Hubbard, above note 10.

92 UNSC Res. 2118, para. 21; UNSC Res. 2235, para. 15. Notably, this statement was not reaffirmed in UNSC Res. 2319 extending the duration of the JIM.

As previously determined by the Security Council, the use of chemical weapons anywhere constitutes a threat to international peace and security and a serious violation of international law. I hope that the Security Council will now be able to come together and use the tools available to it to take concrete steps to ensure that those who have used chemical weapons are held accountable, in order to deter and put an end to those inhumane acts. There can be no impunity for such abhorrent attacks.<sup>93</sup>

The measures available under Chapter VII include a referral of the situation of Syria to the International Criminal Court (ICC)<sup>94</sup> and the establishment of an *ad hoc* international or hybrid tribunal to investigate and prosecute persons allegedly responsible for chemical weapons crimes.<sup>95</sup> In the event that the Security Council should fail to reach agreement on these types of measures, it could signal its clear recognition that the use of chemical weapons in any circumstances, by anyone, is an international crime, opening up further possibilities for national prosecutions. At the time of writing, despite the reports of the JIM assigning responsibility to both State and non-State actors for chemical weapons attacks in six separate incidents, any such action by the Security Council remains stymied by the likely use of the veto by Russia.

### OPCW Technical Secretariat additional inspections in Syria

With the Security Council gridlocked on Syria, the OPCW cautiously responded to the JIM's 2016 reports with the adoption by the Executive Council of a decision mandating further inspections by the Technical Secretariat at sites identified in the JIM's third and fourth reports as being involved in the weaponization, storage, delivery and use of toxic chemicals as weapons.<sup>96</sup> The decision further requires the Secretariat to "retain and promptly analyse any information or materials, including samples from the Syrian chemical weapons programme, that it considers relevant to existing or future allegations of chemical weapons possession or use".<sup>97</sup> In addition, the Secretariat is required to conduct inspections, including

93 "Letter Dated 28 April 2017 from the Secretary-General Addressed to the President of the Security Council – Progress in the Elimination of the Syrian Chemical Weapons Programme", S/2017/373, 28 April 2017.

94 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 13(b). A draft resolution that would have had the Security Council refer the situation of Syria to the ICC, proposed by France in 2014, was vetoed by two permanent members of the Security Council: the Russian Federation and China. "Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution", UN Doc. SC/11407, 22 May 2014.

95 The Security Council has established two *ad hoc* international criminal tribunals using its Chapter VII powers, the ICTY and the International Criminal Tribunal for Rwanda. The UN has also been instrumental in the establishment of hybrid courts such as the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, and the Special Panels in East Timor.

96 OPCW, "OPCW-United Nations Joint Investigative Mechanism Reports on Chemical Weapons Use in the Syrian Arab Republic", Executive Council Decision EC-83/DEC.5, 11 November 2016, para. 10.

97 *Ibid.*



sampling and analysis, twice a year at the Barzah and Jamrayah facilities of the Syrian Scientific Studies and Research Centre (SSRC).<sup>98</sup>

The Executive Council decision – a result of political compromise in an (unsuccessful) effort to find consensus – stops short of any findings or measures on accountability.<sup>99</sup> The additional inspections of sites identified by the JIM as being involved in the use of chemical weapons only relate to those incidents mentioned in the third and fourth reports (three incidents involving chlorine and one involving sulphur mustard). Since the FFM has already investigated the facts surrounding these incidents, the additional inspections would appear to be intended to inspect the point of origin of the weapons used. At the time of writing, the security situation has prevented any inspections at sites identified in the JIM's third and fourth reports from taking place.<sup>100</sup> A further Executive Council decision may be required to mandate the Secretariat to inspect sites connected to the other findings of the JIM, including in relation to the Khan Shaykhun incident, which involved sarin.

Inspections of the Barzah and Jamrayah SSRC facilities were conducted in February and March 2017 and February 2018.<sup>101</sup> The objective of these inspections was to determine whether activities at the facilities were consistent with the obligations of the Syrian Arab Republic under the CWC.<sup>102</sup> The SSRC has long been suspected by Western intelligence to have played a central role in the development of the Syrian chemical weapons programme. However, contrary to expectations, Syria did not declare the SSRC in its initial declaration or

98 *Ibid.*, para. 11.

99 The Executive Council decision was adopted by vote – a rare exception from the practice of consensus decision-making at the OPCW. A previous version of the decision advanced by the United States had contained stronger language based on the OPCW's prerogative to take action: see "Statement By H. E. Ambassador Kenneth D. Ward, Permanent Representative of the United States of America to the OPCW at the Eighty-Third Session of the Executive Council", EC-83/NAT.5, 11 October 2016, available at: [www.opcw.org/fileadmin/OPCW/EC/83/en/United\\_States\\_of\\_America\\_Statement\\_at\\_the\\_83nd\\_session\\_of\\_the\\_Executive\\_Council.pdf](http://www.opcw.org/fileadmin/OPCW/EC/83/en/United_States_of_America_Statement_at_the_83nd_session_of_the_Executive_Council.pdf). Russia had counter-proposed a decision that would have required Syria to undertake a national investigation into the allegations. See "Russian Federation Statement by H. E. Ambassador A. V. Shulgin Permanent Representative of The Russian Federation to the OPCW at the Eighty-Third Session of the Executive Council (on the Results of the Vote on the draft Decision of the Executive Council on Syria)", EC-83/NAT.20, 11 November 2016 (Statement of Russian Ambassador), available at: [https://www.opcw.org/fileadmin/OPCW/EC/83/en/ec83nat20\\_e\\_.pdf](https://www.opcw.org/fileadmin/OPCW/EC/83/en/ec83nat20_e_.pdf). Spain proposed the compromise decision, which was eventually adopted by a narrow majority.

100 OPCW, *Report by the Director-General: Status of Implementation of Executive Council Decision EC-83/DEC.5 (Dated 11 November 2016)*, EC-84/DG.25, 6 March 2017, para. 3, available at: [www.opcw.org/fileadmin/OPCW/EC/84/en/ec84dg25\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/EC/84/en/ec84dg25_e_.pdf).

101 OPCW, *Report by the Director-General: First Inspections at the Barzah and Jamrayah Syrian Scientific Studies and Research Centre Facilities in the Syrian Arab Republic in Accordance with Decision EC-83/DEC.5 (Dated 11 November 2016)*, EC-85/DG.16, 2 June 2017 (First Inspections Report), para. 3, available at: [www.opcw.org/fileadmin/OPCW/EC/85/en/ec85dg16\\_e\\_.pdf](http://www.opcw.org/fileadmin/OPCW/EC/85/en/ec85dg16_e_.pdf); OPCW, "Note by the Director-General: Progress in the Elimination of the Syrian Chemical Weapons Programme", EC-88/DG.1, 23 March 2018 (Director-General's Note), para. 11.

102 First Inspections Report, above note 101, para. 4; Director-General's Note, above note 101, para. 11.

subsequent submissions to the Secretariat.<sup>103</sup> During the inspections of the Barzah and Jamrayah SSRC facilities, the inspection team did not observe any activities inconsistent with Syria's obligations under the CWC.<sup>104</sup> It was reported that, on 7 September 2017, Israel<sup>105</sup> launched a military strike against another facility of the SSRC located at Masyaf, suspected by Western intelligence of producing chemical munitions, and a military camp nearby used to store short-range surface-to-surface missiles.<sup>106</sup> This facility is not covered by the Executive Council's decision. One of the targets of the air strikes conducted by the United States in concert with the United Kingdom and France following the alleged chemical weapons attack in Douma in April 2018 was the Barzah SSRC facility. The Pentagon stated that the site is now "nothing but rubble".<sup>107</sup>

The reference to "future allegations" in the Executive Council's decision suggests an ongoing need for the Secretariat to retain and analyze materials that it collects in the course of its activities, including those of the FFM and DAT. Should the results of the Secretariat's work indicate a violation of the CWC, this might provide a basis for further Executive Council action, as required by the CWC.<sup>108</sup> However, any such results would need to be clear and incontrovertible, in view of the heavily contested political context within which the Executive Council decision was adopted.

Most recently, the OPCW Conference of States Parties created a new mechanism within the Technical Secretariat that can identify "the perpetrators" of the use of chemical weapons in those instances in which the FFM determines or has determined that use or likely use occurred, and cases for which the JIM has not issued a report.<sup>109</sup> The mechanism is required to "preserve and provide information" to the mechanism created by the General Assembly in Resolution

103 Article III(1)(d) of the CWC requires States Parties to "specify the precise location, nature and general scope of activities of any facility ... that has been designed, constructed or used since 1 January 1946 primarily for development of chemical weapons ... [including] laboratories". In addition, para. 1(a)(iii) of Executive Council Decision EC-M/33/DEC.1 requires Syria to submit information to the Secretariat on its chemical weapons research and development facilities.

104 First Inspections Report, above note 101, para. 10; Director-General's Note, above note 101, para. 11.

105 Israel is one of only four States not party to the CWC, although it is a signatory. The other non-party States are Egypt, North Korea and South Sudan.

106 "Israeli Jets Hit Syria's Masyaf Chemical Site" – Reports, *BBC News*, 7 September 2017, available at: [www.bbc.co.uk/news/world-middle-east-41184867](http://www.bbc.co.uk/news/world-middle-east-41184867).

107 Keith Collins, Joe Ward and Karen Yourish, "What We Know About the Three Sites Targeted in Syria", *The New York Times*, 14 April 2018, available at: <https://www.nytimes.com/interactive/2018/04/14/world/middleeast/syria-airstrikes-chemical-weapons-sites.html>. The other two air strikes were reportedly directed at the Him Shinshar chemical weapons storage site and bunker.

108 Article VIII(35) of the CWC requires the Executive Council to consider any concerns regarding compliance, and cases of non-compliance, and, as appropriate, inform States Parties and bring the issue or matter to the attention of the Conference of States Parties. The Executive Council is further required to make recommendations to the Conference regarding measures to redress the situation and to ensure compliance. In cases of particular gravity and urgency, the Executive Council must bring the issue or matter, including relevant information and conclusions, directly to the attention of the UN General Assembly and Security Council (Art. VIII(36)).

109 OPCW Conference of States Parties, "Decision – Addressing the Threat from Chemical Weapons Use", C-SS-4/DEC.3, 27 June 2018, para. 10.

71/248, discussed below, as well as “any relevant investigatory entities established under the auspices of the United Nations”.<sup>110</sup>

## The International, Impartial and Independent Mechanism

The UN General Assembly has also been active – although not unanimously – in regard to the issue of chemical weapons use in Syria. A number of resolutions from 2014 to 2016 repeatedly condemned the use of chemical weapons in Syria and called for those responsible to be held accountable.<sup>111</sup>

On 21 December 2016, the UN General Assembly established by a majority vote the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM). In the resolution, the General Assembly expressed its appreciation to the JIM and recalled the JIM’s reports and the conclusions contained therein.<sup>112</sup> This suggests that one of the crimes in the mandate of the IIIM – which is tasked with collecting and analyzing evidence of violations of international humanitarian law and human rights law – is the use of chemical weapons.<sup>113</sup> This is confirmed in the report of the Secretary-General on the establishment of the IIIM, which notes that the three chemical weapons attacks on which the JIM made findings “may, depending on the circumstances, amount to war crimes and crimes against humanity”.<sup>114</sup> The JIM is specifically mentioned as a source from which the IIIM will collect evidence and relevant information.<sup>115</sup>

An emphasis on chemical weapons crimes committed in Syria would seem to be reflected in the recent work of the Human Rights Council-appointed Independent International Commission of Inquiry on the Syrian Arab Republic (CoI), which is a primary source of information for the IIIM. In its report of 8 August 2017, the CoI focused in large part on the chemical weapons attack on Khan Shaykhun, and – basing its position on the FFM report as well as interviews with survivors, medical personnel and others – concluded that the Syrian government was responsible for

110 *Ibid.*, para. 12.

111 UNGA Res. A/RES/69/67, 11 December 2014, preambular para. 8; UNGA Res. A/RES/70/41, 11 December 2015, preambular para. 6; UNGA Res. A/RES/71/69, 14 December 2016, op. para. 1; UNGA Res. A/RES/71/203, 19 December 2016, op. paras 3–9, 13, and preambular paras 8, 13 30. See also *ibid.*, op. para. 42, encouraging the Security Council to take “appropriate action to ensure accountability, noting the important role that the International Criminal Court may play in this regard”.

112 UNGA Res. A/RES/71/248, 21 December 2016, preambular para. 5.

113 *Ibid.*, op. para. 4.

114 *Report of 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*, UN Doc. A/71/755, 19 January 2017, para. 6.

115 *Ibid.*, para. 12. See also Annex, “Terms of Reference of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011”, para. 5(a).

the attack.<sup>116</sup> The CoI also published a map of Syria with recorded chemical weapons attacks.<sup>117</sup> In its report, the CoI makes no mention of the JIM or the fact that the latter body is specifically tasked with determining responsibility for chemical weapons attacks confirmed by the FFM in Syria. This raises some questions about the risks of having overlapping mandates of independent UN bodies and the need for coordination. If the JIM had produced findings that were different to the CoI about responsibility for the Khan Shaykhun attack or other attacks, this may have also raised doubts about the credibility of both the CoI and the JIM. It may also have complicated the job of the IIIM and any courts seeking to rely on the evidence adduced by that body. As it turned out, both the CoI and the JIM concluded that the Syrian government was responsible for the Khan Shaykhun attack.

This was not the first time that the CoI had attributed responsibility for chemical weapons attacks in Syria. In its report of 13 August 2014, the CoI found that “[r]easonable grounds exist to believe that chemical agents, likely chlorine, were used on Kafr Zeita, Al-Tamana’a and Tal Minnis in eight incidents within a 10-day period in April [2014]”, and that “[t]here are also reasonable grounds to believe that those agents were dropped in barrel bombs from government helicopters flying overhead”.<sup>118</sup> The CoI had previously reported on 12 February 2014 that the chemical agents used in the Khan-al-Assal attack bore “the same unique hallmarks as those used in Al-Ghouta”. The report also indicated that the perpetrators of the Ghouta attack “likely had access to the chemical weapons stockpile of the Syrian military as well as the expertise and equipment necessary to manipulate safely large amount of chemical agents”. The CoI nonetheless found that its “evidentiary threshold” was not met in regard to identifying the perpetrators of the Ghouta chemical attacks.<sup>119</sup>

## The International Partnership against Impunity

On 23 January 2018, the International Partnership against Impunity for the Use of Chemical Weapons, a proposal of France, was endorsed by 29 States. The Partnership is an intergovernmental initiative “to supplement the international mechanisms to combat the proliferation of chemical weapons” and deals “exclusively with the issue of impunity for the perpetrators of chemical attacks worldwide”.<sup>120</sup>

116 See CoI, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/36/55, 8 August 2017, para. 77, finding that “there are reasonable grounds to believe that Syrian forces attacked Khan Shaykhun with a sarin bomb at approximately 6.45 a.m. on 4 April, constituting the war crimes of using chemical weapons and indiscriminate attacks in a civilian inhabited area. The use of sarin by Syrian forces also violates the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and Security Council resolution 2118 (2013)”.

117 See the infographic available at: [www.ohchr.org/SiteCollectionImages/Bodies/HRCouncil/IICISyria/COISyria\\_ChemicalWeapons.jpg](http://www.ohchr.org/SiteCollectionImages/Bodies/HRCouncil/IICISyria/COISyria_ChemicalWeapons.jpg).

118 CoI, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/27/60, 13 August 2014, para. 118.

119 CoI, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, 12 February 2014, paras 127–129.

120 International Partnership against Impunity for the Use of Chemical Weapons website, available at: [www.noimpunitychemicalweapons.org/en-.html](http://www.noimpunitychemicalweapons.org/en-.html).

Participating States have committed to collecting, compiling and facilitating the sharing of information in order to hold perpetrators to account, and to helping States in need to build the capacity to prosecute perpetrators.<sup>121</sup> While the Partnership is not solely concerned with Syria, its mandate appears to overlap somewhat with that of the IIIM, discussed above, in respect of chemical weapons attacks in Syria. If the Partnership works in concert with the IIIM, it may prove to be a useful platform for information-sharing, and may provide a boost to the IIIM's capacity to fulfil its mandate with respect to chemical weapons crimes in Syria.

## Options for accountability

The UN and OPCW's investigations have confirmed that chemical weapons have been used during the armed conflict in Syria, yet accountability remains elusive, and responsibility contested. Every party in this armed conflict has accused others of using chemical weapons, and no party has admitted to using them. The JIM's findings on responsibility – which should have been authoritative – have not been unanimously accepted, with Damascus and Russia expressing criticism of its methodology and conclusions.<sup>122</sup> As a result, the Security Council, which created the JIM, has yet to take any action on the JIM's conclusions, despite repeatedly undertaking to do so in its own resolutions. A draft Security Council resolution that would have imposed sanctions on a number of Syrian military officials and entities for the incidents involving chlorine as found by the JIM was vetoed by Russia and China on 28 February 2017.<sup>123</sup> In explanation of the veto, Russian president Vladimir Putin stated: "As for sanctions against the Syrian leadership, I think the move is totally inappropriate now. It does not help, would not help the negotiation process. It would only hurt or undermine confidence during the process."<sup>124</sup> As noted above, on 24 October and 16 November 2017, Russia again used its veto to block resolutions that would have extended the mandate of the JIM.<sup>125</sup>

Meanwhile, an information war about who is responsible for using chemical weapons in Syria continues to play out in the international news media, sowing further doubt and confusion in the general public's minds about each claim and counter-claim on the issue.<sup>126</sup> One article in *Foreign Policy* recently

121 "Launch of the International Partnership against Impunity for the Use of Chemical Weapons (23 January 2018)", France Diplomatie – Ministry of Foreign Affairs and International Development, available at: [www.diplomatie.gouv.fr/en/french-foreign-policy/disarmament-and-non-proliferation/events/article/chemical-weapons-ending-impunity-23-01-18](http://www.diplomatie.gouv.fr/en/french-foreign-policy/disarmament-and-non-proliferation/events/article/chemical-weapons-ending-impunity-23-01-18).

122 The Russian ambassador to the OPCW said of the JIM's reports: "These conclusions are not convincing, they are superficial, and they were produced by dubious methodology." See Statement of Russian Ambassador, above note 99. See also Russian Statement, above note 71.

123 Somini Sengupta, "Russia and U.S. Clash Over Syria in Security Council Vote", *The New York Times*, 28 February 2017, available at: [www.nytimes.com/2017/02/28/world/middleeast/united-nations-security-council-syria-sanctions-russia-trump.html](http://www.nytimes.com/2017/02/28/world/middleeast/united-nations-security-council-syria-sanctions-russia-trump.html).

124 *Ibid.*

125 See above notes 86–88.

126 See, for example, Seymour M. Hersh, "Whose Sarin?", *London Review of Books*, Vol. 35, No. 24, 19 December 2013, available at: [www.lrb.co.uk/v35/n24/seymour-m-hersh/whose-sarin](http://www.lrb.co.uk/v35/n24/seymour-m-hersh/whose-sarin).

described in detail and set out an organigram of those allegedly responsible in the Syrian government for the use of chemical weapons in Syria.<sup>127</sup> Another recent article in *RT* recalled Moscow's warning that the FFM report "had many flaws and could not be deemed conclusive" and underlined that the "JIM mission never actually visited the site of the alleged attack, ... relied on evidence collected by the militant groups controlling the area ... [and] also failed to properly inspect the Shayrat Airbase ... [by not] collect[ing] ground samples there".<sup>128</sup> Countering the claim that the Syrian government is responsible for the chemical weapons attacks against anti-governmental forces and supporting civilian populations using chlorine stocks that were never declared or verified, or sarin from an undeclared stockpile, is an alternative narrative that chemical weapons were smuggled into Syria, possibly from Turkey, by forces seeking to depose Assad, in order to stage the use of a weapon that would be blamed on the Syrian government and would trigger international intervention in the war against Assad's forces.<sup>129</sup>

With conflicting information and significant political and legal ramifications emanating from this lack of an internationally accepted truth, what should be done? From an international law perspective, it is clear what the response to these allegations should be. The use of chemical weapons in armed conflict is a war crime, and war crimes must be investigated; those suspected to be responsible must be prosecuted and, if found guilty, punished.<sup>130</sup> The hyper-political context of Syria and the controversial issue of chemical weapons use, together with the groundwork already laid by the existing international mechanisms, strongly suggest that an independent international criminal tribunal would be the most appropriate forum for properly investigating and prosecuting the perpetrators.

## The International Criminal Court

One option would be for the Security Council to refer the situation of Syria to the ICC, in exercise of its Chapter VII powers.<sup>131</sup> Under Article 13(b) of the Rome

127 Gregory Koblentz, "Syria's Chemical Weapons Kill Chain", *Foreign Policy*, 7 April 2017, available at: <http://foreignpolicy.com/2017/04/07/syrias-chemical-weapons-kill-chain-assad-sarin/>.

128 "Russia Vetoes UNSC Resolution on Renewing Syria Chemical Weapons Probe", *RT*, 24 October 2017, available at: [www.rt.com/news/407641-russia-veto-chemical-un-resolution/](http://www.rt.com/news/407641-russia-veto-chemical-un-resolution/).

129 See, for example, S. M. Hersh, above note 126.

130 Rule 74 of the ICRC Customary International Law Study, above note 29, states that "[t]he use of chemical weapons is prohibited" both in international and non-international armed conflicts. Rule 156 states that "[s]erious violations of international humanitarian law constitute war crimes". Article 3(a) of the Statute of the ICTY provided jurisdiction over "employment of poisonous weapons or other weapons calculated to cause unnecessary suffering". "Employing poison or poisoned weapons" and "[e]mploying asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" constitutes a war crime in international and non-international armed conflicts under the Rome Statute, Articles 8(2)(b)(xvii–xviii) and 8(2)(e)(xiii–xiv) respectively.

131 Syria is not a party to the Rome Statute. If Syria had been a party to the Statute, the ICC may have been able to exercise jurisdiction if Syria had been found to be unable or unwilling to prosecute the crimes under the Statute. See Rome Statute, Arts 12(2), 13, 17.

Statute of the ICC, the Security Council may refer to the Prosecutor a situation in which one or more of the crimes within the jurisdiction of the ICC appears to have been committed, acting under Chapter VII of the UN Charter. While in some ways the ICC would appear to be the obvious forum for adjudication of these war crimes, there are two main problems with this option. The first problem is political. A Security Council resolution referring the situation of Syria to the ICC would almost certainly be vetoed by Russia, and possibly China. This was already tested in 2014, when a draft resolution backed by thirteen members of the Security Council that would have referred the situation in Syria to the ICC was vetoed by Russia and China.<sup>132</sup>

The second problem is legal. The use of chemical weapons is not specifically listed as a crime under the jurisdiction of the ICC. As noted above, the ICC has jurisdiction over the war crime of using “poison or poisoned weapons” or “asphyxiating, poisonous or other gases” committed in international and non-international armed conflicts.<sup>133</sup> While at first glance it would appear that most uses of chemical weapons would fall within these categories, the drafting history of the Rome Statute suggests that chemical weapons were deliberately excluded from the jurisdiction of the ICC.<sup>134</sup> During the Rome Conference, the inclusion of chemical weapons within Article 8 was debated.<sup>135</sup> A prior draft of Article 8 included a specific reference to “[c]hemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction”. Despite the deliberate exclusion of any reference to chemical weapons as defined in the CWC, it has been persuasively argued that “poison or poisoned weapons” and “asphyxiating, poisonous or other gases, and ... all analogous liquids materials or devices” – language which derives directly from the 1925 Geneva Protocol – functionally includes all chemical weapons.<sup>136</sup>

The draft Statute also contained a broad prohibition on weapons that cause unnecessary suffering and superfluous harm and that are inherently indiscriminate. The nuclear weapons possessor States objected to this clause, since it would also prohibit the use of nuclear weapons. In a compromise move to appease some non-nuclear States which viewed biological and chemical weapons as the “poor

132 “Russia, China Block Security Council Referral of Syria to International Criminal Court”, *UN News Centre*, 22 May 2014.

133 Rome Statute, Arts 8(2)(b)(xvii–xviii), 8(2)(e)(xiii–xiv).

134 See Dapo Akande, “Can the ICC Prosecute for Use of Chemical Weapons in Syria”, *EJIL: Talk!*, 23 August 2013, available at: [www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/](http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/).

135 For a discussion, see Amal Alamuddin and Philippa Webb, “Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute”, *Journal of International Criminal Justice*, Vol. 8, No. 5, 1 November 2010, pp. 1227–1228.

136 See, for example, Ralf Trapp, “The Investigation into the Islamic State and Chemical Weapons”, *Just Security*, 27 October 2015, available at: [www.justsecurity.org/27116/investigation-islamic-state-chemical-weapons/](http://www.justsecurity.org/27116/investigation-islamic-state-chemical-weapons/); Alex Whiting, “The International Criminal Court, the Islamic State, and Chemical Weapons”, *Just Security*, 4 November 2015, available at: [www.justsecurity.org/27359/icc-islamic-state-chemical-weapons/](http://www.justsecurity.org/27359/icc-islamic-state-chemical-weapons/). See, *contra*, Kevin Jon Heller, “The Rome Statute Does Not Criminalise Chemical and Biological Weapons”, *Opinio Juris*, 5 November 2015, available at: <http://opiniojuris.org/2015/11/05/why-the-rome-statute-does-not-criminalise-chemical-and-biological-weapons/>.

man's" weapons of mass destruction, the clauses on biological and chemical weapons were removed, alongside the removal of the broad general provision capable of covering nuclear weapons.<sup>137</sup> Instead, a placeholder was inserted that might allow for these weapons to be later added separately. Article 8(2)(b)(xx) provides jurisdiction over the war crime of using "weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict". This provision will only become enforceable once an annex listing such weapons is agreed upon. No agreement has yet been reached. Even were such an annex listing chemical weapons agreed to, the provision only appears in the list of war crimes for international armed conflicts, and therefore might not be applicable to instances of the use of chemical weapons in Syria.

Should the ICC decide that the use of chemical weapons does contravene the prohibition against using "poison or poisoned weapons" or "asphyxiating, poisonous or other gases" in Article 8(2)(e)(xiii–xiv) of the Rome Statute, a further jurisdictional issue arises. These provisions were added to the list of war crimes committed in non-international armed conflict in the Rome Statute at the Kampala Review Conference in 2010, pursuant to Article 121(5) of the Statute. This provision states that the amendment will come into force for each State Party that ratifies it. For States Parties that have not ratified the amendment, "the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory". Syria is not a party to the Rome Statute, and it is not clear from the text of the Statute whether the Security Council's referral of a situation would cover crimes added by an Article 121(5) amendment. An argument can be made that since Article 121(5) seeks to provide jurisdiction based on State consent, and Security Council referrals are not based on State consent, Article 121(5) cannot logically apply to Security Council referrals.<sup>138</sup> This interpretation would best comport with the functionality of Security Council referrals in the Rome Statute. However, it remains to be seen how the ICC would determine this matter.<sup>139</sup>

The use of chemical weapons in Syria could theoretically be prosecuted as "violence to life and person" against persons taking no active part in hostilities or those members of the armed forces who are *hors de combat*, or "intentionally directing attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities" in Article 8(2)(c)(i) or 8(2)(e)(i) of the Statute. But to establish guilt for these charges, it would have to be proven that the attacks were directed against civilians or those not participating directly in hostilities. Such elements do not capture the full criminality of using chemical weapons, which are banned even when directed against members of the armed forces.

137 See William Schabas, "Chemical Weapons: Is It a Crime?", *PhD Studies in Human Rights*, 23 April 2013, available at: <http://humanrightsdoctorate.blogspot.nl/2013/04/chemical-weapons-is-it-crime.html>.

138 See D. Akande, above note 134.

139 *Ibid.*



An alternative to prosecuting the use of chemical weapons as a war crime under the Rome Statute would be to prosecute the use of chemical weapons as a crime against humanity under Article 7 of the Statute. This would be possible where such usage results in one of the proscribed acts, such as murder, extermination, persecution<sup>140</sup> or other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health, and the act is perpetrated as part of a widespread or systematic attack upon a civilian population. One instance of the use of chemical weapons that is perpetrated in the context of multiple acts of violence against a civilian population in furtherance of an organizational policy to commit the attack could amount to a crime against humanity.<sup>141</sup> A series of usages of chemical weapons might also amount to a crime against humanity. Given the repeated use of chemical weapons in Syria as confirmed by the reports of the FFM and the JIM, as well as reports of its use in combination with other attacks on the civilian population,<sup>142</sup> prosecuting chemical weapons use as a crime against humanity might be a viable prosecutorial option, provided all the elements of the crime could be proven.

The use of chemical weapons could also theoretically be prosecuted as a crime of genocide under Article 8 of the Rome Statute, where such an act constituted one of the proscribed acts, such as killing members of the targeted group or causing serious bodily harm, and was accompanied with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. The use of chemical weapons has been prosecuted in other courts as a means of carrying out genocidal acts.<sup>143</sup> However, the facts surrounding the use of chemical weapons in Syria do not appear to evidence an intent on the side of any party to the conflict to destroy a national, ethnical, racial or religious group as such. Rather, the attacks would appear to be targeting political opponents, enemy combatants, or civilians living in rebel-held territory. It is doubtful, therefore, that genocide could be proven in relation to the use of chemical weapons in Syria.

140 Persecution could be proved if the person or persons are targeted by chemical weapons by reason of the identity of a group or collectivity or targeted as the group or collectivity as such. ICC, *Elements of Crimes*, Art. 7(1)(h)(2).

141 Ban Ki-moon, as former Secretary-General of the UN, stated that the use of any chemical weapons in Syria would amount to a “crime against humanity” and there would be “serious consequences” for the perpetrators. “Use of Chemical Weapons in Syria Would Be ‘Crime against Humanity’ – Ban”, *UN News Centre*, 23 August 2013. Similarly, President Obama stated that the use of chemical weapons would constitute a crime against humanity. White House Office of the Press Secretary, “Remarks by the President in Address to the Nation on Syria”, 10 September 2013, available at: [www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria](http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria).

142 See Human Rights Watch, “Syria: Coordinated Chemical Attacks on Aleppo”, 13 February 2017, available at: [www.hrw.org/news/2017/02/13/syria-coordinated-chemical-attacks-aleppo](http://www.hrw.org/news/2017/02/13/syria-coordinated-chemical-attacks-aleppo).

143 In the *Anfal* case, the Iraqi Special Tribunal found Ali Hassan al-Majid, the secretary-general of the Northern Bureau of the Ba’ath Party responsible for commanding all State agencies in the Kurdish-populated region of the country in 1987–88, guilty of committing genocide against the Kurds using chemical weapons. Iraqi High Tribunal, *Farhan Mutlak Al Jibouri, Sultan Hashim Ahmad Al Tae’e, Hussein Rashid Mohammed and Ali Hasan Al Majid v. the General Prosecutor*, Appeals Commission, 4 September 2007, available at: [www.worldcourts.com/ist/eng/decisions/2007.09.04\\_Prosecutor\\_v\\_al\\_Majid\\_et\\_al.pdf](http://www.worldcourts.com/ist/eng/decisions/2007.09.04_Prosecutor_v_al_Majid_et_al.pdf).

## *Ad hoc* international criminal tribunal

Another option would be for the Security Council to adopt a resolution under its Chapter VII powers creating an *ad hoc* international criminal tribunal for chemical weapons in Syria. Creating a tribunal dealing with chemical weapons use in Syria would be a logical next step for the Security Council following the JIM's reports, which make findings on accountability. The Security Council has repeatedly affirmed "that the use of chemical weapons constitutes a serious violation of international law", determined "that the use of chemical weapons anywhere constitutes a threat to international peace and security",<sup>144</sup> stressed "that those individuals responsible for any use of chemical weapons must be held accountable",<sup>145</sup> and threatened to use its Chapter VII powers in case of the use of chemical weapons.<sup>146</sup> Just as the Security Council did in the case of the former Yugoslavia and Rwanda, the Security Council could establish an *ad hoc* international criminal tribunal for Syria in exercise of its Chapter VII powers. Such a tribunal could be focused on determining accountability for the use of chemical weapons, building upon the previous relevant resolutions, particularly Resolution 2235 establishing the JIM.

The JIM's findings arguably provide at least reasonable grounds to believe who is responsible for the chemical weapons attacks in Syria, sufficient for the issuance of an arrest warrant. If the JIM's conclusions are flawed, as the Syrian and Russian governments have claimed, a properly constituted investigation and trial is arguably the best way to collect and assess the evidence, allowing arguments to be canvassed in a transparent, fair and legal process. Without such a judicial follow-up process, the JIM's reports will be the last official word on the matter – which is presumably not the best outcome for Damascus, Russia or other Syrian allies.

However, for the Security Council to pass such a resolution, there would still need to be unanimity from the five permanent members. Should Russia or China fail to be convinced of the need or advantage of establishing an *ad hoc* international criminal tribunal on chemical weapons crimes, such a resolution will never be adopted.

144 UNSC Res. 2118, 27 September 2013.

145 *Ibid.*, preambular para. 8 and op. paras 1, 5, 15 (notably, the language changes slightly to "should be held accountable" in op. para. 15); UNSC Res. 2209, 6 March 2015, preambular para. 8. See also operative para. 6 of UNSC Res. 2209, in which the UN Security Council stressed again "that those individuals responsible for any use of chemicals as weapons, including chlorine or any other toxic chemical, must be held accountable". In addition, see UNSC Res. 2235, op. para. 4 (reiterating that "those individuals, entities, groups, or governments responsible for any use of chemicals as weapons, including chlorine or any other toxic chemical, must be held accountable") and UNSC Res. 2319, preambular para. 4 ("reaffirming that the use of chemical weapons constitutes a serious violation of international law and reiterating that those individuals, entities, groups or Governments responsible for any use of chemical weapons must be held accountable").

146 UNSC Res. 2118, op. para. 21; UNSC Res. 2209, op. para. 7; UNSC Res. 2235, para. 15.

## National prosecutions

National courts can also carry out prosecutions, but national jurisdictions are dependent on having applicable and relevant legislation in place, as well as the ability and will to investigate a complex crime that may require extradition and judicial assistance agreements. An international criminal tribunal would likely be better placed in terms of resources and legitimacy required to establish the “truth” with regard to the use of chemical weapons in Syria. Nonetheless, national prosecutions may present a viable option if jurisdiction is founded.

There is near-universal adoption of the CWC,<sup>147</sup> Article VII of which requires criminalization of the use of chemical weapons at the national level. As of 31 July 2016, 145 States Parties (76%) had prohibitions in place, while 143 (74%) had specific penalties. 127 States Parties (66%) had provisions for extraterritorial jurisdiction (for crimes committed by nationals).<sup>148</sup> Moreover, the most comprehensive prohibition against using chemical weapons is found in Article I(1)(b) of the CWC. The CWC prohibits States Parties from using chemical weapons in all circumstances, as well as developing, producing, otherwise acquiring, stockpiling and retaining or transferring them (directly or indirectly) to anyone, or assisting, encouraging or inducing, in any way, anyone to engage in any of those activities.<sup>149</sup> This broad category of possible criminal activity covers a range of direct and indirect perpetrators. However, the CWC only requires national legislation to cover crimes that are committed on a State Party’s territory or by its nationals. Therefore, in regard to the use of chemical weapons in Syria, this means that basically only Syria could investigate and prosecute these crimes (a point made by the Russian ambassador in his statement to the 83rd session of the OPCW Executive Council).<sup>150</sup> If foreign fighters were involved in the use of chemical weapons in Syria, the States of nationality of the offenders would have jurisdiction pursuant to Article VII of the CWC. However, it is likely that the majority of those involved in these crimes are Syrian nationals and only a small number of CWC States Parties have legislated to allow for the exercise of universal jurisdiction over chemical weapons crimes, regardless of the location of the offence or the nationality of the offender.<sup>151</sup>

147 OPCW, *Note by the Technical Secretariat: Status of Participation In The Chemical Weapons Convention as at 17 October 2015*, S/1315/2015, 19 October 2015, available at: [www.opcw.org/fileadmin/OPCW/S\\_series/2015/en/s-1315-2015\\_e.pdf](http://www.opcw.org/fileadmin/OPCW/S_series/2015/en/s-1315-2015_e.pdf). There are only four non-party States: Egypt, Israel (a signatory), North Korea and South Sudan (which has indicated an intention to accede to the CWC).

148 OPCW, *Report by the Director-General: Overview of the Status of Implementation of Article VII of the Chemical Weapons Convention as at 31 July 2016*, EC-83/DG.11, C-21/DG.11, 11 September 2016, paras 19–21.

149 CWC, Art. I(1)(a–b).

150 See above note 122.

151 The following States have legislation that would appear to support a prosecution for chemical weapons crimes under universal jurisdiction: Sweden (Amended Criminal Code, Chap. 2(3)); Belarus (Penal Code of Belarus, Art. 6); Finland (Penal Code Extract 39/1889, Section 7); Greece (Law No. 2991, Section 5, Art. 4); Indonesia (Law No. 9 of 2008, Art. 3, Chap. I and Art. 28, Chap. V); Liberia (Chemical Weapons Act of 2008); Republic of Serbia (Criminal Code 85/2005, Arts 7–9).

A higher proportion of national courts may be able to exercise universal jurisdiction over chemical weapons crimes in Syria by prosecuting these acts as a war crime, crime against humanity or genocide. In particular, States that are party to the Rome Statute, and which have ratified the Kampala Amendment, may have legislation in place that would allow them to prosecute those suspected of using chemical weapons in Syria, regardless of their nationality.<sup>152</sup> But other States may also have applicable legislation that allows them to prosecute persons suspected of serious violations of international humanitarian law, such as attacks on civilians, indiscriminate attacks and murder.

National prosecutions are supported by the practice of the OPCW policy-making organs, the Conference of States Parties and the Executive Council, which have consistently “underlined that the use of chemical weapons by anyone in any circumstances would be reprehensible and completely contrary to the legal norms and standards of the international community”.<sup>153</sup> In the Ieper Declaration adopted on 21 April 2015, the States party to the CWC unanimously determined that “any use of chemical weapons anywhere, at any time, by anyone, under any circumstances is unacceptable and would violate the legal norms and standards of the international community”, and expressed the “strong conviction that those individuals responsible for the use of chemical weapons should be held accountable”.<sup>154</sup> This pronouncement has been repeated in a number of operative decisions of the Executive Council.<sup>155</sup> Regional statements and national statements by States Parties at meetings of the policy-making organs have reiterated these sentiments.<sup>156</sup> Sixty-one States Parties made a joint statement at the 2016 Conference of States Parties that expressed the “strong conviction that every actor involved in these chemical weapons attacks must be held accountable”.<sup>157</sup> In 2017,

152 As of October 2017, thirty-four States Parties have ratified the document. See: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10-a&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-a&chapter=18&clang=_en). The amendment comes into force one year after the State Party has accepted the amendment.

153 *Report of the Third Review Conference of the CWC*, RC-3/3\*, 19 April 2013.

154 Ieper Declaration, 21 April 2015, available at: <https://ieper100.org/commemoration/ieper-declaration/>.

155 See OPCW, “Destruction of Syrian Chemical Weapons”, Executive Council Decision EC-M-33/DEC.1, 27 September 2013, preambular para. 1; OPCW, “Reports of the OPCW Fact-Finding Mission in Syria”, Executive Council Decision EC-M-48/DEC.1, 4 February 2015, preambular para. 1, op. paras 2–4; OPCW, “Further Reports of the OPCW Fact-Finding Mission in Syria”, Executive Council Decision EC-M-50/DEC.1, 23 November 2015, preambular para. 1, op. paras 3–5; OPCW, “OPCW-United Nations Joint Investigative Mechanism Reports on Chemical Weapons Use in the Syrian Arab Republic”, Executive Council Decision EC-83/DEC.5, 11 November 2016, paras 3–4; OPCW, “Decision Addressing the Threat Posed by the Use of Chemical Weapons by Non-State Actors”, Executive Council Decision EC-86/DEC.9, 13 October 2017, preambular para. 3, op. paras 3, 5–8.

156 See, for example, “Statement on Behalf of the European Union: Statement Delivered by Mr Jacek Bylica, Special Envoy for Non-Proliferation and Disarmament”, C-21/NAT.5, 28 November 2016: “The EU reiterates its strong belief that the use of chemical weapons by anyone, including non-State actors, anywhere and under any circumstances is abhorrent and must be rigorously condemned and that those responsible for such acts must be held accountable. The use of chemical weapons constitutes a violation of international law, a war crime, and a crime against humanity.” Similar statements were made by Finland, Germany, India, Ireland, Singapore and Switzerland.

157 C-21/NAT.17, 30 November 2016.

one State Party unequivocally declared that the “use of chemical weapons by anyone, anywhere at any time constitutes an international crime”.<sup>158</sup>

There have been a number of cases at the national level prosecuting non-State actors for the use or possession of chemical weapons. Many of these cases relied on the implementing legislation of the CWC, often in conjunction with terrorism charges.<sup>159</sup> The use of chemical weapons has also been prosecuted at the national level as a war crime, genocide or crime against humanity. In the *Zyklon B* case before the British Military Court at Hamburg, the owner and second-in-command of the firm which arranged the supply of the poison gas to the SS were convicted of the war crime of supplying “poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used”.<sup>160</sup> 4.5 million persons were exterminated through the use of Zyklon B in Auschwitz/Birkenau alone.<sup>161</sup> The case is instructive as to how the use of a chemical weapon as a tool for the “wholesale extermination of human beings”<sup>162</sup> can be prosecuted as an international crime.<sup>163</sup>

The use of chemical and biological weapons by Japan during World War II, through Units 731 and 100 in China,<sup>164</sup> was prosecuted domestically in the Soviet

158 Statement by Sweden, 54th meeting of the Executive Council of the OPCW, 13 April 2017. See also Statement by the Permanent Representative to the OPCW of Switzerland at the Conference of States Parties, 2016: “It is of utmost importance that the perpetrators of these grave violations of international law, which can constitute war crimes and crimes against humanity, be held accountable.”

159 See, for example, United Kingdom, *R v. Davison* (Unreported, Newcastle Crown Court, 14 May 2010) (defendant linked to a white supremacist group produced a quantity of ricin sufficient to kill nine persons in violation of Section 2(1)(b) of the Chemical Weapons Act 1996 (United Kingdom)); United States, *United States v. Levenderis*, 806 F.3d 390 (2015) (defendant produced a quantity of ricin – although there was no link to a terrorist group, the Court found that the high lethality of the chemical weapon justified the prosecution under the Chemical Weapons Implementation Act 1998 (United States)); United States, *Bond v. United States*, 572 US (2014); United States, *United States v. Fries aka Burns*, 781 F.3d 1137 (2015) (concerning the production and use of a chemical weapon in violation of the Chemical Weapons Implementation Act 1998 (United States) related to the home-made production and use of a chlorine chemical device which produced a huge cloud that required the evacuation of the neighbourhood); United States, *United States v. Ghane*, 673 F.3d 771 (8th Cir.2012) (defendant possessed enough potassium cyanide to kill 450 people); United States, *United States v. Crocker*, 260 F. App’x 794 (6th Cir.2008) (defendant attempted to acquire VX nerve gas and chlorine gas as part of a plot to attack a federal courthouse); United States, *United States v. Krar*, 134 F. App’x 662 (5th Cir.2005) (*per curiam*) (defendant possessed sodium cyanide); United Kingdom, *United Kingdom v. Ali* (Unreported, Central Criminal Court (Old Bailey), 18 September 2015 (defendant attempted to acquire ricin on the “dark web” in contravention of the Chemical Weapons Act 1996 (United Kingdom)).

160 British Military Court, *The Zyklon B Case*, Case No. 9, Hamburg, 8 March 1946, in *Law Reports of Trials of War Criminals*, UN War Crimes Commission, Vol. 1, 1947, p. 94.

161 Jonathan B. Tucker, *War of Nerves: Chemical Warfare from World War I to Al-Qaeda*, Pantheon Books, New York, 2006.

162 British Military Court, *Zyklon B*, above note 160.

163 The acts were prosecuted as war crimes since genocide was not yet codified as an international crime at the time of these trials (the Genocide Convention was adopted in 1948). In addition, by reason of the application of the laws of war at the time by the military tribunals, the case was focused on the murder of interned Allied civilians, rather than on the murder of the Jews, despite the fact that the Jews were the primary victims of the gas.

164 Sheldon H. Harris, *Factories of Death: Japanese Biological Warfare, 1932–45 and the American Cover-Up*, Routledge, Abingdon, 1994; Shirley Tourinsky (ed.), *Medical Aspects of Chemical and Biological Warfare*, Office of the Surgeon General, US Department of the Army, 2008, p. 418.

Union as a crime against humanity.<sup>165</sup> The use of chemical weapons and of biological weapons were characterized in the submissions of different parties during the trial as “deeds that in every civilized country are regarded as heinous crimes”.<sup>166</sup> Individuals involved in Units 731 and 100 were also prosecuted by the Chinese authorities, but there are no reliable records of those trials. In *Van Anraat*, a Dutch chemical dealer who sold the component chemicals that were used to make mustard gas to Saddam Hussein’s government was tried in the Netherlands for complicity in genocide and war crimes. Ultimately, he was acquitted of the genocide charge but convicted on the war crimes charge.<sup>167</sup> The conviction was upheld by the Court of Appeals,<sup>168</sup> the Supreme Court of the Netherlands<sup>169</sup> and the European Court of Human Rights (ECtHR).<sup>170</sup>

In the *Anfal* case, the Iraqi Special Tribunal found Ali Hassan al-Majid, the secretary-general of the Northern Bureau of the Ba’ath Party responsible for commanding all State agencies in the Kurdish-populated region of the country in 1987–88, guilty of committing genocide against the Kurds using chemical weapons. The Iraqi High Tribunal found that there was a “clear plan” to target the Kurdish population with sarin and mustard gas by al-Majid, who was responsible for the implementation of a policy to exterminate the Kurdish population, in a joint criminal enterprise with Saddam Hussein.<sup>171</sup> Evidence in the case included a number of audio tapes recording meetings of al-Majid with senior Ba’ath officials in 1988 and 1989, in which al-Majid stated: “I will kill them all with chemical weapons! Who is going to say anything? The international community? Fuck them! The international community and those who listen to them.”<sup>172</sup>

## Measures available under the Chemical Weapons Convention

A further possible option for establishing an international criminal tribunal for chemical weapons use in Syria emanates from the OPCW. Unlike the Security

165 Russell Working, “The Trial of Unit 731”, *Japan Times*, 5 June 2001, available at: <https://tinyurl.com/ycmefuem>; Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951*, University of Texas Press, Austin, TX, 1979; Otozo Yamada, *Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons*, Foreign Languages Publishing House, Moscow, 1950.

166 O. Yamada, above note 165, p. 490.

167 District Court of The Hague, *Public Prosecutor v. Frans Cornelius van Anraat*, Case No. 09/751003-04, 23 December 2005, available at: [www.haguejusticeportal.net/index.php?id=4497](http://www.haguejusticeportal.net/index.php?id=4497).

168 Court of Appeal of The Hague, *Public Prosecutor v. Frans Cornelis van Anraat*, Case No. 2200050906-2, Appeal Judgment, 9 May 2007.

169 Supreme Court of the Netherlands, *Public Prosecutor v. Frans Cornelis van Anraat*, Case No. 07/10742, Judgment, 30 June 2009.

170 ECtHR, *Frans Cornelis van Anraat v. The Netherlands*, Appl. No. 65389/09, 6 July 2010.

171 Iraqi High Tribunal, *Al Majid et al.*, above note 143.

172 Iraqi High Tribunal, *Special Verdict Pertaining to Case No 1/C Second/2006: Al Anfal*, Second Criminal Court, Ref. No. 1/C Second/2006, 24 June 2007, p. 294, available at: [www.worldcourts.com/ist/eng/decisions/2007.06.24\\_Prosecutor\\_v\\_al\\_Majid\\_et\\_al.pdf](http://www.worldcourts.com/ist/eng/decisions/2007.06.24_Prosecutor_v_al_Majid_et_al.pdf). See also Human Rights Watch, “Chemical Ali in His Own Words: The Ali Hassan Al-Majid Tapes”, available at: <http://pantheon.hrw.org/legacy/campaigns/iraq/chemicalali.htm> (audio file available at: <http://pantheon.hrw.org/legacy/campaigns/iraq/chemali.mp3>).

Council, the policy-making organs of the OPCW are not subject to a veto power of any particular members. While decisions are in practice usually taken by consensus, they may be taken by a majority vote.<sup>173</sup> Hence, in response to the JIM's reports in 2016, the OPCW Executive Council adopted a decision by majority vote, which, *inter alia*, instructed the Technical Secretariat to inspect the sites identified by the JIM as having been involved in the chemical weapons attacks.<sup>174</sup> Similarly, in a Special Session in 2018, the Conference of States Parties adopted a decision by majority vote which established the so-called "attribution mechanism" that may identify the perpetrators of the use of chemical weapons.<sup>175</sup>

The CWC requires the Conference of States Parties to take the "necessary measures" to redress and remedy "any situation which contravenes the provisions of the Convention", and sets out certain options of redress, including the possibility of recommending collective measures to States Parties.<sup>176</sup> Given that the appropriate response to the use of war crimes is prosecution and punishment of offenders, a case may be made that a "measure" which is "necessary" to redress the use of chemical weapons in Syria is the setting up of an *ad hoc* international or hybrid tribunal to try the alleged perpetrators.<sup>177</sup> This may be particularly necessary where other national or international fora of accountability are unable or unwilling to perform these judicial functions. It could also allow the OPCW States Parties to institute a judicial procedure that may determine individual responsibility without having to first determine State responsibility based on the JIM's reports, which have not been accepted by all States Parties. This would not preclude the OPCW policy-making organs from later making determinations as to State responsibility and adopting necessary measures under Article XII in that context. Insofar as accountability measures are concerned, it could also be considered necessary for the OPCW policy-making organs to recognize or

173 Rule 36 of the OPCW Executive Council Rules of Procedure provides that "decisions of the Council on matters of substance shall be made by a two-thirds majority of all its members". Rule 69 of the OPCW Rules of Procedure of the Conference of States Parties provides that "[d]ecisions on matters of substance should be taken as far as possible by consensus. If consensus is not attainable when an issue comes up for decision, the presiding officer shall defer any vote for 24 hours and during this period of deferment shall make every effort to facilitate achievement of consensus, and shall report to the Conference before the end of this period. If consensus is not possible at the end of 24 hours, the Conference shall take the decision by a two-thirds majority of the Members present and voting unless specified otherwise in the Convention."

174 OPCW, "OPCW-United Nations Joint Investigative Mechanism Reports on Chemical Weapons Use in the Syrian Arab Republic", Executive Council Decision EC-83/DEC.5, 11 November 2016, para. 10. The decision was adopted with twenty-eight States Parties in favour, four against, and nine abstentions. OPCW, *Report of the Eighty-Third Session of the Executive Council*, EC-83/5, 11 November 2016, para. 6.27.

175 OPCW Conference of States Parties, above note 109, para. 10. The decision was adopted with eighty-four States Parties in favour and twenty-four against. OPCW, *Report of the Fourth Special Session of the Conference of States Parties*, C-SS-4/3, 27 June 2018, para. 3.15.

176 CWC, Arts VIII(21)(k), XII.

177 Article VIII(f) of the CWC provides that the Conference may establish "such subsidiary organs as it finds necessary for the exercise of its functions in accordance with the Convention". Other international organizations have established *ad hoc* international criminal courts; for example, the Extraordinary African Chambers were established under an agreement between the African Union and Senegal to try international crimes committed in Chad from 7 June 1982 to 1 December 1990.

establish a duty of States Parties to investigate, prosecute and punish offenders regardless of the nationality of the offender or place where the crime took place, as a means to redress the situation.

The 2018 decision of the Conference of States Parties establishing the attribution mechanism clearly demonstrates the potential of the OPCW in this regard. The decision cites as its legal basis the general mandate of the Conference of States Parties to take decisions on matters raised by States Parties or brought to its attention by the Executive Council, and to review compliance with the CWC.<sup>178</sup> The only reference to Article XII in the decision is in respect of the obligation to bring cases of particular gravity to the attention of the UN General Assembly and Security Council.<sup>179</sup> Nonetheless, the work of the mechanism could lead to criminal prosecutions. The mechanism is required to “preserve and provide information” to the IIIM, as well as “any relevant investigatory entities established under the auspices of the United Nations”.<sup>180</sup> The Technical Secretariat has concluded an arrangement with the IIIM for this purpose.<sup>181</sup>

Where the Security Council is blocked from taking action, the role of the OPCW policy-making organs in establishing measures of redress for violations of the CWC takes on renewed significance. As guardians of the CWC, with its objective of eliminating the possibility of the use of chemical weapons, the OPCW policy-making organs are singularly well placed to contribute to setting up an accountability mechanism for chemical weapons use in Syria. If such a mechanism were part of a comprehensive peace plan or negotiation with international backing, this would undoubtedly solidify the support for such a decision by the OPCW policy-making organs.

## Conclusion – the potential to move forward

The truth is that international humanitarian law sets all kinds of red lines, and a great number of them have been crossed in the war in Syria. But the difference with crossing the red line of using chemical weapons is the universal condemnation by the international community and the total absence of legal defences. No party to the armed conflict in Syria has admitted to using chemical weapons or has defended their use as justified. There are good reasons for that. The prohibition against using chemical weapons is absolute. There is no justification, no military necessity that can be raised in defence of their use. Chemical weapons are banned because their use violates the fundamental rule

178 OPCW Conference of States Parties, above note 109, preambular para. 6 (CWC, Art. VIII(19)). The decision also refers to the functions of the Technical Secretariat to carry out verification measures (CWC, Art. VIII(37)) and to inform the Executive Council of doubts about compliance with the Convention that have come to its notice in the performance of verification activities (CWC, Art. VIII(40)).

179 OPCW Conference of States Parties, above note 109, preambular para. 10 (CWC, Art. XII(4)).

180 OPCW Conference of States Parties, above note 109, para. 12.

181 OPCW Executive Council, “Opening Statement by the Director-General to the Executive Council at its Eighty-Ninth Session”, EC-89/DG.31, 9 October 2018, para. 6.



against means and methods of war that cause unnecessary suffering and superfluous injury.<sup>182</sup> This rule refers to the effect of a weapon on combatants. The use of chemical weapons also breaches the rule prohibiting indiscriminate attacks and using indiscriminate weapons.<sup>183</sup> Therefore, the use of chemical weapons is unlawful whether the targets or victims are civilians or members of the armed forces or armed groups. The prohibition applies whether there is one victim or one hundred victims. Therefore, once responsibility for the use of chemical weapons is established beyond doubt, there ends the legal dispute.

This does not mean that the war crime of using a chemical weapon is any more grave or deserving of condemnation than other war crimes. But in the context of the armed conflict in Syria, the world's unified stance on chemical weapons crimes may present an opportunity for progress on accountability within the complex context of a potential transition to peace. Despite the fact that the "red line" of chemical weapons use has been crossed multiple times during the war, the prohibition on using chemical weapons remains intact. Syria has maintained its position that "the military will never use such weapons against its own people or even terrorists".<sup>184</sup> Syrian allies the Russian Federation and Iran (itself a victim of chemical weapons use during the Iran–Iraq War and usually a staunch advocate for the victims of chemical weapons) have strenuously defended Syria against such accusations. Even Islamic State – which has openly admitted to committing atrocities such as sexual slavery, murder and cruel treatment – has not claimed any use of chemical weapons, despite the JIM's findings that it used sulphur mustard on two occasions.<sup>185</sup> Unlike the cases of other banned weapons under international law, the use of chemical weapons in Syria has been the subject of two specific accountability measures established by the international

182 See the Brussels Declaration of 1874 (prohibiting the use of poison or poisoned weapons, and the employment of arms, projectiles and material causing unnecessary suffering); the Hague Declaration Concerning Asphyxiating Gases of 1899 (prohibiting the use of projectiles the sole purpose of which is the diffusion of asphyxiating or deleterious gases); the Hague Regulation of 1907 (prohibiting the use of arms, projectiles or material calculated to cause unnecessary suffering); the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; and the Preamble and Article I of the CWC. The ICRC Customary Law Study notes that the prohibition on the use of chemical weapons in the 1925 Protocol was originally motivated by the rule prohibiting means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering. See ICRC Customary Law Study, above note 29, Rule 70.

183 *Ibid.*, Rules 12, 71.

184 "Syria Denies & Condemns Use of Chemical Weapons – Foreign Minister", RT, 7 April 2017, available at: [www.rt.com/news/383677-syria-bomb-chemical-depot-terrorists/](http://www.rt.com/news/383677-syria-bomb-chemical-depot-terrorists/).

185 On the use of chemical weapons by Islamic State, see Eric Schmitt, "ISIS Used Chemical Arms at Least 52 Times in Syria and Iraq, Report Says", *The New York Times*, 21 November 2016, available at: [www.nytimes.com/2016/11/21/world/middleeast/isis-chemical-weapons-syria-iraq-mosul.html](http://www.nytimes.com/2016/11/21/world/middleeast/isis-chemical-weapons-syria-iraq-mosul.html). While not directly addressed by Islamic law which predates the creation of chemical weapons, a good case may be made that the use of chemical weapons would also be prohibited by those tenets, such as the non-use of poison, the prohibition on polluting the environment, the principle of separation and the prohibition against causing unnecessary suffering. See Katariina Simonen, "Chemical Weapons, Ayatollah Khomeini and Islamic Law", *Global Security: Health, Science and Policy*, Vol. 2, No. 1, 2017. Khalil al-Maliki's book on jihad states that combatants are forbidden to employ weapons that cause unnecessary injury to the enemy, except under dire circumstances; hence, the use of poisonous spears is forbidden, since it inflicts unnecessary pain. Sayyid Mustafa Muhaqqiq Dāmād *et al.*, *Islamic Views on Human Rights*, Center for Cultural-International Studies, Tehran, 2003, p. 266.

community: the Secretary-General's Mechanism and the JIM. This practice is remarkable in view of the typically high political sensitivity that weapons-use regulations carry in the international arena. It attests to the singularly unified stance of the international community on the prohibition of chemical weapons in international law and the need for accountability.

With the issuance of the JIM's reports identifying the perpetrators of chemical weapons attacks in Syria, the international community stands at a crossroads in terms of whether States are willing to take the necessary measures to deliver on accountability. It has been aptly noted by commentators that "[a]n *ad hoc* tribunal dedicated to Syria offers the most promising avenue for war crimes accountability, if only the political will existed for its creation".<sup>186</sup> As demonstrated by the international community's responses to the use of chemical weapons in Syria, the key difference between chemical weapons crimes and other international crimes committed during the war in Syria is that there is political will to establish responsibility for chemical weapons crimes. This political will is evident in the US–Russia Framework for Elimination of Syrian Chemical Weapons, the decisions of the OPCW Executive Council on the destruction of Syrian chemical weapons, the endorsement of the FFM, the decision of the Conference of States Parties to establish an attribution mechanism, the resolutions of the UN Security Council and General Assembly setting up accountability mechanisms and demanding accountability for chemical weapons crimes, the sanctions imposed by certain governments on those considered to be involved, the US unilateral military strike on Shayrat Airbase, and the joint air strikes of the United States, UK and France following the Douma incident.

This political will could be harnessed to create an *ad hoc* tribunal to try the alleged perpetrators of these crimes. The inclusion or endorsement of international tribunals in peace agreements can play an important role in the credibility of the peace process. The 1995 General Framework Agreement for Peace in Bosnia and Herzegovina contained a reference (in an annex) to the International Criminal Tribunal for the former Yugoslavia and established the parties' duty to cooperate with it. The 1945 London Agreement<sup>187</sup> established the International Military Tribunal at Nuremberg. An *ad hoc* tribunal may serve as a tool to facilitate the transition to peace. In this area of startlingly contested versions of events, an international trial may be the most accepted and legitimate means to establish the truth about the use of chemical weapons in Syria. Given the central position that chemical weapons use has been accorded by the international community in this war, the truth at least about this aspect of the war can provide an accepted basis on which to begin to build a lasting transition to peace. Moreover, incorporating an *ad hoc* tribunal for chemical weapons crimes into the peace negotiation may provide a crucial means of encouraging international acceptance of the process. A peace agreement on Syria that is entirely devoid of accountability mechanisms is

186 B. Van Schaak, above note 2, p. 339.

187 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945.

likely to founder and fail to gain the broad regional or international support that would allow it to succeed. Moreover, an *ad hoc* tribunal would provide an added incentive to end the use of chemical weapons in Syria. The fact that chemical weapons have continued to be used even after the creation of the JIM and the IIIM suggests that these mechanisms – which, unlike a court, do not make findings beyond a reasonable doubt and cannot impose punishment – fail to serve as a deterrent to perpetrators. The possibility of actual criminal proceedings is likely to be more effective. Establishing an *ad hoc* tribunal may be a more politically viable option than a Security Council referral to the ICC, and can be crafted in a manner that achieves the objectives of the sponsoring States while remaining independent and impartial. Unlike national trials, an *ad hoc* tribunal would function through State cooperation and would be based on international law rather than extradition agreements and national law, which may prove difficult to apply to crimes committed in Syria. Most importantly, an *ad hoc* tribunal could be built into the peace agreement, signalling a commitment to justice by the involved parties.

A mechanism to try the alleged perpetrators of chemical weapons crimes would be in every major player's interest. It would provide a needed boost to the Security Council's credibility or to that of the OPCW, if created by that body. A tribunal would allow the evidence about chemical weapons use and responsibility to be presented and debated in a fair and legal process. A tribunal is the best opportunity for Syrian officials accused of involvement in these crimes and subject to sanctions by the United States and European Union to clear their names, or for responsibility to be appropriately apportioned in a fair, legal and public process.

The case made here for an *ad hoc* tribunal on chemical weapons crimes does not mean to suggest that there should be impunity for all other international crimes committed during the Syrian crisis – at least not in the long run. But injecting a modicum of justice and the rule of law, on which all sides can agree, into a negotiated peace deal may allow some progress to be made in an otherwise bleak legal and political outlook.

