

NO IMPUNITY FOR CHEMICAL WARFARE

// What are the options for ending the use of chemical weapons?

Not too long ago, it seemed that chemical warfare was a thing of the past. In recent years, however, the world has been troubled by news of state and non-state actors' use of chemical weapons in Syria, with the reported attack in Douma on 7 April 2018 being only the latest in a long series of similar accounts. Such use poses a challenge to the universal chemical weapons prohibition as long as the international community is unable to agree on a unified and determined response and to find ways of holding the perpetrators to account. This situation must be overcome if chemical warfare is to be consigned to history for good.



UN weapons inspector collecting samples during the team's investigations at Ain Terma, Syria. (Photo: © dpa)

Una Becker-Jakob

The first allegations of chemical weapons (CW) use in Syria date from 2012. In August 2013, more than one thousand people were wounded or killed in heinous attacks with the nerve agent sarin in Ghouta near Damascus. The perpetrators have not been officially identified, and narratives vary between a staged attack by opposition fighters and, more predominant, sarin use by President Assad's troops. In the wake of this attack, with a US intervention looming and under pressure from its Russian ally, Syria acceded to the *Chemical Weapons Convention* (CWC), thereby agreeing to declare and dismantle its entire CW programme under the watch of the *Organisation for the Prohibition of Chemical Weapons* (OPCW). The disarmament pro-

cess initially seemed quite successful: by June 2014, all declared production and storage sites had been rendered inoperable and all declared chemicals had been removed from Syria for destruction, which was completed in January 2016. However, inconsistencies in the Syrian declarations and other findings by OPCW inspectors from 2014 onwards, as well as continuing reports of chemical attacks by various parties to the conflict, heightened fears of more widespread chemical warfare and roused suspicions that Syria might not fully comply with its obligations under the CWC.

CW use is prohibited by the CWC, the 1925 *Geneva Protocol* and international customary law. The prohibition is comprehensive and covers all toxic chemicals when used as means of warfare. CW-related incidents have been rare. They include non-state actors' use of sarin in Japan in 1995 and of chlorine in Iraq since the early 2000s, as well as attempted or actual assassinations in 1978, in 2017 and, most recently, in March 2018, when a former Russian spy and his daughter were attacked with a nerve agent in Salisbury, UK. The most recent case of chemical warfare was Iraq's use of CW against Iran and against Iraqi Kurds in the 1980s. The chemical attacks carried out by Syrian forces thus represent the first such case in 30 years.

Investigations of alleged chemical weapons attacks in Syria, 2011-2017

As part of its investigations into human rights violations in Syria, the *Independent International Commission of Inquiry on the Syrian Arab Republic*, set up by the *UN Human Rights Council* in 2011, documented 28 incidents and attributed 16 of them to the Syr-



A Syrian man collects samples from the site of a suspected toxic gas attack in Khan Sheikhun in Syria. (Photo: © dpa/newscom)

ian government. In 2013, the *UN Secretary General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons* investigated the Ghouta attacks, among others. The experts determined that sarin had been used but had no mandate to identify those responsible. The *OPCW Fact-Finding Mission (FFM)*, established in 2014 to scrutinise allegations of CW use in Syria, has looked into more than 70 allegations of CW use in Syria and is continuing its work, but is not mandated to attribute the blame to anyone either. In 2015, however, the UN Security Council unanimously agreed to set up the *OPCW-UN Joint Investigative Mechanism (JIM)* and tasked it to identify the perpetrators of those incidents the FFM had verified as CW attacks. This mechanism was a first in the history of disarmament. It sent an encouraging signal that the international community, including the five permanent UN Security Council members, were determined to uphold the prohibition of chemical warfare and to bring perpetrators to justice. The JIM inves-

tigated eleven cases of CW use and identified those responsible for six of them: ISIL (*Islamic State of Iraq and the Levant*) employed mustard gas twice, and the Syrian government used chlorine gas three times and attacked the town of Khan Shaykhun with Sarin in April 2017. While some countries, including Russia and Syria, doubted the professionalism and impartiality of the JIM, most states and experts accepted the results as valid.

In November 2017, Russia vetoed the extension of the JIM, depriving the international community of its most effective chemical weapons-related investigation mechanism for Syria. The US, Russia and others have prepared separate draft UN resolutions aimed at re-establishing an investigative capacity but none of them has been accepted in the UN Security Council to date. The CWC provides for consultation procedures and challenge inspections to resolve cases of suspected treaty violations, but the OPCW members are as divided as the UN Security Council regarding the evaluation

Chemical Weapons Convention (CWC), Article I (1992)

"1. Each State Party to this Convention undertakes never under any circumstances:

- (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
- (b) To use chemical weapons;
- (c) To engage in any military preparations to use chemical weapons;
- (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

(...)"

<https://www.opcw.org/chemical-weapons-convention/articles/article-i-general-obligations/>

of and appropriate reactions to pertinent events. With 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), the UN General Assembly (UNGA) initiated an ambitious endeavour in December 2016. The IIIM is tasked to collect and analyse evidence as well as prepare and facilitate court proceedings related to violations of human rights and international humanitarian law – which includes CW use. However, being based on a UNGA resolution (71/248), it is not binding, and it does not enjoy unanimous support.

With the JIM's mandate expired, the IIIM not yet fully operational and lacking universal acceptance, all relevant international fora deadlocked, and political divisions among the permanent UN Security Council members increasing, the international community is lacking effective ways of responding to chemical weapons attacks. This does not automatically render the prohibition invalid, but it does signal to those willing to use these banned weapons that they would have nothing to fear.

The International Partnership Against Impunity for the Use of Chemical Weapons

Countering this signal was one rationale for the new International Partnership Against Impunity for the Use of Chemical Weapons which France launched in January 2018. It currently brings together 25 countries from various regions and the EU and is open to participation for all CWC members.

To join, states are expected to support a Declaration of Principles in which they condemn CW use “by anyone under any circumstance” and express support for the pertinent international agreements and UN resolutions. The ultimate aim of the initiative is “to hold to account those responsible for using chemical weapons, seek justice for the victims, and prevent such abhorrent attacks from happening again”. To this end, partners agree to, inter alia, collect, preserve and facilitate the sharing of information on those involved in the proliferation or use of chemical weapons, place them under sanctions and subsequently publish their the names of those individuals or entities on the Partnership's website.

The supporters of the initiative do not aim to carry out their own investigations or collective actions, or duplicate tasks of existing international institutions. Rather, the Partnership is intended as a complementary tool in support of these institutions as well as a framework for coordination and consolidation of members' activities. The intentions behind it appear genuine and credible. As for its objective to hold per-

	Australia		Norway
	Belgium		Peru
	Canada		Poland
	Côte d'Ivoire		Senegal
	Czech Republic		South Korea
	European Union		Spain
	France		Sweden
	Germany		Switzerland
	Italy		Tunisia
	Japan		Turkey
	Kuwait		Ukraine
	Morocco		United Kingdom
	Netherlands		USA

Members of the Partnership (23 March 2018)

(<https://www.noimpunitychemicalweapons.org/-en-.html>)

petrators accountable, its members can act mostly symbolically, reactively and through national political means such as targeted sanctions. Targeted, or “smart”, sanctions, directed at individuals or companies rather than states, were devised in the 1990s to mitigate the negative effects of state-centred sanctions on populations. Precedents of their use in non-proliferation can be found in Iran and North Korea and in counter-terrorism efforts. Placing individuals under sanctions, for instance by issuing travel bans and freezing assets, and publicising this step might have a deterrent effect on current or potential proliferators, as envisaged by the Partnership, thus helping to prevent further CW proliferation and use in a best-case scenario. But targeted sanctions entail problems: individuals are exposed and condemned publicly without prior legal proceedings; rehabilitation might be difficult for those placed on the list erroneously; and the national decision-making on which sanctioning rests, even if carried out thoroughly and conscientiously, is often non-transparent, leaving the resulting decisions susceptible to doubts, contestation and politicisation. Members of the Partnership hence need to design their policies carefully lest they deepen existing political divisions and – despite express intentions to the contrary – complicate the work of the established institutions which the Partnership intends to support and which are indispensable for chemical weapons control. Since states currently have limited scope for action to prevent CW use, the Partnership could be useful despite the caveats expressed above, as it visibly and actively upholds the international prohibition of chemical weapons.

So far, no state has publicly defended CW use as legitimate, and even the Syrian government has repeatedly

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denied that it used CW in the ongoing war. This suggests that, at least officially, there is still a broad consensus on the condemnation of the use of chemical weapons. As long as there is no risk of being identified and prosecuted, however, those willing to use CW can feel relatively safe. The ultimate goal should therefore be to seek legal accountability for those using chemical weapons, with support from the OPCW and other independent investigation mechanisms and through international and impartial institutions such as the *International Criminal Court* or an ad hoc tribunal. In the current state of affairs, it is hard to give an optimistic outlook on how this could be achieved. Possible steps include the following: A CW-specific investigative mechanism would need to be re-established and equipped with a mandate to identify perpetrators and collect evidence that could be used in an international trial. In the meantime, the IIIM should be supported financially, through further UNGA resolutions if necessary, and/or through technical expertise. Security Council endorsement would be helpful, but currently seems out of reach. The crucial role of the CWC and the OPCW for chemical disarmament should be respected, maintained and supported by all those involved. The UNGA or the UN Secretary General might also consider other ways in which they could fulfil their respective responsibilities for international peace and security while the Security Council remains deadlocked. Political divisions between Russia and Western countries over CW issues – which have just deepened significantly and which are preventing any progress – would have to be reduced, and ending chemical warfare would have to be re-established as a common

objective and disentangled from the broader context of the Syrian war and its (geo-)political implications. All this would require intense political will and diplomatic efforts – a challenge the Partnership might consider taking on. Any step forward would support the fight against impunity for CW proliferation and use and might, in the long term, hopefully contribute to ending chemical warfare once and for all.

Useful links and sources

- <https://www.opcw.org/special-sections/syria/>
- <https://www.un.org/disarmament/wmd/secretary-general-mechanism/>
- <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx> (Commission of Inquiry)
- [http://undocs.org/S/RES/2235\(2015\)](http://undocs.org/S/RES/2235(2015)) (Resolution establishing JIM)
- http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/248 (Resolution establishing IIIM)
- <http://disarmament.un.org/treaties/>
- <https://www.noimpunitychemicalweapons.org/-en.html>
- Fehl, Caroline/Mocková, Eliška (2017): Chasing Justice for Syria. Roadblocks and detours on the path to accountability, PRIF Spotlight 5/2017, Frankfurt/M. (https://www.hsfk.de/fileadmin/HSFK/hsfk_publicationen/Spotlight0517.pdf)

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