

**THE AUTHORITY AND SCOPE OF ACTIVITIES OF THE OPCW -  
DECISION TO ESTABLISH A MECHANISM TO ATTRIBUTE  
RESPONSIBILITY FOR CHEMICAL WEAPONS USE IN SYRIA**

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<p><b>SUMMARY</b></p> <p>The 20-year success of the Chemical Weapons Convention (CWC) and world chemical disarmament has been marred by very sudden and unexpected re-emergence of chemical weapons (CWs) in the modern day battlefield, as well as them being used a tool in high-profile assassinations and assassination attempts. The international community has proven to be very limited in its capability to react and respond to the emerging CWC treaty violations, primarily due to the permanent members of the United Nations Security Council (UN SC) actively employing their veto powers to prevent the UN SC from adopting any decisions that conflict with the views and interest of the said permanent member states.</p> <p>In July 2018, the Conference of the States Parties (CSP) of the international organisation implementing the CWC, the Organisation for the Prohibition of Chemical Weapons (OPCW) authorised the OPCW Director-general (DG) to put in place arrangements to identify the perpetrators of chemical attacks in the Syria, in cases where CW use has been previously confirmed by OPCW fact-finding missions. The decision, adopted by a two-thirds majority vote, meant that the OPCW, previously concentrated on politically very neutral technical expertise approach and unequivocal analysis to proof the presence or absence of chemical warfare agents only, would start looking for identifying the origin of the CWs used, with the objective of identifying those responsible for using CWs.</p> <p>This study discusses the question whether the attribution of responsibility to the perpetrators of CWs use in the Syrian Arab Republic, as outlined in the CSP decision, is within the authority and scope of activities of the OPCW. The study question is approached in the broader context of powers of international organisations, but the main focus and primary source of the study is the CWC treaty text. The treaty text is examined regarding the powers and functions of the OPCW and its main organs, with the purpose of finding out the treaty provisions on investigating alleged use of CWs, and the OPCW powers to establish that a treaty violation has occurred. Furthermore, the decision and the mechanism it proposes are compared to the procedural and voting requirements of the OPCW. The amendment and dispute settlement processes outlined in the treaty are discussed. Finally, this study examines whether the attribution mechanism, as laid out in the decision, is in line with the division of OPCW tasks, and the responsibilities, tasks and authority of the United Nations, those of the UN Security Council in particular.</p>	

As stated in the Preamble of the treaty, the objective of the CWC is to exclude completely the possibility of the use of CWs. The objective of the treaty is reached through its implementation, for the purpose of which the OPCW was created. One of the distinctive hallmarks of the CWC, and the most significant part of its implementation, is its comprehensive mechanism for verification of compliance. Establishing compliance of a treaty state party in alleged use cases requires the power to conclude whether the state party has used CWs or not. Therefore, by necessary implication, the power to attribute CW use to a CWC state party should be well within the authority and scope of action of the OPCW.

The CWC establishes mechanisms for investigating alleged CW use in Article IX, that deals with clarifying and resolving cases of non-compliance, as well as in Article X that concerns with assistance in cases CWs have been used against a CWC state party. These investigations are carried out using detailed procedures set out in the Part XI of the Verification Annex. Investigating alleged use pursuant to Article IX via a challenge inspection, initiated by a CWC state party, has the endpoint of the OPCW Executive Council reaching a conclusion whether any non-compliance has occurred. The CWC explicitly mentions that the alleged use investigation process is to be utilised to identify the origin of any chemical weapons used, if possible. Attribution of responsibility through the technical investigative actions of the OPCW seems therefore a self-evident part of the process of establishing non-compliance in cases of alleged use. However, the mechanism established by the CSP decision does not follow the core processes described in the CWC, leaving room for political debate and division among the OPCW member states.

The attribution mechanism as outlined in the CSP decision can be seen to follow closely the mandate, as well as the tasks, duties and responsibilities allocated to different OPCW organs in the treaty. In addition, the OPCW considers all rules and procedural modalities followed by the CWC states parties at session of the CSP that adopted the decision. However, the CWC states parties maintain very divided opinions on the subject of the OPCW establishing such a mechanism for attribution of CW use, and the adoption of the CSP decision has created an obvious situation of dispute on the application of the CWC. Formal dispute settlement initiatives have not been made, but the dispute settlement mechanisms described in CWC Article XIV as well as the possibility to ask for the International Court of Justice advisory opinion on the subject remain an option. Formal amendment of the treaty according to CWC article XV to resolve this debate is likely not possible given the lack of common will among the states parties to the CWC.

The CSP decision to establish the mechanism does not refer to any actions after the CW use is attributed to the perpetrators through these activities, other than reporting the findings to the relevant OPCW organs and UN entities. This implies that these activities are to be kept within the statutory powers of the OPCW, with the possible measures available to the OPCW limited to those listed in CWC Article XII, and referring further action to the United Nations. It can therefore be seen, that the OPCW assuming these activities does not inherently overlap with the responsibilities, tasks and authority of the UN, and special responsibilities of the UN Security Council concerning international peace and security.

#### AVAINSANAT

Chemical disarmament, international law, investigating alleged CW use, chemical warfare agents, Chemical Weapons Convention, the OPCW, treaty law.

## TIIVISTELMÄ

Kemiallisten aseiden kehittämisen, tuotannon, varastoinnin ja käytön kieltämistä sekä niiden hävittämistä koskevan yleissopimuksen (jäljempänä ”yleissopimus”) sekä hyvin edistyneen maailmanlaajuisen kemiallisen aseriisunnan 20 vuoden mittainen menestystarina on vastatuulella kemiallisten aseiden palattua yllättäen ja odottamatta maailman taistelukentille. Kemiallisia taisteluaineita on viime vuosien aikana käytetty myös salamurhien ja niiden yritysten välineinä. Kansainvälinen yhteisö on osoittautunut varsin rajoittuneeksi kyvyltään vastata sopimusrikkomuksiin. Tähän on osaltaan vaikuttanut Yhdistyneitten Kansakuntien (YK) turvallisuusneuvoston pysyvien jäsenmaiden aktiivinen halu pysäyttää veto-oikeudellaan kaikki pysyvien jäsenmaiden näkemysten ja etujen vastaiset päätökset neuvoston kokouksissa.

Heinäkuussa 2018 yleissopimusta toimeenpanevan kansainvälisen järjestön, Kemiallisten aseiden kieltojärjestön (jäljempänä ”OPCW”) Sopimusvaltioiden Konferenssi (jäljempänä ”Konferenssi”) valtuutti OPCW:n Teknisen sihteeristön pääjohtajan luomaan järjestelyt kemiallisia aseita käyttäneiden tahojen tunnistamiseksi Syyriassa niissä tapauksissa, joissa kemiallisten aseiden käyttö oli jo aiemmin todennettu OPCW:n tosiasioiden selvittämisooperaatioissa. Tämä päätös hyväksyttiin kahden kolmanneksen enemmistöllä läsnä olevista ja äänestävistä jäsenvaltioista. Päätös tarkoitti sitä, että OPCW, jonka on aiemmin keskittynyt tarkastustoimissaan lähinnä kemiallisten taisteluaineiden läsnäolon toteamiseen tai poissulkemiseen, alkaisi tutkia väitetyn kemiallisen aseiden käytön tapauksia päämääränä kemiallisten taisteluaineiden alkuperän, ja sitä kautta käyttäjän identiteetin selville saaminen.

Tässä tutkimuksessa tarkastellaan sitä, kuuluuko Konferenssin päätöksen mukainen toiminta kemiallisen aseiden käyttöön syyllistyneiden tunnistamiseksi OPCW:n toimivallan ja tehtävien piiriin. Tutkimuskysymystä lähestytään tutkimuksessa kansainvälisten järjestöjen toimivallan laajemmassa kontekstissa, mutta tutkimuksen keskipisteenä ja ensisijaisena lähteenä on yleissopimuksen teksti. Yleissopimuksen tekstiä tutkitaan ja tulkitaan sen selvittämiseksi, mitä yleissopimuksessa sanotaan OPCW:n ja sen toimielinten toimivaltuuksista ja tehtävistä, keskittyen OPCW:n toimivaltuuksiin ja tehtäviin liittyen kemiallisten aseiden väitetyn käytön tapauksiin, ja OPCW:n toimivaltaan todeta, että sopimusrikkomus on tapahtunut. Konferenssissa tehdyn päätöksen tekoprosessia ja päätöksessä kuvattuja järjestelyjä verrataan yleissopimuksessa linjattuihin menettelytapoihin. Lisäksi tarkastellaan sitä, miten yleissopimusta koskevien riitojen ratkaisua ja yleissopimukseen tehtäviä lisäyksiä on käsitelty sopimustekstissä. Lopuksi tutkimuksessa tarkastellaan OPCW:n vastuualueiden ja YK:n vastuualueiden rajapintoja ja päätöksen mukaisen tutkimusmekanismin luomisen vaikutuksia niihin.

Yleissopimuksen johdantoluvussa todetaan, että yleissopimuksen päämääränä on koko ihmiskunnan edun vuoksi täydellisesti poistaa kemiallisten aseiden käytön mahdollisuus. Yleissopimuksen päämäärä saavutetaan täytäntöönpanemalla yleissopimuksen määräykset, mitä varten sopimusvaltiot perustivat Kemiallisten aseiden kieltojärjestön. Yksi yleissopimuksen poikkeuksellista piirteistä valtiosopimuksena on sen sisältämä sopimuksen täytäntöönpanoa ja todentamista koskeva mekanismi. Väitetyn kemiallisen aseiden käytön tapauksissa sopimuksen noudattamisen todentaminen vaatii sen, että OPCW pystyy tekemään päätöksen, onko sopimusvaltio käyttänyt kemiallisia aseita vai ei. Kansainvälisten järjestöjen implisiittistä toimivaltaa koskevan tulkinnan mukaisesti voidaan siis nähdä, että OPCW:lla pitäisi olla toimivalta tutkia väitetyn käytön tapauksia päämääränä tunnistaa kemiallisen aseiden käyttöön syyllistynyt taho.

Väitetyn kemiallisen aseiden käytön tapausten tutkimista käsitellään yleissopimuksen Artiklassa IX, Neuvottelut, yhteistyö ja tosiasioiden selvittäminen, sekä Artiklassa X, Apu

ja suojautuminen kemiallisilta aseilta. Väitetyn käytön tutkimuksissa käytetyt menetelmät ja toimintatavat luetellaan yleissopimuksen Täytäntöönpanoa ja todentamista koskevan liitteen, ”Todentamisliitteen” osassa XI. Väitetyn käytön tapauksen tutkimisen päämääränä ja päätepineenä, kun se tapahtuu Artiklan IX perusteella, on OPCW:n Hallintoneuvoston tekemä päätös siitä, onko yleissopimuksen määräyksiä jätetty noudattamatta. Yleissopimus mainitsee lisäksi eksplisiittisesti, että väitetyn käytön tapausten tutkimusprosessin aikana hankitut tiedot, joilla voitaisiin tunnistaa käytettyjen kemiallisten aseiden alkuperä, nämä tiedot on liitettävä tutkimuksen raportointiin. Myös yleissopimuksen tekstin perusteella kemiallisen aseiden käyttöön syyllistyneen tahon selvittämisen voidaan siis väitetyn käytön tapauksissa katsoa kuuluvan osaksi sopimuksen täytäntöönpanoa ja todentamista koskevia toimia. Konferenssin päätöksen kuvaama mekanismi ei kuitenkaan tarkkaan noudata yleissopimuksessa kuvattuja prosesseja, mikä jättää mahdollisuuden erilaisille tulkinnoille, ja lisää jäsenvaltioiden kiistelyä yleissopimuksen tulkinnasta asiassa.

Tarkasteltaessa yleissopimuksessa linjattuja OPCW:n ja sen toimielinten tehtäviä ja toimintoja voidaan Konferenssin tekemän päätöksen kuvaavan mekanismin nähdä noudattavan näitä hyvin. OPCW:n mielestä Konferenssi on noudattanut päätöstä tehdessään yleissopimuksessa määritellyjä menettelytapoja ja päätöksentekoa. Yleissopimuksen jäsenvaltioilla on kuitenkin edelleen jyrkästi keskenään eroavia mielipiteitä Konferenssin päätöksen mukaisesta OPCW:n roolista kemiallisen aseiden käyttöön syyllistyneiden tahojen tunnistamisessa. Tämä on synnyttänyt yleissopimuksen soveltamista ja tulkintaa koskevan ilmeisen riitatilanteen. Muodollisia aloitteita riitatilanteen ratkaisemiseksi ei ole tehty, mutta yleissopimuksen Artiklan XIV kuvaamat riitojen ratkaisumekanismit olisivat käytettävissä tilanteen selvittämiseksi. OPCW:n Hallintoneuvostolla ja Sopimusvaltioiden Konferenssilla on mahdollisuus kysyä myös Kansainvälisen tuomioistuimen neuvoa-antavaa mielipidettä koskien järjestön toimivaltaan kuuluvia oikeudellisia kysymyksiä. Muodollinen yleissopimuksen muutosprosessi, jonka tarkoituksena olisi selkeyttää OPCW:n toimivaltaa tutkimusaiheen kysymyksessä, ei ole mahdollinen sopimusvaltioiden yhteisen näkemyksen puuttuessa.

Konferenssin tekemä päätös tutkia väitetyjä kemiallisen aseiden käyttötapauksia päämääränä käyttöön syyllistyneiden tahojen tunnistaminen ei ota kantaa siihen mitä tapahtuu, kun nämä tahot on tunnistettu OPCW:n suorittamien teknisten tutkimuksien kautta. Konferenssin päätös viittaa ainoastaan tulosten raportointiin relevanteille OPCW:n ja YK:n toimielimille. Tämä pitää näiden löydösten jälkeiset toimenpiteet yleissopimuksen määrittämien OPCW:n ja sen toimielinten tehtävien ja toimivallan sisällä. OPCW:n mahdolliset toimenpiteet tilanteiden oikaisemiseksi ja sopimuksen noudattamisen varmistamiseksi, mukaan lukien pakotteet, on lueteltu yleissopimuksen Artiklassa XII. Konferenssi voi hallintoneuvoston suosituksesta muun muassa rajoittaa tai peruuttaa yleissopimuksesta kyseiselle valtiolle seuraavat oikeudet ja erioikeudet, mutta erityisen vakavissa tapauksissa Konferenssin on saatettava asia ja siihen liittyvät tosiseikat sekä johtopäätökset YK:n yleiskokouksen ja turvallisuusneuvoston tietoon. Voidaan siis nähdä, että päätöksen luoma kemiallisten aseiden käyttäjien tunnistusmekanismi noudattaa YK:n ja OPCW:n vastuualueiden perinteisiä rajapintoja eikä kyseenalaista turvallisuusneuvoston erityisasemaa ja -oikeuksia kansainvälisen turvallisuuden ja rauhan ylläpitäjänä.

#### AVAINSANAT

Aseriisunta, kansainvälinen oikeus, kemialliset taisteluaineet, kemiallisen aseiden väitetty käyttö, Kemiallisten aseiden kieltämisestä koskeva yleissopimus, Kemiallisten aseiden kieltöjärjestö.

# THE AUTHORITY AND SCOPE OF ACTIVITIES OF THE OPCW - DECISION TO ESTABLISH A MECHANISM TO ATTRIBUTE RESPONSIBILITY FOR CHEMICAL WEAPONS USE IN SYRIA

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## Abbreviations

AC	Amendment Conference (CWC)
ASRIWA	Articles on State Responsibility for Internationally Wrongful Acts
BTWC	Biological and Toxin Weapons Convention
CD	Conference on Disarmament (UN)
CSP	Conference of the States Parties (OPCW)
CW	Chemical weapon
CWA	Chemical warfare agent
CWC	Chemical Weapons Convention
CWPF	Chemical weapons production facility
DG	Director-General (OPCW)
EC	Executive Council (OPCW)
EU	European Union
FFM	Fact-finding mission (OPCW)
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
IIIM	International, impartial and independent mechanism (UN)
IIT	Incident investigation team (OPCW)
ILC	International Law Committee
IGO	Intergovernmental organisation
IO	International organisation
JIM	Joint investigative mechanism (OPCW-UN)
OPCW	Organisation for the Prohibition of Chemical Weapons
SAR	Syrian Arab Republic
SC	Security Council (UN)
SP	State party (CWC)
TS	Technical Secretariat (OPCW)
UN	United Nations
UN SG	United Nations Secretary General
UNHRC	United Nations Human Rights Council
VCLT	Vienna Convention on the Law of Treaties
VX	[2-(Diisopropylamino)ethyl]-O-ethyl methylphosphonothioate
WMD	Weapons of mass destruction

## 1 BACKGROUND OF THE STUDY

### 1.1 The Chemical Weapons Convention

The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons, and on Their Destruction, commonly referred to as the Chemical Weapons Convention or the CWC, entered into force on 29<sup>th</sup> of April 1997. The CWC is an international disarmament treaty that mandates the destruction and prohibition of all chemical weapons and facilities related to them, and bans the use of any toxic chemical as a weapon. The CWC also provides for restrictions on international trade of toxic chemicals and their precursors. The convention's verification and monitoring measures involve submissions of declarations regarding listed chemicals, and inspections of the facilities where these chemicals are produced<sup>1</sup>. The implementation of its provisions and cooperation between the state parties is carried out by the Organisation for the Prohibition of Chemical Weapons, the OPCW.

CWC can be considered to be a highly successful disarmament treaty, as it covers and bans a whole category of weapons of mass destruction and at present, is one of the most ratified international treaties<sup>2</sup>. CWC has 193 state parties and one signatory member state (Israel), the most recent state party to accede to the convention being Palestine (17.5.2018)<sup>3</sup>. Only three of the 193 member states of the United Nations (UN) have not ratified the treaty. These are Egypt, North Korea, and South Sudan. Eight states<sup>4</sup> have declared themselves as chemical weapons (CWs) possessor states either when entering the CWC, or while being bound by the treaty. In addition, 14 states parties have declared the possession of a total of 97 chemical weapons production facilities (CWPFs)<sup>5</sup>.

The treaty mandates the destruction of CWs as well as CWPFs within 10 years of the treaty entering into force, with the possibility of extending this timeline with 5 years under certain circumstances. Several countries did not meet these disarmament deadlines, most recent being in 2012 counting from the first day the treaty entered into force and employing the 5-year extension. However, in 2020, only one CWC state party (USA) was still in possession of

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<sup>1</sup> OPCW, 2017b. The OPCW fact sheet - Origins of the Chemical Weapons Convention and the OPCW.

<sup>2</sup> UN, 2016. Treaties deposited with the UN secretary-general close to universal participation.

<sup>3</sup> OPCW, 2018. Evolution of the status of participation in the convention.

<sup>4</sup> USA, Russia, Libya, India, Albania, Syria, Iraq and a country that wishes itself to be referred just as A State Party in the OPCW documents

<sup>5</sup> OPCW AR, 2017. Report of the OPCW on the implementation of the Convention on the Prohibition of the Development, production, stockpiling and use of chemical weapons and on their destruction in 2016.



CWAs declared under the CWC<sup>6</sup>, with the target date for destruction of all remaining CWAs set for September 2023. 68125 tonnes representing 97 % of the world's total declared stockpiles of category 1 CWAs had been destroyed under the verification regime of the OPCW by the end of 2018<sup>7</sup>, highlighting the success of this arms control treaty and its implementing organisation. By the end of 2018, all 97 of the CWPFs declared under the convention had been certified as having been destroyed, or converted for purposes not prohibited by the CWC<sup>8</sup>.

### 1.1.1 The CWC treaty regime

The preamble of the convention states the aims of the convention and the contexts to which it is aimed to contribute:

*... Determined for the sake of all mankind to exclude completely the possibility of the use of chemical weapons through the implementation of the provisions of the Convention...*

The provisions of the treaty contribute to three arms control regimes - disarmament, verification of compliance, and non-proliferation of weapons of mass destruction (WMDs). The convention contains 24 Articles, as well as three annexes: Annex on chemicals; Annex on implementation and verification; and Annex on the protection of confidential information. These are listed in Table I. The CWC represents a total ban of all chemical weapons, considering all toxic chemicals as chemical weapons, unless the intended purpose of their use is not prohibited by the convention<sup>9</sup>. This principle, called the general purpose criterion, ensures the comprehensive and general prohibition of weapons that use toxic chemicals, as well as toxic chemicals as a method of warfare.

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<sup>6</sup> OPCW AR, 2019. Report of the OPCW on the implementation of the Convention on the Prohibition of the Development, production, stockpiling and use of chemical weapons and on their destruction in 2018.

<sup>7</sup> OPCW, 2020. The OPCW website.

<sup>8</sup> OPCW AR, 2019.

<sup>9</sup> Article II (1) (a) of the CWC: "1. "Chemical Weapons" means the following, together or separately: (a) Toxic 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;" OPCW, 2005

Table I: The Articles and Annexes of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons, and on Their Destruction<sup>10</sup>.

The Preamble and the Articles	The Annexes
Preamble	Annex on chemicals
I: General obligations	Annex on implementation and verification
II: Definitions and criteria	Annex on the protection of confidential information
III: Declarations	
IV: Chemical weapons	
V: Chemical weapons production facilities	
VI: Activities not prohibited under this convention	
VII: National implementation measures	
VIII: The organization	
IX: Consultations, cooperation and fact-finding	
X: Assistance and protection against chemical weapons	
XI: Economic and technological development	
XII: Measures to redress a situation and to ensure compliance, including sanctions	
XIII: Relation to other international agreements	
XIV: Settlement of disputes	
XV: Amendments	
XVI: Duration and withdrawal	
XVII: Status of the annexes	
XVIII: Signature	
XIX: Ratification	
XX: Accession	
XXI: Entry into force	
XXII: Reservations	
XXIII: Depositary	
XXIV: Authentic texts	

The scope of the CWC and its prohibitions are presented in Articles I and II. Article I sets out the obligations for the convention states parties to never use, develop, produce, stockpile or transfer CWs<sup>11</sup>, excluding any possibility to gain exceptions from these stipulations. In Article II, the aforementioned general-purpose criterion is created, and the definition of chemical weapons is presented. These prohibitions, binding the states parties (SPs) of the treaty, are extended to include natural and legal persons that are under the jurisdiction of a SP in Article VII on national implementation measures<sup>12</sup>.

The practical steps of CW disarmament required from the CWC SPs are laid out in the CWC Articles III, IV and V. The first phase of disarmament are the declarations, where data on existing CWs and chemical weapons production facilities, as well as other facilities related to

<sup>10</sup> The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons, and on Their Destruction. OPCW, 2005. From the table of contents.

<sup>11</sup> Article I (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.” OPCW, 2005

<sup>12</sup> Article VII (1) (a): “Each State Party shall ... (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention...” OPCW, 2005

development of CWs, are declared to the OPCW<sup>13</sup>. The process of elimination of the declared CWs and facilities, as well as the requirements to provide unhindered access to the verification measures described in the convention, including on-site inspections, are set out in CWC Articles IV and V.

### 1.1.2 The Organisation for the Prohibition of Chemical Weapons, OPCW

The Organisation for the Prohibition of Chemical Weapons, OPCW is established in the CWC Article VIII entitled the Organization. All States Parties (SPs) to the CWC are automatically members of the OPCW, and a CWC state party can not be deprived of its membership of the OPCW<sup>14</sup>. The OPCW has three main bodies defined in the convention itself: the Conference of the States Parties (CSP), the Executive Council (EC) and the Technical Secretariat (TS)<sup>15</sup>. The Conference of States Parties is the principal organ of the OPCW and oversees the implementation of the CWC, promotes its goals, and reviews compliance with the treaty. It also oversees the activities of the EC and TS. The Executive Council is the executive organ of the OPCW, consisting of 41 OPCW member states that are elected by the CSP, and rotated every two years. The EC is subordinated to the CSP, and supervises the activities of the TS together with the CSP. The OPCW Technical Secretariat is a technical and professional body that assists the CSP and the EC in performing their tasks, and carries out the CWC's verification measures<sup>16</sup>. The OPCW organs and subsidiary bodies are presented in Figure 1.



Figure 1. OPCW organs and subsidiary bodies. Data from OPCW, 2017c.

<sup>13</sup> Article III (1-2), OPCW, 2005

<sup>14</sup> Article VIII (2), OPCW, 2005

<sup>15</sup> Article VIII (4), OPCW, 2005

<sup>16</sup> OPCW, 2017c. OPCW fact sheet - The structure of the OPCW.

The OPCW headquarters are located in the Hague, Netherlands. While the CSP and the EC comprise delegates of the member states to the organisation and convene in sessions on regular intervals, the TS holds a permanent staff of about 500 people working at the Hague headquarters. Around 60 per cent of the TS staff, recruited from over 80 CWC SPs, are employed in the Inspectorate and the Verification divisions of the TS. The Inspectorate division of the TS is involved in carrying out the inspections required by the CWC of both military and commercial facilities around the world. The Verification division analyses the information collected during inspections, as well as assesses the data submitted by OPCW member states in their declarations. The organisation's budget for 2020 is 70 958 760 euros.<sup>17</sup>

The Director-General (OPCW DG) is the head of the TS and its chief administrative officer. The OPCW DG is appointed by the CSP for a term of four years, renewable for one further term. The OPCW DG is responsible for organising and functions of the Scientific advisory board, referred to in Article VIII (21) (h). The OPCW DG has also powers to establish temporary working groups of scientific experts to provide recommendations on specific issues. In the performance of their duties, the OPCW DG or any other OPCW members of the staff are responsible only to the CSP and the EC, and cannot seek or receive instructions from any government or from any other source external to the organisation.<sup>18</sup> The organisation has the legal capacity and the privileges and immunities as are necessary for the exercise of its functions. They are established in the CWC Article VIII, part E<sup>19</sup>. The organisation enjoys these privileges and immunities on the territory and in any other place under the jurisdiction or control of a CWC state party, as stated in Article VIII (48).

### **1.1.2.1 The Conference of the States Parties, CSP**

The composition, procedures and decision-making, as well as the powers and functions of the Conference of the States Parties, CSP, are set out in CWC Article VIII, paragraphs 9 through 22. The CSP is the principal, decision-making organ of the OPCW, responsible for considering and adopting the report, programme and budget of the OPCW<sup>20</sup>, as well as having the power to consider, make recommendations and take decisions on any questions, matters or

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<sup>17</sup> OPCW, 2017c. OPCW fact sheet - The structure of the OPCW.also OPCW, 2020. OPCW by the numbers

<sup>18</sup> Article VIII (43-46), OPCW, 2005

<sup>19</sup> Article VIII (48-51), OPCW, 2005

<sup>20</sup> Article VIII (21) (a), OPCW, 2005

issues within the scope of the CWC. This decision-making power includes the matters relating to the powers and functions of the EC and the TS<sup>21</sup>.

The CWC is built on the principles of equality, and all CWC states have one vote at the CSP<sup>22</sup>. The CSP meets in its regular sessions annually for one week in The Hague. In addition to the yearly CSP sessions, special sessions (SS) of the conference can be organised under the following circumstances: when decided by the CSP, when requested by the executive council, or when requested by one third of all CWC states parties. The CSP must also meet to consider any proposed amendments to the CWC. Since 2003, the CSP has also organised regular special sessions at five-year intervals to review the operation of the CWC.<sup>23</sup>

## **1.2 The CWC and the OPCW in the context of international law**

The customary norm to prohibit the use of poisons as a method of warfare has evolved over the centuries. Toxic chemicals have been used as a method of warfare throughout the known history; however, the use of poison as a weapon has also long been associated with unnecessary and inhumane cruelty and suffering. Using chemical weapons has therefore been regarded as something that is below the definition of ‘civilised’ battle, and banning chemical weapons has taken a prominent position in since the earliest disarmament agreements. The Hague Conventions of 1899 and 1907<sup>24</sup>, and the Geneva Protocol in 1925 distilled the international customary law emerging from these general sentiments into treaty law.<sup>25</sup>

After the end of WWII, the world was mainly focused on the threat of nuclear war. The weapons of mass destruction disarmament efforts therefore took decades to start receiving attention again. However, in 1968, discussions on disarmament of biological and chemical weapons were begun at the Geneva disarmament conference. These discussions lead eventually to the birth of Biological and Toxin Weapons Convention (BTWC) that opened for

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<sup>21</sup> Article VIII (19), OPCW, 2005

<sup>22</sup> Article VIII (9), OPCW, 2005

<sup>23</sup> OPCW, 2020; The CSP special sessions are held every five years to undertake reviews of the operation of the convention and to take into account any relevant scientific and technological developments. These special sessions are set out in Article VIII (12) and Article VIII (22) of the CWC, OPCW, 2005

<sup>24</sup> The Hague Conventions of 1899 and 1907 were the first multilateral treaties that addressed the conduct of warfare. The Hague Convention from 1899 included a declaration on the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases, from which the contracting powers agreed to abstain. The 1907 Convention (IV) on Laws and Customs of War on Land (II) Hostilities (I) Means of injuring the enemy, sieges, and bombardments, Article 23 states that it is especially forbidden to employ poison or poisoned weapons. Yale, 2008. The Avalon project. Documents in law, history and diplomacy.

<sup>25</sup> The Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was signed at Geneva in 17th June 1925 and it entered into force on 8th February 1928. Also OPCW, 2017c; OPCW, 2020, History: Chemical Weapons Convention Negotiations.

signature in 1972. The BTWC obliged its state parties to continue negotiations on chemical weapons, with the goal of instituting measures mandating their destruction, and the prohibition of their development, production and stockpiling. Negotiations on chemical weapons convention proved to be slow.<sup>26</sup>

In 1980, the Geneva Conference on Disarmament (CD) established a working group on chemical weapons, which, in 1984, was tasked of creating the outlines of a chemical weapons ban, paving way to the annually updated rolling text of the convention. The CD is a multilateral disarmament forum established in 1978. The terms of reference of the CD include multilateral arms control and disarmament problems. The CD meets in an annual session, and conducts its work by consensus. Its budget is included in that of the United Nations, and the CD reports to the United Nations General Assembly (UN GA) annually. In 1992, a draft convention on chemical weapons was adopted by the CD. Subsequently, the United Nations Secretary-General (UN SG), the depositary of the convention, was requested by the UN GA to open the convention for signature on 13 January 1993 in Paris. The convention was signed by 130 countries during the three-day Paris signing conference.<sup>27</sup>

The link between the CWC and the international humanitarian law is clear. The obligations assumed under, and the principles and objectives of the Geneva Protocol of 1925 and the BTWC of 1972 are reaffirmed in the preamble to the CWC<sup>28</sup>. However, the potential routes that would lead to eventual accountability for CW -related crimes are complicated. The International Criminal Court (ICC) has jurisdiction over persons with respect to war crimes, complementary to national criminal jurisdictions. Article 8 (2) (b) (xviii) of the 1998 ICC Statute states that “Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” is a war crime in international armed conflicts. Article 8 (2) (e) (xiv) of the ICC Statute as amended in 2010, extends this war crime definition to cover non-international armed conflicts<sup>29</sup>. State responsibility is yet another thing.

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<sup>26</sup> UNOG, 2020. The Biological Weapons Convention. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, commonly known as the Biological and Toxin Weapons Convention (BTWC), opened for signature in 1972 and entered into force in 1975; Also OPCW, 2020. History: Chemical Weapons Convention Negotiations

<sup>27</sup> UNOG, 2020. An introduction to the Conference on Disarmament; OPCW, 2020. History: Chemical Weapons Convention negotiations. In between the CD sessions, the questions regarding the scientific basis of the convention were researched in various institutions, discussion groups and scientific organisations. To mention a few, the Pugwash Conference on Science and World Affairs has made a long-standing contribution to the chemical disarmament talks. In Finland, the CC (later CW) -project of the University of Helsinki was established to develop analytical methods to support chemical disarmament. After the project ended, the Finnish Institute for Verification of the Chemical Weapons Convention (VERIFIN) was established as an independent institute under the University of Helsinki.

<sup>28</sup> The CWC Preamble (3-6), OPCW, 2005

<sup>29</sup> ICC, 2010. Rome Statute of the International Criminal Court.

### 1.2.1 The CWC is a treaty

An agreement is a consensual bond between two or more subjects of international law. This bond may be either express or tacit. An express bond can be embodied in a written instrument such as a treaty, or concluded orally. A tacit bond means that a state does not expressly participate in the agreement, but acts in a way that can be only interpreted in good faith as an acceptance of the agreement. A treaty is therefore a written instrument of express agreement between two or more subjects of international law.<sup>30</sup> Treaties may be concluded between states, between states and international organisations, and between international organisations<sup>31</sup>. Since the end of the WWII, treaties have assumed an increasingly important place in international law. Unlike custom, whose precise requirements may often be unclear and whose evolution may take long periods of time, treaties provide their state parties with instant and clearly defined rights and obligations<sup>32</sup>.

The 1969 Vienna convention on the law of treaties (VCLT) is a convention governing the rules of the creation and legal effects of treaties, and their interpretation. The VCLT originated as a statement of customary international law through collection of rules on treaty interpretation. The VCLT only applies to some treaties and not all agreements existing, and valid under international law, defining the scope of application in its article 2 (1) (a)<sup>33</sup>:

*“Treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”*

The principle of the binding nature of treaties is stated in Article 26 of the VCLT, under the heading ‘*Pacta sunt servanda*’, every treaty is binding upon the parties to it and must be performed by them in good faith. On the other hand, the Article 34 of the VCLT defines that a

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<sup>30</sup> Kolb, 2017. The law of treaties. An introduction. Paperback edition 2017. Edward Elgar Publishing Ltd, Cheltenham, UK. Ch II, Concept, p. 16

<sup>31</sup> Fitzmaurice in Evans (2018) International Law. 5th edition. Oxford University Press, UK. Ch 6, The practical working of the law of treaties, p.144

<sup>32</sup> Hall in McConville & Chui (Eds., 2017) Research methods for law. 2nd edition, Edinburgh University Press, Edinburgh, UK. Ch 10, Researching international law, p. 255

<sup>33</sup> Article 2 (1) (a), The Vienna Convention On the Law of Treaties. VCLT, 1969; also Kolb, 2017. Ch II, Concept p. 21

state not party to a treaty is as a matter of treaty law in most cases under no obligation to comply with the obligations set therein<sup>34</sup>.

Treaties are one of the clearest ways to bring into existence rules that are binding between two or more states. It should be noted, however, that legal relations produced by treaties have differences. Some treaties are dispositive, and their legal effects are realised as a whole immediately upon their conclusion. A good example of a dispositive treaty would be a treaty establishing an international boundary. Some treaties, however, are treaties establishing an evolving relationship where only certain core principles are spelled out, but parties are left to discuss the potentially arising details and problems. If consensus is not agreed, a dispute-settlement body will decide on the outcome. Furthermore, some treaties consist of exchange of reciprocal promises regarding the parties' future conduct, such as extradition treaties.<sup>35</sup> These differences have a profound effect on how treaties can be interpreted. With any non-dispositive type of treaty, it is not feasible to find out what the parties actually agreed upon, by simply inspecting the treaty text.

When a multilateral treaty is widely adhered to, and represents the views of the state parties as to universal legal principles, such treaties are said to be legislative, or law-making. That means they lay down standards of conduct common to all states parties. These kind of legislative treaties create rules binding on all states, whether or not they are actual parties to the treaty<sup>36</sup>. The CWC, approaching universal participation, can be considered to contribute in such a way to the formation of international customary law.

### **1.2.2 The OPCW is an international organisation**

International organisations (IOs) coordinate efforts of states on issues of international relevance. IOs first emerged in the nineteenth century, evolving from multilateral conferences invested to deal with particular situations, to permanently working institutions around which member states meet regularly. Today, IOs perform a number of functions, such as providing forums for deliberating and discussing matters of common interest, as well as developing rules for matters of common interest, providing mechanisms for monitoring compliance with internationally agreed rules and policies, and providing forums for the resolution of international disputes. It is difficult to lay down an all-encompassing definition of an IO,

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<sup>34</sup> Article 34 (1): "A treaty does not create either obligations or rights for a third state without its consent." VCLT, 1969

<sup>35</sup> Lowe in Tams *et al.* (Eds., 2016) Research handbook on the law of treaties. Paperback edition 2016. Edward Elgar Publishing Ltd, Cheltenham, UK. Ch 1, The law of treaties; or, should this book exist? pp. 5-6

<sup>36</sup> Hall in McConville & Chui (2017) Ch 10, Researching international law p. 256



however, IOs are most commonly created between states, and on the basis of a treaty. The organisation must be established under international law. In addition, the definition of an IO usually includes possessing at least one organ, and having a will that is distinct from that of their member states. The “distinct will”, manifested in practise by at least one organ of the organisation being autonomous from the members or possessing the ability of operating on a majority basis, justifies the IOs having a separate legal personality.<sup>37</sup> That an entity has an international legal personality means that the entity is a bearer of rights and duties derived from international law<sup>38</sup>.

Legal principles concerning IO matters such as membership, competences, and financing are derived from the organisation’s own constituent instrument and practises. Furthermore, customary international law as well as treaties have created common principles that generally apply to all IOs. These common principles apply in the absence of contrary principles provided for in the law of the particular IO. The common principles concern matters such as the legal personality of IOs, implied competences, interpretation of constituent instruments, and the liability and responsibility of an IO and its member states.<sup>39</sup> The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations from 1986<sup>40</sup> can be considered to be a statement of such customary international law. The treaty has not yet entered into force.

The purposes, structure and competences of an IO as a whole, as well as the powers and functions granted to its particular organs, are set out in the treaty that establishes the organisation. In addition to the powers expressly conferred on IOs by their constituent treaties, IOs also possess powers that are implied. The doctrine of implied powers of IOs means, that IOs are deemed to have the powers that are essential for the organisation to perform their duties, even though they are not expressly provided for in the treaty establishing the organisation. These powers are not limited to those needed to carry out express functions of the organisation, but rather are implied whenever they are essential to the fulfilment of the organisation’s objectives and purpose. The doctrine emerged in the mid-20th century

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<sup>37</sup> Klabbers, 2015. *Advanced introduction to the law of international organisations*. Edward Elgar Publishing Ltd, Cheltenham, UK. Ch 1, The concept of international organization pp. 1-7; Akande in Evans (2018) Ch 8, *International organizations* pp. 227-230; Malanczuk, 1997. *Akehurst’s modern introduction to international law*. 7<sup>th</sup> revised edition. Routledge, UK. Ch 6, *International organizations, individuals, companies and groups* pp. 92-96

<sup>38</sup> Akande in Evans (2018) Ch 8, *International organizations* pp. 231-232. The international legal personality can be conferred to the IO by the express provisions of the treaty establishing it. The personality can also be deduced - either from will of the members in form of capacities, powers, rights and duties bestowed to the organisation, or from the concept that an international organisation has an international legal personality from the presence of criteria stated in the paragraph.

<sup>39</sup> *Ibid.* p. 230

<sup>40</sup> Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. VCLTIO, 1986.

following the realisation that as IOs are given certain functions, purposes and objectives, they must possess certain powers to execute those, even when a situation arises that member states have never before considered. The doctrine has been applied by the International Court of Justice (ICJ) in a number of cases concerning the powers of the IOs, most prominent being the ICJ Advisory opinion on Certain expenses of the United Nations from 1962.<sup>41</sup>

In general, IOs also have powers to make decisions relating to their scope of activity. These may be directed towards their members, or in rare cases, at third parties such as individuals or other non-state entities. Whether a particular decision is legally binding to its addressee depends on if the IO or its organ has been expressly or impliedly conferred with a power to take binding decisions. If the treaty establishing an international organisation provides that the organisation may adopt measures that bind the treaty member states, the states parties are obliged to comply with any such measures to the extent and manner described in the convention. Furthermore, the language of the decision must reveal an intention to issue a binding decision by the decision-making organ.<sup>42</sup> An example of this is the UN, where the member states of the UN are obliged to carry out the binding decisions of the UN SC<sup>43</sup>. Although resolutions and acts of international organisations do not directly generate rules in the context of international law, they indirectly help to create such rules by providing useful and easily accessible evidence of *opinio juris* and therefore contribute to the emergence of rules of customary international law<sup>44</sup>.

Few IOs have a judicial system that can adjudicate on the legality of acts of the organisation or its organs. If an IO makes a decision that is beyond its powers (*ultra vires*), the legal effectiveness of the decision can be questioned. A decision taken *ultra vires* can be considered to stand, unless it is set aside by a competent body. On the other hand, these kinds of decisions can be considered a nullity and of no effect at all, with the states free to depart from. In the Advisory opinion on Certain expenses of the United Nations, the ICJ determined that if an act of the UN organ is considered an invalid act, such invalidity would constitute the absolute nullity of the act. However, in the same opinion, the ICJ claimed that even if the activity is

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<sup>41</sup> Akande in Evans (2018) Ch 8, International organizations pp. 339-242; Klabbers, 2015. Ch 2, The legal existence of international organizations pp. 22-25; ICJ, 1962. Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter) Advisory Opinion of 20 July 1962: I.C. J. Reports 1962, p. 151; Klabbers, 2015. Ch 6, Accountability pp. 83-84

<sup>42</sup> Akande in Evans (2018) Ch 8, International organizations pp. 339-242; Hall in McConville & Chui (2017) Ch 10, Researching international law p. 273

<sup>43</sup> Relevant Articles of the UN Charter dealing with this are Ch V, Article 23: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." and Ch XVI, Article 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

<sup>44</sup> Hall in McConville & Chui (2017) Ch 10, Researching international law p. 273

beyond the powers of a particular organ of an IO, it may still be within the powers of the organisation at large. In addition, the ICJ was of the opinion that each organ of an IO must decide for itself on the proper scope of its competences.<sup>45</sup>

### 1.2.3 On state responsibility and attribution

International law treats states as the basic units of the system. States are both the main subjects of the international law, as well as the entities whose choices and conduct generate positive international law. The choices and conduct of states are their practise, and the practise of states defines the emergence and evolution of norms of customary international law.<sup>46</sup> A hallmark of a system of law is that its rules can be enforced against those who break them. As mentioned, states are the primary subjects of international law, and state responsibility is also the paradigm form of responsibility on the international plane. In addition, international organisations, individuals and companies have legal personalities, and as such are subjects of international law. Apart from the responsibility of IOs, however, the rules concerning the responsibility of the aforementioned under international law are less distinct, and no general regime of responsibility has developed to cover them.<sup>47</sup>

The law of state responsibility deals with three general questions - whether there has been a breach by a state of an international obligation, what are the consequences of this breach and who, and in what ways, may respond to this breach or seek reparations due to it. A state can only be engaged by for breaches of international law, and for conduct that is internationally wrongful. What is a breach of international law by a state depends on the said state's international obligations. These obligations may vary between states even under customary international law, but especially when treaties are concerned. The background assumptions underlying state responsibility - attribution, breach, excuses and consequences - and the basis on which specific state obligations exist, are set out in the 2001 International Law Commission (ILC) Articles on State Responsibility on Internationally Wrongful Acts (ASRIWA).<sup>48</sup>

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<sup>45</sup> ICJ, 1962; Also Akande in Evans (2018) Ch 8, International organizations pp. 241-243

<sup>46</sup> Hall in McConville & Chui (2017) Ch 10, Researching international law p. 258

<sup>47</sup> Crawford & Colleson in Evans (2018) Ch 14, The character and forms of international responsibility p. 416; Malanczuk, 1997. Ch 6, International organizations, individuals, companies and groups pp. 91-92

<sup>48</sup> Crawford & Colleson in Evans (2018) Ch 14, The character and forms of international responsibility pp. 415-416

That a certain conduct is attributable to a state does not say anything about the legality of that conduct as such. Theeuwen<sup>49</sup> discussed attribution in three different categories: a) Technical attribution: the outcome of a factual and technical investigation both in terms of who the likely perpetrator is and the degree of certainty with which this can be established; b) Political attribution: the decision whether or not to publicly and politically attribute a particular attack to a particular actor, without necessarily attaching legal consequences to this attribution; and c) Legal attribution: the decision to attribute certain conduct to a particular state with a view to invoking the responsibility of that state for an internationally wrongful act. The author argued in the view of ASRIWA articles that the purpose of legal attribution is to establish that the act considered as internationally wrongful emanates from a certain state for the purposes of state responsibility.

State responsibility may be invoked by acts or omissions of any state organ, or officials. A state is liable for the acts of its officials even when they have disobeyed or exceeded their instructions, provided that the officials were acting under the apparent authority of the state, or if they have abused the powers and facilities placed at their disposal by the state. The rules of attribution under the Articles 4-11 of the ASRIWA specify the actors whose conduct may engage the responsibility of the state. In general, a state is not responsible for the acts of mobs or individuals. However, their acts may be attributable to state if the state acknowledges the acts as its own, or fails in some obligations to prevent the conduct.<sup>50</sup>

### **1.3 Re-emerging chemical weapons threat in the 21<sup>st</sup> century**

#### **1.3.1 Barrel bombs and perfume bottles**

The 20-year success of the CWC and world chemical disarmament has been marred by very sudden and unexpected return of CWs in the modern day battlefield, as well as the recurring appearance of CWAs in the news headlines. In addition to the battlefield use by various parties involved with the Syrian civil war, CWAs have recently been used as a tool in high-profile assassinations and assassination attempts.

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<sup>49</sup> Theeuwen, 2018. Attribution for the purposes of state responsibility. Netherlands Military Law Review p. 6

<sup>50</sup> ASRIWA, 2005; Malanczuk, 1997. Ch 17, State responsibility pp. 256-259; Crawford & Colleson in Evans (2018) Ch 14, The character and forms of international responsibility pp. 416-417

In 2017 in Kuala Lumpur, Malaysia, the People's Democratic Republic of North Korea's leader Kim Jong Un's brother Kim Jong Nam was assassinated using nerve agent VX<sup>51</sup>. A former Russian spy Sergei Skripal and his daughter were poisoned in Salisbury, UK in early 2018, using a CWA belonging to a group of nerve agents called the Novichoks<sup>52</sup> that were originally developed in the 1970s - 1990s Soviet Union. Later in 2018, the open-source intelligence organisation Bellingcat provided evidence that two persons carrying out the Salisbury attack were intelligence officers of the Russian Armed Forces intelligence service GU<sup>53</sup>. In addition to the original target Mr. Skripal and his daughter, both of whom survived the attack despite severe toxicity symptoms, the incident resulted in two unintended casualties due to a passer-by finding the vessel the attackers used to transport the Novichok poison, a small perfume bottle, and giving the bottle to his partner. The partner sprayed the contents of the bottle onto her hands, developed symptoms within 15 minutes and died a week later at a hospital. The finder got poisoned while handling the bottle, but survived.<sup>54</sup>

In February 2019, Bellingcat released additional intelligence findings<sup>55</sup> that connected a third person also involved in the 2018 Salisbury attack to previous poisoning incident of a Bulgarian arms trader and his son. In April 2015, a Bulgarian arms manufacturer and his son were severely affected by a yet-unidentified poison during a dinner event with foreign trade partners. Biological samples taken from the victims were confirmed to contain traces of organophosphate type (nerve-agent or pesticide) substances by analysis in an OPCW designated laboratory. The person suspected of carrying out the Salisbury attack travelled multiple times to Bulgaria during 2015, including a trip days before the incident. Again, Bellingcat provided detailed proof that the person in question is a GU officer.

Even more worrisome development concerns the return of CWs in the battlefield use. Repeated incidents of CW use have since 2012 been reported as a part of the armed conflict in the Syrian Arab Republic (SAR). At that time, the SAR was not a state party to the CWC. Syria, mediated by Russia, ratified the CWC in 2013<sup>56</sup> following the world reaction to the re-emerging use of these banned weapons, and to stop the impending US military intervention in the conflict. SAR accession to the CWC included the declaration of the SAR CWA stockpile

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<sup>51</sup> OPCW, 2017. OPCW Executive Council condemns chemical weapons use in fatal incident in Malaysia. OPCW Press release 10.3.2017

<sup>52</sup> UK Prime Minister, 2018. Oral statement to Parliament. PM Commons statement on Salisbury incident: 12 March 2018

<sup>53</sup> Bellingcat, 2018. Skripal suspects confirmed as GRU operatives: Prior European operations disclosed.

<sup>54</sup> BBC, 2018. Novichok: Victim found poison bottle in branded box.

<sup>55</sup> Bellingcat, 2019. Third suspect in Skripal poisoning identified as Denis Sergeev, high-ranking GRU officer.

<sup>56</sup> OPCW, 2013. Syria's accession to the Chemical Weapons Convention enters into force. OPCW Press release 14.10.2013.

to the OPCW, followed by its destruction<sup>57</sup>. In addition, the SAR has since destroyed all its declared 27 chemical weapons production facilities (CWPFs), the destruction having been verified by the OPCW TS<sup>58</sup>. However, the OPCW has also concluded that there were gaps, inconsistencies and discrepancies in the initial SAR CWA declaration, and its subsequent submissions to the OPCW<sup>59</sup>.

Attacks using chlorine gas and other CWAs such as nerve agents have continued in Syria until the present day. On 4th April 2017, a chemical attack was carried out in Khan Shaykhun area in the Idlib province of the SAR. There, tens of civilians died and further hundreds got poisoned by chemicals deployed using a barrel bomb dropped from an aircraft<sup>60</sup>. Biomedical samples taken from the victims by OPCW representatives confirmed that the Khan Shaykhun victims were exposed to a chemical warfare agent - a nerve gas sarin<sup>61</sup>.

Recently, Schneider and Lütkefend<sup>62</sup> and al Maghafi<sup>63</sup> have compiled comprehensive reports on the total scale and logic of CW use during the Syrian conflict. According to al Maghafi report there was credible evidence to be confident that a chemical weapon had been used in at least 106 incidents between 2014 and 2018. Schneider and Lütkefend concluded in their research that the extent of CW use in Syria is even higher than other sources have considered, and there have been at least 336 chemical weapons attacks over the course of the Syrian civil war. The authors attributed 98 percent of these attacks to the Assad regime, with the Islamic State group being responsible for the rest.

Chlorine munitions derived from conventional “barrel” or “lob” bombs have accounted for at least 89 per cent of all chemical attacks throughout the Syrian war<sup>64</sup>. Chlorine gas was the first chemical weapon used at a large scale, and its use begun already during the World War I. Chlorine gas is also an ordinary industrial chemical and as such, has many everyday practical uses and is not classified as a CWA. However, the CWC in its Article II comprehensively bans the use of all poisonous substances as a weapon in war<sup>65</sup>. The use of chlorine gas as a CW is difficult to prove afterwards even using the most modern technology, as chlorine

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<sup>57</sup> OPCW, 2014b. OPCW maritime operation completes deliveries of Syrian chemicals to commercial destruction facilities. OPCW Press release 24.7.2014.

<sup>58</sup> OPCW EC, 2020. Report by the director-general. Progress in the implementation of decision C-SS-4/Dec.3 on addressing the threat from chemical weapons use.

<sup>59</sup> OPCW EC, 2016. Decision. Report by the director-general regarding the declaration and related submissions by the Syrian Arab Republic.

<sup>60</sup> BBC, 2017. Syria conflict: 'Chemical attack' in Idlib kills 58.

<sup>61</sup> OPCW, 2017f. OPCW Fact-Finding Mission confirms use of chemical weapons in Khan Shaykhun on 4 April 2017. OPCW Press release 30.06.2017.

<sup>62</sup> Schneider and Lütkefend, 2019. Nowhere to hide. The logic of chemical weapons use in Syria. Global Public Policy Institute. Berlin, Germany p. 3

<sup>63</sup> al Maghafi, 2018. How chemical weapons have helped bring Assad close to victory. BBC News Panorama.

<sup>64</sup> Schneider and Lütkefend, 2019 p. 3

<sup>65</sup> Article II (1), OPCW, 2005

evaporates rapidly and does not leave behind very distinct metabolites or degradation products in the victims or in the environment.

### **1.3.2 International efforts to uphold accountability concerning emerging CWC treaty violations**

In order to uphold the international law and treaties, those who break them should face consequences. Although CWs are subject to a comparatively well-developed set of international instruments such as the CWC, the international community as a whole has proven to be very limited in its capability to react and respond to the emerging CWC treaty violations with concise action. The veto powers of permanent members of the United Nations Security Council (UN SC), the main UN body responsible in upholding the international law, are actively employed to prevent the UN SC from adopting any decisions that conflict with the interests of the said permanent member states. This has been characteristic also to the attempts to initiate chemical weapons justice processes, most prominently during the Syria crisis.

The OPCW launched already in 2014 a still ongoing OPCW Fact Finding Mission (FFM)<sup>66</sup> to investigate the alleged CWC treaty violations in the SAR area. The OPCW FFM was then seen as a purely technical effort to find out if chemical weapons had been used and did not seek to identify the perpetrators responsible of the CW use cases. In 2017, the FFM issued three reports determining that chemicals had been used as weapons in SAR: in Um Housh on 16th September 2016; in Khan Shaykhun on 4th April 2017 and in Ltamenah on 30th March 2017<sup>67</sup>. The OPCW FFM efforts in Syria have continued up until this day.

To uphold accountability regarding CWC treaty violations, the UN SC adopted resolution 2235 (2015) on 7<sup>th</sup> August 2015, condemning “any use of any toxic chemical, such as chlorine, as a weapon in the Syrian Arab Republic”, and expressing determination to identify and hold accountable those responsible for such acts<sup>68</sup>. The resolution established a specially developed attribution mechanism, a partnership between the UN and the OPCW. The OPCW-UN Joint Investigative Mechanism (JIM) had a mandate to “...identify individuals, entities, groups or governments who were perpetrators, organizers, sponsors or otherwise involved in the use of CWs in the SAR...”. OPCW-UN JIM reports in 2016 and 2017 demonstrated the

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<sup>66</sup> OPCW, 2014a. OPCW to undertake fact-finding mission in Syria on alleged chlorine gas attacks. OPCW Press release 29.4.2014

<sup>67</sup> OPCW AR, 2018. Report of the OPCW on the implementation of the Convention on the Prohibition of the Development, production, stockpiling and use of chemical weapons and on their destruction in 2017.

<sup>68</sup> UN, 2017. Fact sheet. The OPCW –UN Joint Investigative Mechanism

involvement of SAR government in several chemical attacks carried out in SAR<sup>69</sup>. The UN SC renewed the JIM's mandate in resolution 2319 on 17 November 2016<sup>70</sup>, for a further period of one year. However, the mandate of OPCW-UN JIM ended in late 2017, after Russia repeatedly vetoed the renewal of its mandate by the UN SC<sup>71</sup>.

Although the international response to the recent CWC treaty violations has reflected these constraints of the international security mechanism and appeared somewhat stalled, some progress has been made towards ensuring accountability regarding CW use. In addition to UN-OPCW JIM, terminated in 2017, various other initiatives have been launched aiming at attribution, collecting evidence and criminal prosecution in case of CWC violations. The UN Independent International Commission of Inquiry on the Syrian Arab Republic was established already in August 2011 by the UN Human Rights Council with a mandate to investigate all alleged violations of international human rights law since March 2011 in the SAR<sup>72</sup>. In addition, The International, Impartial and Independent Mechanism on International Crimes Committed in the Syrian Arab Republic (IIIM) was established in December 2016 by the UN General Assembly. IIIM seeks to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law, committed in the SAR since March 2011, by collecting and analysing information and evidence to assist criminal proceedings in national, regional or international courts or tribunals that have, or may in the future have, jurisdiction over these crimes<sup>73</sup>.

The examples mentioned above concern the operations of international organisations - The OPCW and the UN. In addition, individual states have the possibility to take initiatives on the international plane. The International Partnership Against Impunity for the Use of Chemical Weapons was launched in January 2018 by France. The membership of this intergovernmental initiative currently comprises 40 states and the European Union. The purpose of the mechanism is to collect and preserve information to hold accountable those responsible for the proliferation or use of chemical weapons. In addition, the purpose of the mechanism is to facilitate the sharing of such information through all available mechanisms, as well as to designate individuals, entities, groups and governments involved in the proliferation or use of

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<sup>69</sup> OPCW UN JIM, 2016. Third report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, Part V. Assessments, findings and conclusions pp.12-19; OPCW UN JIM, 2017. Seventh report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism, Part IV (B) 46.

<sup>70</sup> UN SC, 2016b. United Nations Security Council resolution 2319 (2016).

<sup>71</sup> UN, 2017b. Security Council fails for fourth time to renew mandate of Joint Mechanism investigating chemical weapons attacks in Syria.

<sup>72</sup> UN, 2019a. Independent International Commission of Inquiry on the Syrian Arab Republic.

<sup>73</sup> UN, 2019b. The International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic.



chemical weapons, and publicise the names of those placed under sanctions for these<sup>74</sup>. France, in its capacity as a chair of the initiative, has published a guiding document on international tools for fighting against impunity for the use of chemical weapons<sup>75</sup>.

### 1.3.3 The turning point - 4th special session of the CSP, July 2018

At the 5-yearly planned 4th special session (SS) of the CSP in July 2018, the UK, supported by 30 other CWC states parties<sup>76</sup> supplied a draft decision to be discussed at the conference, titled “Addressing the threat from chemical weapons use”<sup>77</sup>. The draft decision operative paragraph 1 condemned:

*“...in the strongest possible terms the use of chemical weapons by anyone under any circumstances, emphasising that any use of chemical weapons anywhere, at any time, by anyone, under any circumstances is unacceptable and contravenes international norms and standards.”*

In addition, the decision condemned the use of chemical weapons since 2012 in Iraq, Malaysia, the SAR, and the UK, and condemned the use of chemical weapons by the SAR government as reported by the OPCW-UN JIM. Furthermore, the draft decision stated, that the OPCW TS will put in place arrangements to identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic. Also, the OPCW director general, if requested by a state party investigating a possible CW use on its territory, could provide technical expertise to identify those who were perpetrators, organisers, sponsors or otherwise involved in the use of chemicals as weapons. The draft decision paragraphs 10 through 12 were as follows:

*“The Conference of the States Parties ...*

*...10. **Decides** that the Secretariat shall put in place arrangements to identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic by identifying and reporting on all information potentially relevant to the origin of those chemical weapons in those instances in which the OPCW Fact-Finding Mission in Syria determines or has determined that use or likely use occurred, and cases for which the OPCW-UN Joint Investigative Mechanism has not issued a report; and decides also that the*

<sup>74</sup> Chemical weapons - no impunity, 2020

<sup>75</sup> *Ibid.* The report states that it is not a negotiated product of the initiative participants and its contents do not represent positions of the initiative’s participating states.

<sup>76</sup> Albania, Australia, Belgium, Bulgaria, Canada, Denmark, Estonia, Finland, France, Georgia, Germany, Iceland, Ireland, Japan, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Moldova, Romania, Slovakia, Slovenia, Sweden, Turkey, and the USA

<sup>77</sup> OPCW CSP SS4, 2018. Report of the fourth Special Session of the Conference of the States Parties.

*Secretariat shall provide regular reports on its investigations to the Council and to the United Nations Secretary-General for their consideration;*

*11. **Notes** that under paragraph 35 of Article VIII, the Council shall consider any issue or matter within its competence affecting the Convention and its implementation, including 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, and further notes that under paragraph 36 of Article VIII of the Convention that, in its consideration of doubts or concerns regarding compliance and cases of non-compliance, the Council shall, in cases of particular gravity and urgency, bring the issue or matter directly to the attention of the United Nations General Assembly and the United Nations Security Council;*

*12. **Decides** that the Secretariat shall preserve and provide information to the investigation mechanism established by the United Nations General Assembly in resolution 71/248 (2016), as well as to any relevant investigatory entities established under the auspices of the United Nations;”*

The draft decision was unprecedented, suggesting that the OPCW, previously determined to battle the use of chemical weapons with very neutral technical expertise approach and unequivocal analysis to proof the presence or absence of CWAs only, should start looking for answers to who has used the chemical weapons instead of plainly, if they had been used.

#### **1.3.4 Opposing positions of the CWC States Parties related to OPCW attribution tasks**

The draft decision was met with very heated discussion between the states parties and the OPCW groups of nations attending the 4<sup>th</sup> SS CSP, representing very different views on the scope and mandate of the CWC treaty. During the conference, 68 statements were given under this agenda item by the CWC state parties and other authorised delegations, with 62 of those made a public part of the proceedings and available for public. The draft decision were countered by seven amendment proposals and alternative draft decisions<sup>78</sup>, all which were voted upon and rejected by the conference. Consensus was not reached. Ultimately, the draft decision was voted on and adopted with two thirds majority CSP vote as decision C-SS-4/Dec.3, dated 27 June 2018, with 82 votes for and 24 votes against the adoption of the decision<sup>79</sup>. The vote results, together with the attendance data on the conference are listed in Table II.

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<sup>78</sup> submitted by Kazakhstan, Belarus, Venezuela, Iran, Burundi with two countering draft decisions, and Russia together with China

<sup>79</sup> OPCW CSP SS4, 2018

Table II: List of CWC states parties' attendance<sup>80</sup> and vote<sup>81</sup> concerning the draft decision "Addressing the threat from chemical weapons use" at the 4<sup>th</sup> SS CSP. The states parties present in the SS but not voting on the draft decision were counted as abstaining from the vote.

CWC states parties/Area	Number	Present at the 4 <sup>th</sup> SS CSP	Voted	Abstained	For	Against	Voting %	Abstain %	Against %	For %
Total	193	152	106	46	82	24	69.7	30.3	22.6	77.4
Africa	52	31	16	15	9	7	51.6	48.4	43.8	56.3
Asia	56	45	29	16	17	12	64.4	35.6	41.4	58.6
Eastern Europe	23	22	20	2	18	2	90.9	9.1	10.0	90.0
Latin America and the Caribbean	33	25	13	12	10	3	52.0	48.0	23.1	76.9
Western European and other states	29	29	28	1	28	0	96.6	3.4	0.0	100.0

The decision C-SS-4/Dec.3<sup>82</sup>, adopted by two-thirds majority vote in 4<sup>th</sup> special session of the CSP was formulated on the rationale that the mandate of including attribution duties in the functions of OPCW is already included in the current text of the CWC treaty. The decision text recalled Articles VIII, IX and XII of the treaty as the basis of the decision. The contents of these CWC Articles are discussed in detail in this study.

#### 1.3.4.1 We owe it to the victims

The rationales presented in favour and against the adoption of the decision C-SS-4/Dec.3 in the 4<sup>th</sup> special session of the CSP can be examined through the national statements of the states and authorised parties, presented at the meeting and included in the meeting's official documentation. The viewpoints presented at the 4<sup>th</sup> SS CSP by the CWC states parties in favour of adopting the decision C-SS-4/Dec.3 highlight the responsibility of the international community to ensure accountability of those guilty of using CWs. Establishing a functional mechanism of attribution is presented as an integral requirement for this process.

<sup>80</sup> OPCW CSP SS4 INF 1, 2018. List of participants of the fourth Special Session of the Conference of the States Parties.

<sup>81</sup> OPCW CSP SS4, 2018

<sup>82</sup> OPCW CSP SS4 DEC 3, 2018. Decision: Addressing the threat from chemical weapons use

European Union was represented at the CSP by Bulgaria, whose representative Ms. Koromi gave official statements on behalf of the EU both before and after adopting the decision C-SS-4/Dec.3. In the first statement<sup>83</sup> before the decision vote, she recalled the recent years' CWA use events in detail, pointing out that for the first time in over 70 years chemical weapons use has occurred on European soil, and urged the CWC states parties to accept the decision. Regarding the attribution tasks she continued:

*“...We firmly believe that it is the international community’s task and responsibility to identify and hold accountable individuals, entities, groups or governments responsible for the use of chemical weapons, and that the question of attribution can and should be addressed by the OPCW ... We were disappointed with the impasse at the United Nations Security Council at the end of last year, which effectively terminated the Joint Investigative Mechanism. This outcome deprived the international community of a vital mechanism in the significant efforts designed to uphold the absolute ban on the use of chemical weapons and deter other would-be perpetrators. Restoring an independent mechanism for attribution has become particularly important in this regard. The Convention allows the OPCW itself to go into attribution. The Organisation has the technical capacity and operational experience to, with the addition of appropriate expertise, carry out investigations for attribution purposes once it has the necessary information and evidence at its disposal. The OPCW Technical Secretariat has shown through its recent work, that once tasked and resourced to undertake challenging missions, it can more than deliver...”*

The EU statement reflects the other national statements speaking for the approval of the decision. Overall, the rationale of states parties speaking for accepting and including attribution duties for the OPCW were based on as those simply being already included in the text of the CWC treaty.

The statements speaking in favour of adopting the decision can be characterised as in part highly emotionally loaded:

*“... The use of chemical weapons, including the use of any toxic chemical as weapon, by anyone, be it a State, or a non-State actor, anywhere, and under any circumstances is abhorrent and must be rigorously condemned. It is a war crime and may amount to a crime against humanity. There can be no impunity and those responsible for such acts must be held accountable. This is what keeps us together and keeps the global norm established by the Convention ... All States Parties to this Convention owe it to the victims of the chemical weapons attacks and to the future generations to whom we have committed ourselves to free the world from the scourge of chemical weapons...”<sup>84</sup>*

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<sup>83</sup> OPCW CSP SS4 NAT 5, 2018. Bulgaria: Statement on Behalf of the EU Delivered by Ms. Judit Koromi, Chair of the Working Party on Non-Proliferation (CONOP) of the Council of the EU, European External Action Service, at the Fourth Special Session of the Conference of the State Parties.

<sup>84</sup> *Ibid.*

### 1.3.4.2 This path is wrought with unpredictable implications

These counterarguments for adopting the decision were also laden with highly emotional pleadings. In several national statements<sup>85</sup>, the adopted decision's legitimacy was questioned. A particularly vocal opposite of the adoption of the decision C-SS-4/Dec.3 was Russian Federation, who released two statements concerning the matter, as well as an amended draft decision which was, however, rejected by vote. The head of the Russian delegation Mr. Kalamanov argued in his statement<sup>86</sup> before the vote:

*“...It is also clear that no transformations of this kind are possible without making substantial amendments to the Convention. The implementation of these types of plans can only be carried out in line with the procedure set out in the Convention: by convening a special session of the Conference on amendments. Attempts to pass this decision at today's regular special session of the Conference are simply illegitimate. In all of this, we see a clear attempt to distort the mandate of the OPCW, and to undermine the legal framework upon which it rests. This is a destructive idea with which we categorically disagree...”*

By the decision opponents, the common argument was that the CWC does not contain any provision that states the OPCW, or its policy-making organs having the mandate to establish a violation of an obligation under the CWC, and that the CWC is a purely technical arrangement<sup>87</sup>. In addition, the OPCW was characterised as a purely technical organisation. Investigation of activities prohibited under CWC, as well as criminal prosecution for such facts, were seen to be entrusted directly to the states parties by the CWC Article VII. Any attributive function was seen to go beyond the mandate of the OPCW as set out in the treaty, and creation of such attributive mechanism within the OPCW could be legitimate only through adoption of a relevant amendment to the CWC, as provided for in Article XV of the CWC. Furthermore, the CWC states parties opposing the CSP decision presented claims that the mechanism thus established encroaches on the tasks and duties of the UN<sup>88</sup>.

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<sup>85</sup> See OPCW CSP SS4 NAT 17, 2018. Syrian Arab Republic: Statement by H.E. Ambassador Bassam Al-Sabbagh, permanent representative of the Syrian Arab Republic to the OPCW at the fourth Special Session of the Conference of the States Parties; OPCW CSP SS4 NAT 40, 2018 Russian Federation. Statement by Mr G. V. Kalamanov, head of delegation of the Russian Federation at the 4th SS of the CSP; OPCW CSP SS4 NAT 54, 2018. Venezuela: Statement by H.E. Ambassador Haifa Aissami Madah, permanent representative of Bolivarian Republic of Venezuela to the OPCW at the fourth Special Session of the Conference of the States Parties - Explanation of vote.

<sup>86</sup> OPCW CSP SS4 NAT 40

<sup>87</sup> See OPCW CSP SS4 NAT 17, 2018; OPCW CSP SS4 NAT 40, 2018; OPCW CSP SS4 NAT 54, 2018

<sup>88</sup> OPCW CSP SS4 NAT 53, 2018. Venezuela: Statement by H.E. Ambassador Haifa Aissami Madah, permanent representative of Bolivarian Republic of Venezuela to the OPCW at the fourth Special Session of the Conference

*“...Will this not lead to a failure in the work of global non-proliferation regimes or even a breakdown of the entire international security system that has developed since World War II, and the central role of the United Nations and its Security Council in international affairs? This path is wrought with unpredictable implications, particularly in the era of the emergence of a new generation of nuclear weapons. People of good faith ought to come together in order to put up a barrier against these reckless plans...”<sup>89</sup>*

### **1.3.5 First steps in the implementation of the decision C-SS-4/Dec.3**

The OPCW DG has reported<sup>90</sup> that pursuant to the decision the TS has established an Investigation and Identification Team (IIT) which will be responsible for identifying the perpetrators of the use of chemical weapons in the SAR on the conditions stated in the decision. The IIT reports directly to the OPCW DG.

At its 23<sup>rd</sup> session in 2018<sup>91</sup>, the CSP adopted the programme and budget of the OPCW for 2019, which included resource requirements for implementing the IIT functions but stated that 1.3 million euros of the costs were not include in the regular budget and were to be covered with voluntary funding. A similar decision concerning 1.2 million euros was made by the CSP for the budget in 2020<sup>92</sup>. In early 2020, the OPCW DG reported that the financial implications for the CWC states parties to support the IIT’s work during 2019 and 2020 are considered to have been met via voluntary contributions made by the CWC SPs<sup>93</sup>.

The IIT has announced its intention to investigate nine chemical attacks in Syria. However, the Syrian Arab Republic has indicated to the OPCW DG its refusal to recognise the decision C-SS-4/Dec.3 and to accept any of the implications and effects of the decision. In early 2020, the IIT was reported being in the process of concluding a first report on certain incidents under its consideration.<sup>94</sup>

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of the States Parties; OPCW CSP SS4 NAT 19, 2018. Syrian Arab Republic: Statement by HE Ambassador Bassam Al-Sabbagh, permanent representative of the SAR to the OPCW at the 4th SS of the CSP.

<sup>89</sup> OPCW CSP SS4 NAT 40

<sup>90</sup> OPCW DG, 2019. Report by the director-general. Progress in the implementation of decision C-SS-4/Dec.3 on addressing the threat from chemical weapons use.

<sup>91</sup> OPCW CSP S23 DEC 10, 2018. Decision: Programme and Budget of the OPCW for 2019.

<sup>92</sup> OPCW CSP S24 DEC 12, 2019. Decision: Programme and Budget of the OPCW for 2020.

<sup>93</sup> OPCW EC, 2020. Report by the director-general. Progress in the implementation of decision C-SS-4/Dec.3 on addressing the threat from chemical weapons use.

<sup>94</sup> *Ibid.*

## 2 MATERIALS AND METHODS

### 2.1 Aims of the study and research questions

The current events within the CWC and OPCW discussed in Chapter 1 and its subchapters raise several interesting questions concerning the legal impact of the decision to establish OPCW tasks and mechanisms related to attribution of responsibility for CW use in SAR. These questions are highlighted, for example, in the very divided national statements of the CWC states parties given in conjunction with adoption of the CSP decision C-SS-4/Dec.3. This study aims to evaluate the legality of this OPCW decision under the international law. The OPCW, as an international organisation, has made an internal decision to undertake the tasks and duties described in the decision C-SS-4/Dec.3. From this viewpoint the most important research questions are:

- Is the fact-finding in the cases of alleged use of CWs with the objective to attribute liability to states within the scope and competence of the OPCW, as they are set out in the CWC treaty?
- Are the tasks allocated to the different OPCW organs in the decision C-SS-4/Dec.3 in compliance with the tasks of the respective organs, as set out in the treaty?
- Was the CSP decision C-SS-4/Dec.3 made in compliance with the procedural and voting requirements of the OPCW?
- Would the new OPCW duties laid out in the decision warrant a formal amendment process of the CWC treaty?

Additionally, this study aims to examine the following additional question:

- Are the OPCW attribution of responsibility duties, as laid out in the decision, in line with the division of OPCW tasks and the responsibilities, tasks and authority of the United Nations, those of the UN Security Council in particular?

## 2.2 Research method

Defining the knowledge interest, “What do I want to know about my research topic?” is a key part of planning a master’s thesis research work<sup>95</sup>. Methodology in the academic thesis context means the entity created by the work’s philosophy of science, theoretical model, means of data collection and the research material analysis method (research method) used<sup>96</sup>.

As the topic of this research is application and scope of an international treaty on chemical disarmament and therefore the subject is international law, the theoretical framework and the scientific paradigm followed in this work is European legal positivism, the mainstream approach in research of international public law. Its origins lay in the legal theory relating to national legal systems, in which legal positivism is a currently a paradigm of analytical jurisprudence that sees the existence and content of law depending on social facts and not on the law’s merits<sup>97</sup>. Laws in force in a legal system depend on the social standards that its officials recognise as authoritative. These can be for example, legislative enactments, judicial decisions, or social customs. Laws cannot be defined by which policies would be just, wise or efficient, and on the opposite hand, a law does not cease to exist just because it is unjust, unwise or inefficient. Legal positivism does not take into account matters of ethics, social policies or morality. The research subject in the context of legal positivism is the formally binding law only.<sup>98</sup> In its narrowest sense, legal positivism is a theory, which tells us that law is only that which is *positus*, i.e. set/put into the world by human willing<sup>99</sup>.

International law is the set of laws that govern relations between countries, as established by custom and agreement<sup>100</sup>. International law differs substantially from national legal systems as in the international legal framework there is no sovereign lawmaker. International law therefore lacks an equivalent legislature to domestic one, and it does not have courts with compulsory jurisdiction as to national courts<sup>101</sup>. From the legal positivism point of view, a formally binding international law is considered to be the set of rules that sovereign nations have agreed to follow based on treaties, facts that otherwise imply the state party’s implicit

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<sup>95</sup> Siren & Pekkarinen, 2017. Tieteenfilosofismetodologisia perusteita Pro Gradu -tutkielman laadintaan. Maanpuolustuskorkeakoulu, Johtamisen ja sotaläspedagogiikan laitos, Helsinki, Finland. In Finnish.

<sup>96</sup> *Ibid.*

<sup>97</sup> Green & Adams in Zalta (2019), entry on legal positivism. The Stanford Encyclopaedia of Philosophy (Winter 2019 Edition)

<sup>98</sup> Siren & Pekkarinen, 2017

<sup>99</sup> Kammerhofer in Delplano & Tsagourias (2020) Research Methods in International Law: A Handbook. Edward Elgar Publishing Ltd, Cheltenham, UK. Ch International legal positivist research methods p. 8

<sup>100</sup> AHDEL, 2016. International law. American Heritage Dictionary of the English Language. 5th Edition. Houghton Mifflin Harcourt Publishing Company, USA

<sup>101</sup> Roberts & Sivakumaran in Evans (2018) Ch 4, The theory and reality of the sources in international law p. 90.



consent, or formed by customary international law<sup>102</sup>. Treaties embody the express consent of states, custom their tacit consent<sup>103,104</sup>. Decisions of international courts and tribunals may be used as a tool to further determine and analyse the content, scope and applicability of norms based in custom, treaty and the general principles.<sup>105</sup>

Research methodology based on legal positivism is the most common in international law research. It is also the approach, which is used in international courts and tribunals in their work. Simma and Paulus examine positivist approaches to international law, and international humanitarian law in particular, and note key changes they describe as modern positivism. Modern positivism takes a broader view of the ways in which states can express their will. Different branches of government are increasingly acting on their own behalf instead of through foreign ministries, in addition, other actors than states such as intergovernmental organisations, nongovernmental organisations, global economic players and the global media are assuming growing importance. The authors argue that as international norm perception focuses on the will of states less than previously, the sources of law, and the interpretive tools to understand them also have to change. For the modern representatives of analytical positivism, the unity of the legal system, embodied by the ‘unity of primary and secondary sources,’ is more important than the emanation of law from concrete acts of state will. Modern positivism increasingly recognises that law is not independent of its context.<sup>106</sup>

Kammerhofer argues further that currently practised international positivist research methods and practices are largely determined by culture, rather than a closed set of theoretical axioms. He makes a distinction between theoretical legal positivism and the currently practised ‘default positivism’, illustrating the difference by several examples. Current methods practised by international legal positivists are characterised by heightened submission to widely accepted authority of peers, such as the pronouncements of the International court of justice. Default positivist approaches also tend to be very pragmatic and do not highlight theoretical debate. Part of this realist-pragmatic approach is an orientation towards problem solving, which clashes with theoretical positivism where certain problems cannot be ‘solved’. This includes the principle that legal scholars should seek to find the law rather than to change it.<sup>107</sup>

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<sup>102</sup> Siren & Pekkarinen, 2017

<sup>103</sup> Simma & Paulus (1999) The responsibility of individuals in human rights abuses in internal conflicts: A positivist view. *American journal of International Law*. pp. 302-316.

<sup>104</sup> These sources are the ‘positive international law’, on the sense that the norms they generate have been chosen or agreed upon by states in their dealings with each other. In the absence of such evidence of the will of states, positivists will assume that states remain at liberty to undertake whatever actions they please. Treaties, including so-called lawmaking treaties creating new rules or changing old ones, are binding upon the contracting parties only.

<sup>105</sup> Hall in McConville & Chui (2017) Ch 10, Researching international law p. 254

<sup>106</sup> Simma & Paulus, 1999 pp 302-316.

<sup>107</sup> Kammerhofer in Delplano & Tsagourias (2020) Ch International legal positivist research methods p. 5

The international legal positivist approach to international legal rules resembles the doctrinal method within the legal theory in national civil law systems. Therein what can be called scientific knowledge is created only through following a scientific method, using a defined process for searching, generating and explaining information. There is no generally applicable and standardised set of research methods for the scientific study of law. As jurisprudence falls between social sciences and human sciences, the range of applicable research methods is rather diverse and encompasses an open-ended variety of qualitative as well as quantitative tools. Doctrinal method, followed in this study, is a distinctly legal approach to research. The doctrinal method forms the basis of most legal research, although the use of non-doctrinal, multidisciplinary and interdisciplinary methods is growing. Traditionally, the method is divided into theoretical and practical dimensions, or *systemisation* and *interpretation*.<sup>108</sup>

Moreover, within the legal theory relating to common law -legal systems doctrinal process is used to identify, analyse and synthesise the content of the law, and to verify the authority and status of the legal doctrine examined. In legal doctrine research, the legal system is used as the main supplier of concepts, categories and criteria. Doctrinal research is normally a two-part process involving locating the sources of the law and relevant legal materials, and then interpreting the text.<sup>109</sup> In doctrinal research, the researcher asks what the law is in a particular area - the principal or even sole aim is to describe a body of law, and how it applies. Doctrinal research is often done from a historical perspective, by collecting and analysing a body of case law, together with any relevant legislation. These are usually called the primary sources of law. Secondary sources, such as journal articles or other written commentaries on the case law and legislation may be also be employed. Secondary sources may be used in supporting a particular interpretation, but can not replace primary sources.<sup>110</sup>

In general, the same approach is utilised in international legal positivism, when a certain legal problem has to be analysed. First, the researcher has to find out the applicable legal rules to the problem, i.e. to systemise the applicable legal rules, and thereafter their content has to be interpreted to the sub questions of the legal problem presented. However, as stated before, the applicable legal rules are and their sources in international law are different from national or municipal legal systems. In international law they are the treaty rules, rules of international customary law, or general principles of law.

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<sup>108</sup> Hirvonen, 2011. Mitkä metodit? Opa oikeustieteen metodologiaan. Yleisen oikeustieteen julkaisu 17. Helsingin yliopisto, Helsinki, Finland. In Finnish. p. 22

<sup>109</sup> Hutchinson in Watkins & Burton (Eds., 2017) Research methods for law. Second edition. Routledge, New York, USA. Ch 1, Doctrinal research p. 17

<sup>110</sup> Dobinson & Johns in McConville & Chui (2017) Ch 1, Legal research as qualitative research p. 21

The established paradigm in legal research has been that there is an objective approach to finding the law, and that doctrinal research is therefore quantitative by nature. Doctrinal research is based on positivism and the worldview where the law is objective, neutral and fixed<sup>111</sup>. In order to be deemed quantitative, it must be assumed that the doctrinal research method always leads to discovering the same law using the systematic doctrinal approach, regardless of who is carrying out the research. Doctrinal research, however, does include a process of judicial inductive reasoning, where the principle is extracted from a detailed analysis of all relevant precedent. Doctrinal research also includes processes of selecting and weighing materials, taking into account hierarchy and authority, as well as understanding social context and interpretation. From this viewpoint, it can be argued that doctrinal research is qualitative in its methodology.<sup>112</sup> To state, that doctrinal research is qualitative in nature therefore recognises that law is not found, but in fact reasoned, and acknowledges that the law cannot be objectively isolated<sup>113</sup>.

The steps in judicial doctrinal research, inherent in all legal thinking, has been described, e.g. by Hutchinson and Duncan who discuss the varying degrees of complexity that exist within doctrinal legal research, ranging from practical problem-solving, most often employed by practitioners and students to solve a specific legal problem, all the way to innovative theory building and systematisation. Steps most commonly included in problem-based doctrinal research are illustrated in Figure 2. It should be emphasised, however, that the doctrinal methodology is not always focused on any specific legal problem, or directed to locating a concrete answer or conclusion.

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<sup>111</sup> Hutchinson & Duncan, 2012. Defining and describing what we do: Doctrinal legal research. *Deakin Law Review* 17(1):83-119 p.116

<sup>112</sup> Dobinson & Johns in McConville & Chui (2017) Ch 1, Legal research as qualitative research pp. 23-24

<sup>113</sup> *Ibid.* p. 25

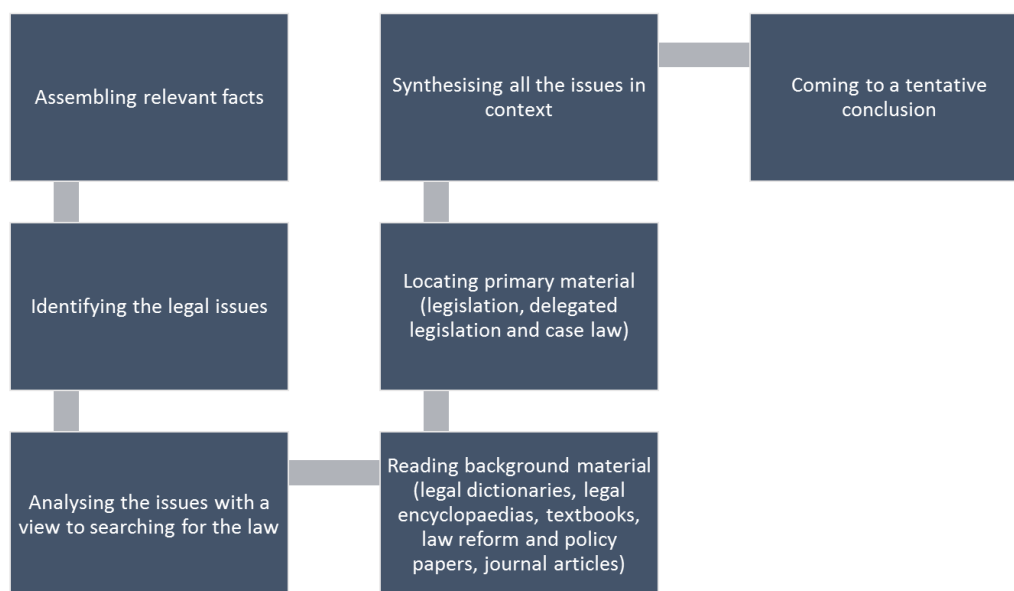


Figure 2. Steps of problem-based doctrinal research<sup>114</sup>.

Doctrinal method is a two-part process, involving first locating the sources of the law and then interpreting and analysing their content within a specific context. In the interpretation step, the outcome of the study becomes dependent on the views, expertise and methods of the individual researcher. Techniques used within the interpretation process need to be described, whether they are conceptual, evaluative or explanatory. Examples that can be employed include deductive logic, inductive reasoning and analogy. Legal reasoning is often deductive because the general rules, categories and concepts are readily given, for example through legislation. In deductive legal reasoning, legal principles are applied to the facts of a particular case. The researcher studies the legislative provision, then studies the situation, and then decides if the situation comes within the rule. Inductive reasoning, on the other hand, is a process that argues from specific cases towards a more general rule, such as from particular case decisions to form a general proposition. Analogy involves finding similar situations such as similar common law cases, and then arguing that similar cases should have similar outcomes and be governed by same principles.<sup>115</sup>

Within international law the deductive logic, inductive reasoning and analogy are among the lawyer's tools. Therefore the research method of this study, dealing with the international legal basis and implications of a decision made within an international organisation implementing a treaty, can be best characterised as problem-based doctrinal research described above. The methodology is based on the scientific paradigm of international legal

<sup>114</sup> as listed in Hutchinson & Duncan, 2012 p. 106

positivism in its current, modern and “enlightened” form. In this study, deductive legal reasoning is employed as an analysis method to examine the legal issues presented as research questions in Chapter 2.1, together with the located sources of the law and relevant legal materials presented in Chapter 2.3, Materials.

### 2.2.1 Sources of law in international law

Within the common law, the doctrinal legal research is based on authority and hierarchy. The objective is to base any statements about what the law is on primary authority - either the legislation or the case law.<sup>116</sup> In international legal science, the term “sources” is used to designate sources of positive legal rules, i.e. the legal rules in force and their origins. Accordingly, the sources of international law refer to where states, organisations, individuals and courts can find the principles of international law<sup>117</sup>. One broadly accepted definition of sources of international law is presented in the Statute of the International Court of Justice, Article 38<sup>118</sup>, which defines in paragraph 1 that:

*“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- b) international custom, as evidence of a general practice accepted as law;*
- c) the general principles of law recognized by civilized nations;*
- d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”*

In these, the actual legal sources are presented in Article 38 (1) (a-c) whereas those presented in (d) are in fact tools for their interpretation. The most important item of these tools are the judicial decisions, because they by nature always consider which legal sources of the (a-c) are to be applied to the legal problem in hand. Apart from international conventions and international custom, the ICJ Statute Article 38 (c) refers to the general principles of law recognised by civilised nations. These can be defined alternatively as principles that can

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<sup>115</sup> Hutchinson & Duncan, 2012 p.111

<sup>116</sup> Dobinson & Johns in McConville & Chui (2017) Ch 1, Legal research as qualitative research p. 26. In doctrinal research, the first step, identification of relevant legislation, cases and secondary legal sources can be considered analogous to a scientific literature review of social sciences. This should be a systematic, explicit and reproducible step for identifying, evaluating and synthesising the existing body of completed and recorded work of researchers, scholars and practitioners.

<sup>117</sup> Cornell law school, legal information institute, 2020. Entry on sources of international law.

<sup>118</sup> Article 38 (1), ICJ, 2020

derived from various systems of domestic law, where the principles are shared by all or majority of them - or principles applicable directly to international legal relations, or general legal relations<sup>119</sup>.

It can be argued, that the doctrine of sources in international law is in practise more nuanced, and the above definition misses some relevant sources concerning international law obligations, such as certain unilateral declarations of the states, resolutions of the UN SC, resolutions of the UN GA, and to some extent, peremptory *jus cogens* norms<sup>120</sup>. Hierarchy of sources in international law is, in general less defined than in national legislation, and, for example, the above-mentioned Article 38 of the ICJ statute does not state the order of which the sources of law are to be applied, apart from the reference to “subsidiary means” in Article 38 (1) (d).<sup>121</sup>

In the international context, examples of soft law include the decisions of international tribunals and the standards endorsed by international organisations. Soft law can also be defined as something that looks like a legal obligation in a way (e.g. a written exchange of promises between states) but is not enough to formally bind states<sup>122</sup>. Classic legal positivism places emphasis on hard law only - in essence there is no place for soft law in classical positivist approach<sup>123</sup>. However, in addition to hard international law, soft law is an integral part of the international legal system. Guzman and Meyer<sup>124</sup> define soft law as those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules, and as rules that have legal consequences because they shape states’ expectations as to what constitutes compliant behaviour. By this definition, the authors aim to preserve the doctrinal distinction between binding and nonbinding norms, but also highlight the difference between quasi-legal rules and purely political rules.

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<sup>119</sup> Roberts and Sivakumaran in Evans (2018) Ch 4, The theory and reality of the sources in international law p. 98.

<sup>120</sup> *Ibid.* pp. 100-102. General principles of law can be source of peremptory norms of general international law or *jus cogens*. This is defined in the VCLT Article 53: “... a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” VCLT, 1969. The same Article states that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.

<sup>121</sup> Dixon (2013) Textbook on international law. 7th Edition. Oxford University Press, Oxford, UK. Ch 2, The Sources of international law p. 25

<sup>122</sup> Guzman & Meyer, 2010. International soft law. Journal of legal analysis 2(1):171-225 p. 172

<sup>123</sup> Simma & Paulus, 1999 p. 304

<sup>124</sup> Guzman & Meyer, 2010 p. 174

### 2.2.2 Treaty interpretation - a tool for resolving ambiguities of treaty texts

The purpose of treaty interpretation is to establish the meaning the parties intended it to have in relation to the circumstances with reference to which the question of interpretation has arisen<sup>125</sup>. An international legal positivist view is that through interpretation we can generate specificity out of unspecific (treaty) norms and guide decision-making<sup>126</sup>. The principles of treaty interpretation is set out in the VCLT Articles 31 and 32. Fitzmaurice has devised a comprehensive set on general principles of treaty interpretation, based on these articles, illustrated in Figure 3.

I Actuality of textuality	II The natural and ordinary meaning	III Integration	IV Effectiveness	V Subsequent practise	VI Contemporaneity
<ul style="list-style-type: none"> <li>• Treaties are to be interpreted as they stand, on the basis of their actual texts</li> </ul>	<ul style="list-style-type: none"> <li>• Particular words and phrases are given their natural and unstrained meaning in the context in which they occur</li> </ul>	<ul style="list-style-type: none"> <li>• Treaties are interpreted as a whole, individual parts must not be interpreted out of their overall context</li> </ul>	<ul style="list-style-type: none"> <li>• Treaties are interpreted with reference to their declared or apparent objects and purposes</li> </ul>	<ul style="list-style-type: none"> <li>• Recourse may be had to subsequent practise of parties relating to the treaty</li> </ul>	<ul style="list-style-type: none"> <li>• Terms of a treaty must be interpreted in the light of linguistic usage current at the time the treaty was concluded</li> </ul>

Figure 3. General principles of treaty interpretation<sup>127</sup>.

The purpose, structure and competences of an international organisation, as well the particular functions and powers granted to its individual organs, are set out in the treaty that establishes the organisation. The treaties as written agreements, however, need to be interpreted. As treaties, in many cases, create rights and impose obligations to the members, as well as may define the relationship between organisations and third parties, the manner of which the treaties are interpreted is of importance.<sup>128</sup>

Interpretations of treaties establishing international organisations is also governed by the VCLT Articles 31 and 32. The fact that the VCLT applies to such treaties is explicitly stated in VCLT Article 5<sup>129</sup>. The 1986 Vienna convention between states and international organisations or between international organisations adapts the 1969 VCLT to its subject

<sup>125</sup> Fitzmaurice in Evans (2018) Ch 6, The practical working of the law of treaties p. 152

<sup>126</sup> Kammerhofer in Delplano & Tsagourias (2020) Ch International legal positivist research methods p. 6

<sup>127</sup> as listed by Fitzmaurice in Evans (2018) Ch 6, The practical working of the law of treaties pp. 152-153

<sup>128</sup> Akande in Evans (2018) Ch 8, International organizations p. 235

matter. The treaty is not yet in force, however, is considered to reflect customary international law<sup>130</sup>. The ICJ has stated that treaty interpretation should be based above all upon the text of the treaty<sup>131</sup>. However, interpretation of treaties establishing international organisations must give special emphasis to the objectives and purposes to the instrument and the organisation. Article 31 of the VCLT states that a treaty must be interpreted in the light of the treaty's object and purpose<sup>132</sup>. In addition, the ICJ has noted in its advisory opinion on the Legality of use by a state of nuclear weapons from 1996, that the constituent instruments of international organisations are treaties of a peculiar character and raise specific problems of interpretation. These may be due to, for example, the nature of the organisation, the objects that have been assigned to it, as well as the imperatives associated with the effective performance of its functions<sup>133</sup>.

The increased role of objects and purposes in treaty interpretation in cases of treaties establishing international organisations is known as the principle of effectiveness. In essence, the treaty text is interpreted in a way that that gives the most effective result concerning the achievement of the purpose and objectives of the organisation. A primary example of this principle is the doctrine of implied powers, by which an organisation is deemed to have powers necessary for achieving its purposes even in the absence of words in the text, which would indicate that the organisation is to have such a power.<sup>134</sup>

The role of subsequent practise is also of importance and used not only where there are ambiguities in the treaty text, but also in cases of silence, and to construct new rules that apply to the treaty. Treaties establishing international organisations are seen as living, changing instruments and they must be permitted to evolve in order to the organisation to fulfil its purpose in the changing environment<sup>135</sup>. Article 31 of the VCLT<sup>136</sup> stipulates that any subsequent practice in the application of the treaty, which establishes the agreement of the

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<sup>129</sup> Article 5: "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization." VCLT, 1969

<sup>130</sup> VCLTIO, 1986; also Fitzmaurice in Evans (2018) Ch 6, The practical working of the law of treaties p. 143

<sup>131</sup> paragraph 41 on page 19, Judgment, Case concerning the territorial dispute (Libyan Arab Jamahiriya/Chad), ICJ, 1994.

<sup>132</sup> Article 31 (1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". VCLT, 1969

<sup>133</sup> paragraph 19 on page 75: "...the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties." ICJ, 1996

<sup>134</sup> Akande in Evans (2018) Ch 8, International organizations p. 157

<sup>135</sup> *Ibid.* p. 155

<sup>136</sup> Article 31 (3) (b), VCLT, 1969



parties regarding its interpretation, is to be taken into account. As an example of international case law concerning subsequent practise of international organisations, the ICJ ruled in its Advisory opinion on Namibia<sup>137</sup> that based on the consistent practise of the UN SC, a permanent member of the UN SC abstaining from voting is not to be construed as a veto, but a concurring vote.

### 2.3 Materials

This chapter describes the sources of international law used in this study. The primary sources include the CWC treaty text and its annexes, the UN Charter, as well as the text of the VCLT, which applies to treaties concluded between states, and to treaties between states and international organisations<sup>138</sup> such as the OPCW.

The resolutions adopted by the UN SC and the UN GA concerning the CW use in the SAR between years 2013-2020 were located. This was done in a systematic fashion via the UN SC resolutions search engine<sup>139</sup> and the UN GA resolutions index<sup>140</sup> by searching the resolutions by year using keywords “chemical”, “chemical weapons” and “OPCW”. Only resolutions addressing the Middle East were collected.

Existing sources on the subject such as the legal commentary of the CWC<sup>141</sup>, relationship agreements between the OPCW and the UN, decisions of the OPCW bodies, and the relevant ICJ decisions were used to facilitate the deductive reasoning and making the conclusions. The documents deemed relevant were retrieved by the discussion themes, during the process of the work. Also listed are relevant resolutions of the UN organs, where located but not within the systematic collection of resolutions described above.

Textbooks and articles on international law, relevant reports and other documents from the meetings of the different OPCW bodies as well as national statements delivered in those were collected and reviewed for the purpose of understanding the OPCW practise as well as building the timeline and sequence of the events. The OPCW reports and national statements used for this study have been retrieved from the OPCW public website that holds the records

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<sup>137</sup> paragraph 22 on page 22. Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). ICJ, 1971

<sup>138</sup> Article 5, VCLT, 1969

<sup>139</sup> Search engine UNSCR, 2020

<sup>140</sup> UN GA resolutions index, 2020

<sup>141</sup> Krutzsch W, Myjer E & Trapp R (Eds., 2014) The chemical weapons convention: A commentary. 1<sup>st</sup> edition, Oxford university press, UK

of the documents from the sessions of the OPCW organs.<sup>142</sup> These were not collected and reviewed in a systematic fashion but rather based on assumed relevance, and are not listed in the materials, but referenced in footnotes as usual, with details provided in the list of sources.

### 2.3.1 The Chemical Weapons Convention text and its annexes

The CWC treaty text used for this study is the English version of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, dated 27<sup>th</sup> September 2005 (Table III). The treaty text is publicly available at the OPCW website, and also included in the OPCW legal texts collection<sup>143</sup> used as a source for this study.

Table III: Details of the Chemical Weapons Convention.

UN Treaty Collection Registration number	Multilateral Treaties Deposited at Secretary General Collection Reference	Title	Entry into force	Reference in this study
No. 33757, 29. April 1997	XXVI-3	The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	29. April 1997	OPCW, 2005

### 2.3.2 The Vienna convention on the law of treaties

The VCLT treaty text from 1969 used for this study is the English version of treaty, dated 23<sup>rd</sup> May 1969 (Table IV). The treaty text was retrieved from the UN Treaty Collection website<sup>144</sup>.

Table IV: Details of the Vienna Convention on the Law of Treaties.

UN Treaty Collection Registration number	Multilateral Treaties Deposited at Secretary General Collection Reference	Title	Entry into force	Reference in this study
No. 18232, 27 January 1980	XXIII-1	Vienna Convention on the Law of Treaties	27 January 1980	VCLT, 1969

<sup>142</sup> OPCW, 2020. Resources.

<sup>143</sup> OPCW, 2015. OPCW: the legal texts. 3rd edition. Asser Press, the Netherlands.

<sup>144</sup> VCLT, 1969

### 2.3.3 The United Nations Charter

The UN Charter from 1945 is the English version of treaty (Table V). The current version of the treaty text was retrieved from the United Nations website<sup>145</sup>.

Table V: Details of the United Nations Charter

UN Treaty Collection Registration number	Multilateral Treaties Deposited at Secretary General Collection Reference	Title	Entry into force	Reference in this study
-	I-1	Charter of the United Nations and Statute of the International Court of Justice	24 October 1945	The UN Charter

#### 2.3.3.1 United Nations Security Council and United Nations General Assembly resolutions

The resolutions adopted by the UN SC and the UN GA concerning the CW use in the SAR between years 2013-2020 were located in a systematic fashion via the UN SC resolutions search engine and the UN GA resolutions collection by searching the resolutions by year with keywords “chemical”, “chemical weapons” and “OPCW”. Only resolutions addressing the SAR were collected. List of the UN SC and the UN GA resolutions addressing the CW use in the SAR between years 2013 - 2020 is presented in Table VI.

Table VI: List of the UN SC and the UN GA resolutions addressing the CW use in the SAR between years 2013 - 2020.

UN document number	Title	Adopted, date	Adopted by	Reference in this study
A/RES/70/41	Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	7 <sup>th</sup> December 2015	UN GA	UN GA, 2015
A/RES/72/43	Implementation of the Convention on the prohibition of the development, production, stockpiling and use of chemical	4 <sup>th</sup> December 2017	UN GA	UN GA, 2017

<sup>145</sup> UN, 2020b. The United Nations Charter.

	weapons and on their destruction			
A/RES/73/45	Implementation of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction	5 <sup>th</sup> December 2018	UN GA	UN GA, 2018
A/RES/74/40	Implementation of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction	19 <sup>th</sup> December 2019	UN GA	UN GA, 2019
S/RES/2118 (2013)	Resolution 2118 (2013)	27 <sup>th</sup> September 2013	UN SC	UN SC, 2013
S/RES/2209 (2015)	Resolution 2209 (2015)	6 <sup>th</sup> March 2015	UN SC	UN SC, 2015
S/RES/2235 (2015)	Resolution 2235 (2015)	7 <sup>th</sup> August 2015	UN SC	UN SC, 2015b
S/RES/2258 (2015)	Resolution 2258 (2015)	22 <sup>nd</sup> December 2015	UN SC	UN SC, 2015c
S/RES/2314 (2016)	Resolution 2314 (2016)	31 <sup>st</sup> October 2016	UN SC	UN SC, 2016
S/RES/2319 (2016)	Resolution 2319 (2016)	17 <sup>th</sup> November 2016	UN SC	UN SC, 2016b
S/RES/2325 (2016)	Resolution 2325 (2016)	15 <sup>th</sup> December 2016	UN SC	UN SC, 2016c

### 2.3.4 Other legal sources

Source documents such as the legal commentary of the CWC, the relevant OPCW decisions, various ICJ opinions and rulings, agreements between IOs, and the resolutions of the UN organs, where not included in the resolutions addressing the SAR situation between years 2013-2020 as described above, are listed in Table VII.

Table VII: List of the various legal commentaries, legal text collections, ICJ opinions and rulings, decisions of the OPCW bodies, UN GA resolutions, and ILC reports used as sources of this study.

Official citation/ document number	Title	Issued, date	Issued by	Reference in this study
Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I. C. J. Reports 1996, p. 66	Advisory opinion of the International Court of Justice: Legality of the use by a state of nuclear weapons in armed conflict	8 July 1996	ICJ	ICJ, 1996
Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I. C. J. Reports 1994, p. 6	Case concerning the territorial dispute (Libyan Arab Jamahiriya/Chad)	3 February 1994	ICJ	ICJ, 1994
Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa)	Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa)	21 June 1971	ICJ	ICJ, 1971

notwithstanding Security Council Resolution 276 (1970)	notwithstanding Security Council Resolution 276 (1970)			
Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C. J. Reports 1962, p. 151.	Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)	20 July 1962	ICJ	ICJ, 1962
Effect of awards of compensation made by the U. N. Administrative Tribunal, Advisory Opinion of July 13th, 1954: I.C.J. Reports 1954, p. 47.	ICJ Advisory opinion on Effect of awards of compensation made by the United Nations Administrative tribunal	13 July, 1954	ICJ	ICJ, 1954
Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 182	Reparation for injuries suffered in the service of the United Nations, Advisory Opinion	11 April, 1954	ICJ	ICJ, 1949
ILC Report, A/56/10	Responsibility of States for Internationally Wrongful Acts	August 2001	ILC	ASRIWA, 2005
EC-MXI/DEC.1	Agreement concerning the relationship between the United Nations and the OPCW	1 September, 2000	OPCW	OPCW EC, 2000
EC-M-33/DEC.1	Decision. Destruction of Syrian chemical weapons.	27 September 2013	OPCW	OPCW EC, 2013
-	OPCW: The legal texts. 3 <sup>rd</sup> edition	2015	OPCW	OPCW, 2015
EC-81/DEC.4	Decision. Report by the Director-General regarding the declaration and related submissions by the Syrian Arab Republic.	23 March 2016	OPCW	OPCW EC, 2016
C-SS-4/DEC.3	Decision. Addressing the threat from chemical weapons use	27 June 2018	OPCW	OPCW CSP SS4 DEC 3, 2018
C-S-23/DEC10	Decision: Programme and Budget of the OPCW for 2019	20 November 2018	OPCW	OPCW CSP S23 DEC 10, 2018
C-24/DEC.12	Decision: Programme and Budget of the OPCW for 2020	28 December 2019	OPCW	OPCW CSP S24 DEC 12, 2019
Krutzsch W, Myjer E & Trapp R (Eds., 2014) The chemical weapons convention: A commentary. 1st edition, Oxford university press, UK.	The chemical weapons convention: A commentary	2014	Oxford university press, UK	Krutzsch <i>et al.</i> , 2014
A/RES/42/37	Measures to uphold the 1925 Geneva protocol and to support the conclusion of a chemical weapons convention	30 November 1987	UN GA	UN GA, 1987
A/RES/55/283	Cooperation between the United Nations and the Organization for the	24 September 2001	UN GA	UN GA, 2001

	Prohibition of Chemical Weapons			
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### 3 DISCUSSION

#### 3.1 The United Nations and its relationship with the OPCW

The United Nations comprises 193 member states<sup>146</sup>. The UN can be considered the most important of all the present international organisations. The aims of the UN, established after the World War II in 1945, focus on the maintenance of international security, the development of friendly relations among the nations, international cooperation in solving international problems of an economic, humanitarian, cultural or social character, as well as the promotion of human rights<sup>147</sup>. The UN is composed of a number of organs, the two types of which (principal organs and subsidiary organs) are identified in the UN Charter Article 7 (1-2)<sup>148</sup>.

The powers, functions and composition of the UN principal organs are determined by the UN Charter, whereas those of the subsidiary organs are determined by the principal organ that establishes them. Most prominent principal organs of the UN are the General Assembly, the Security Council and the International Court of Justice. Examples of the UN subsidiary organs include the UN Human Rights Council, established by the UN GA, and the UN peacekeeping missions established by the UN SC. The OPCW-UN JIM was a UN SC subsidiary organ<sup>149</sup>. In most cases, a principal organ will confer some of its powers on a subsidiary organ that it creates. The principal organs may be entitled to confer the subsidiary organ powers that it does not possess itself, in the case that the power to establish such a subsidiary organ is needed for the performance of the functions of the principal organ. Both the UN GA and the UN SC have established subsidiary organs having judicial powers, although they do not themselves possess such powers. The legality of this, as well as the fact that the subsidiary organ can be conferred powers to bind the principal organ, has been discussed in the ICJ Advisory opinion on Effect of awards of compensation made by the United Nations Administrative tribunal.<sup>150</sup>

<sup>146</sup> UN, 2020b. About the United Nations

<sup>147</sup> Ch I, Article 1 (1-4), The UN Charter

<sup>148</sup> Ch III, Article 7 (1): "...principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat."; Ch III, Article 7 (2): "Such subsidiary organs as may be found necessary may be established in accordance with the present Charter." The UN Charter

<sup>149</sup> UN, 2020b. United Nations Security Council. Subsidiary organs, Middle East.

<sup>150</sup> ICJ, 1954. Effect of awards of compensation made by the U. N. Administrative Tribunal, Advisory Opinion of July 13th, 1954: I.C.J. Reports 1954, p. 47. p. 58; ICJ, 1954 p. 62; Akande in Evans (2018) Ch 8, International organizations p. 253

In addition to the primary and subsidiary organs of the UN, the whole UN system comprises a family of IOs sharing common institutions and practises. Specialised agencies, such as the World Health Organisation, are autonomous organisations working with the UN, brought into relationship with the UN through negotiated agreements. The OPCW was created as an autonomous body under the UN system, but the OPCW is not an UN specialised agency. The OPCW retains autonomy regarding its programme and budget, and reports regularly on its activities to the First Committee of the UN GA<sup>151</sup>.

The Article VIII paragraph 34 (a) of the CWC mandates the OPCW EC to conclude agreements or arrangements with states and international organisations on behalf of the OPCW. These agreements, however, are subject to approval by the CSP. The first such an agreement, an agreement concerning the relationship between the UN and the OPCW, was adopted by the OPCW EC in its 11th session on 1st September 2000, and approved by the CSP at its 6th session on 17th May 2001. The relationship agreement was approved by the UN GA in resolution A/RES/55/283, dated 24 September 2001. In the agreement, both organisations recognise each other's responsibilities, objectives and mandates as well as establish a working relationship.<sup>152</sup> The relationship agreement, Article I (1) states that:

*“The United Nations recognises the OPCW as the organisation, in relationship to the United Nations as specified in this agreement, responsible for activities to achieve the comprehensive prohibition of chemical weapons in accordance with the Convention.”*

While the UN General Assembly is the UN plenary organ composed of all member states of the UN and has competence to discuss and make recommendations on a broad range of matters within the scope of the UN Charter, the UN GA can only make binding decisions on internal administrative matters.<sup>153</sup> The UN Security Council, however, has the power to adopt decisions that bind the member states of the UN<sup>154</sup>. The powers and functions of the UN SC are established in the UN Charter Chapter V, Articles 24 through 26. Under Article 24, the members of the UN confer primary responsibility for the maintenance of international peace and security on the SC, and agree that in carrying out its duties the SC acts on their behalf. The SC consists of fifteen members; five permanent (China, Russia, USA, UK and France) as well as ten other members elected for the term of two years by the UN GA<sup>155</sup>. The SC takes

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<sup>151</sup> UN, 2020b. About the UN. Funds, programmes, specialized agencies and others

<sup>152</sup> OPCW, 2015 pp 721-727

<sup>153</sup> Ch IV (9-17), The UN Charter

<sup>154</sup> Ch V (25): “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” The UN Charter

<sup>155</sup> Ch V (23) (1), The UN Charter

decisions on the matters of substance by an affirmative vote of nine members, including the concurring votes of all permanent members<sup>156</sup>.

Chapter VII of the UN Charter sets out the framework of the enforcement powers of the UN SC. As set out in Article 39, the UN SC is to determine the existence of any threat to the peace, breach of the peace, or act of aggression. The UN SC will then make recommendations or decide what measures will be taken in accordance with Articles 41 and 42 of the Charter. Article 41 deals with measures not involving the use of armed force, including e.g. interruption of economic relations or means of communication, and the severance of diplomatic relations. According to Article 42, if the measures provided for in Article 41 would be inadequate or have proved to be inadequate, the UN SC may take such action by air, sea, or land forces “as may be necessary” to maintain or restore international peace and security.<sup>157</sup>

Any decision of the UN SC is legally binding to the UN member states under Article 25. However, whether a particular provision of a certain UN SC resolution is legally binding on member states (meaning whether the provision is a “decision” of the SC), including the addressee of the resolution, depends on whether the SC has chosen to use words within the provision indicating its intent to create a legally binding obligation. On the other hand, also the non-binding decisions of the SC can be considered to add to the juridical character of legally binding obligations for the addressee.<sup>158</sup> When the position of the UN charter compared with other international agreements is considered, Article 103 of the UN Charter provides for the events of conflict between the obligations of the UN members under the UN Charter and their obligations under any other international agreement<sup>159</sup>. The Article states that in these cases the obligations under the UN Charter shall prevail.

The UN mechanism to investigate alleged chemical, biological and toxin weapons use predates the CWC. The mechanism was developed during the 1980s to ascertain in an objective and scientific manner facts of alleged violations of the 1925 Geneva Protocol. The UNSG mechanism, requested by the UN GA to be implemented by the UN SG in UN GA resolution A/RES/42/37<sup>160</sup>, allows the UN SG to carry out investigations in response to allegations involving the possible use of chemical, biological or toxin weapons. The possible use may be reported, and brought to the attention of the UN SG, by any member state of the

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<sup>156</sup> Ch V (27) (3), The UN Charter

<sup>157</sup> Ch VII (39-42), The UN Charter

<sup>158</sup> Joyner, 2017 in Legal bindingness of Security Council resolutions generally, and resolution 2334 on the Israeli settlements in particular. Blog of the European Journal of International Law 9.1.2017

<sup>159</sup> Ch XVI (103): “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” The UN Charter

<sup>160</sup> UN GA, 1987



UN. The UNSG mechanism may dispatch fact-finding expert teams to collect and examine evidence. Member states of the UN maintain a list of qualified experts and laboratories available to such investigations.

In April 2013 the UN SG, after receiving a formal request for the SAR, initiated an investigation under this mechanism into alleged use of CWs in the SAR<sup>161</sup>, then not a state party to the CWC. The OPCW participated in the investigations<sup>162</sup>. In cases of CW use by a state that is not party to the CWC, paragraph 27 of the Verification Annex Part XI stipulates that the OPCW is to cooperate closely with the UN SG and, if requested, put its resources at the disposal of the UN SG. In such cases, the OPCW essentially supports the UN SG mechanism by making available its inspectors and inspection equipment as well as its network of designated laboratories. The SAR deposited with the UN SG its instrument of accession to the CWC on 14th September 2013 and the CWC entered into force for the SAR in 14th October 2013<sup>163</sup>. After Syria acceded to the CWC, the initially declared Syrian CWAs were removed from Syria and subsequently destroyed by UN-OPCW joint mission, established on the basis of the OPCW -UN cooperation agreement and UN SC resolution 2118<sup>164</sup>.

The UN organs have made numerous resolutions on the course of the ongoing armed conflict in the SAR. Concerning chemical weapons use in Syria and Syrian CW disarmament, one of the most prominent has been the above-mentioned UN SC resolution 2118 in September 2013 after the SAR had announced its plans to accede to the CWC. The resolution invoked the Article 25 of the UN Charter, determined that the use of chemical weapons in the SAR constituted a threat to international peace and security, and bound the SAR to the elimination plan for the Syrian CW programme as outlined by the OPCW<sup>165</sup>. In addition, the resolution in its operative paragraph 4 stated that the UN SC:

*“Decides, that the Syrian Arab Republic shall not use, develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to other States or non-State actors.”*

<sup>161</sup> UN, 2013. Ban appoints Swedish scientist to lead probe into alleged chemical weapons use in Syria. UN News, 26 March 2013.

<sup>162</sup> UN, 2020. Secretary-General’s mechanism for investigation of alleged use of chemical and biological weapons.

<sup>163</sup> OPCW EC, 2013. Decision. Destruction of Syrian chemical weapons.

<sup>164</sup> UN SC, 2013. Paragraph 15 of the resolution stated that the UN SC “Expresses its strong conviction that those individuals responsible for the use of chemical weapons in the Syrian Arab Republic should be held accountable.”

<sup>165</sup> furthermore, the operative paragraph 7 of the resolution 2118 stated that the UN SC: “Decides that the Syrian Arab Republic shall cooperate fully with the OPCW and the United Nations, including by complying with their relevant recommendations, by accepting personnel designated by the OPCW or the United Nations, by providing for and ensuring the security of activities undertaken by these personnel, by providing these personnel with immediate and unfettered access to and the right to inspect, in discharging their functions, any and all sites, and by allowing immediate and unfettered access to individuals that the OPCW has grounds to believe to be of importance for the purpose of its mandate, and decides that all parties in Syria shall cooperate fully in this regard.” UN SC, 2013

In March 2015, the UN SC decided in its resolution 2209 that any future non-compliance with resolution 2118 would lead it to impose measures towards the SAR under Chapter VII of the UN Charter<sup>166</sup>. The UN SC resolution 2235<sup>167</sup> on 7th August 2015 expressed the determination of the SC to identify and hold accountable those responsible for CW use in Syria. Furthermore, the resolution 2235 established the OPCW-UN JIM by the UN SC decision, and reaffirmed the SC decision to impose measures under Chapter VII of the UN Charter in response to violations of resolution 2118. The OPCW-UN JIM mandate was renewed by the UN SC in resolution 2319 for a further period of one year<sup>168</sup>.

Apart from the SAR being a state party to the Geneva Protocol from 1925 and the CWC, these SC resolutions bind the SAR government under the international treaty law. Concerning the OPCW, the UN SC has in repeated resolutions made decisions with the aim of ensuring the full compliance of the SAR towards the CWC, as well as its full cooperation with the OPCW, including unhindered access of the OPCW to inspect the alleged use cases. These SC resolutions have not been upheld and enforced, however, and since the end of 2016, the UN SC has not reached resolutions addressing the ongoing CW use in the SAR. In February 2017, the UN SC failed to adopt a draft resolution that would have imposed Chapter VII sanctions on entities and individuals deemed to be involved in the production or use of CWs in the SAR, following vetoes by Russia and China<sup>169</sup>. In addition, the mandate of OPCW-UN JIM ended in late 2017, after Russia repeatedly vetoed the renewal of the mandate<sup>170</sup>.

As discussed earlier, the OPCW-UN relationship is based on a mutually agreed relationship agreement between these two international organisations. Article II of the agreement states that the UN and the OPCW recognise the need to work jointly to achieve mutual objectives. The two IOs agree to cooperate closely within their respective mandates, to consult on matters of mutual interest and concern, and cooperate with each other in accordance with the provisions of their respective constituent instruments<sup>171</sup>. Under Article XIV of the relationship agreement, the UN SG and the OPCW DG are allowed to make supplementary arrangements and develop the needed practical measures to the implementation of the agreement<sup>172</sup>.

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<sup>166</sup> UN SC, 2015. United Nations Security Council resolution 2209 (2015) op. paragraph 7

<sup>167</sup> UN SC, 2015b. United Nations Security Council resolution 2235 (2015).

<sup>168</sup> UN SC, 2016b

<sup>169</sup> UN, 2017c. Double veto prevents Security Council from adopting draft resolution intended to impose sanctions for use of chemical weapons in Syria.

<sup>170</sup> UN, 2017b. Security Council fails for fourth time to renew mandate of Joint Mechanism investigating chemical weapons attacks in Syria.

<sup>171</sup> Article II (1), OPCW EC, 2000

<sup>172</sup> Article XIV: "The Secretary-General and the Director-General may enter into such supplementary arrangements and develop such practical measures for the implementation of this Agreement as may be found desirable." OPCW EC, 2000

The working relationship of the OPCW and the UN has developed over the course of the various operations during the war in Syria, and included the establishment of the above-mentioned supplementary agreements and practical measures. Starting from the OPCW supporting the UN SG mechanism launched to investigate the alleged CW use incidents in Syria in 2013 as well as the subsequent UN-OPCW joint operation to remove the declared Syrian CW arsenal, the investigative actions later evolved to the establishment of the OPCW FFM in Syria in 2014. In 2015, the UN SC expressed its support for the continued work of the OPCW FFM<sup>173</sup>. Finally, the OPCW-UN JIM was created to identify the perpetrators of CW use based on the work of the OPCW FFM - where the FFM had determined that a specific incident in the SAR involved or likely involved the use of CWs<sup>174</sup>. These highly demanding operational activities have proved the two IOs being able to work jointly to achieve mutual objectives, as their cooperation agreement entails, each complementing the other's work and competences with their own.

Concerning the primary research question of this study, whether the fact-finding in the cases of alleged use of CWs with the objective to attribute liability to states is within the scope and competence of the OPCW, the inspection of the relationship agreement of these two autonomous IOs, or the tasks and duties of the UN alone does not provide a very complete picture. While it is true, that the UN SC by the UN Charter Chapter V carries the primary responsibility for the maintenance of international peace and security, as well as the capability to bind the UN member states and enforce its decisions, it remains equally true that the OPCW is established by the CWC with the purpose and task to supervise compliance to the CWC treaty. Should the UN SC make binding decisions that put the obligations of UN member states under these in conflict with the obligations of the CWC state parties under the CWC, by UN Charter Article 103 the UN SC decisions would prevail. Although the UN SC terminated the UN-OPCW JIM with the specific mandate to attribute CW use in the SAR to individuals and entities, the possibility that the SC would reach any resolution to actively hinder the OPCW from carrying out such activities by the OPCW's own initiative seems unlikely. This is simply because such decision would require the concurring vote of the SC permanent members, and the UK among others, including France and the USA, drafted the decision C-SS-4/Dec.3.

Concerning investigating the alleged use of CWs by a state party to the CWC treaty, the mechanisms established within the CWC for investigating alleged use, as a later development of treaty law, can be seen to be intended to replace the UN SG mechanism, created long

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<sup>173</sup> op. paragraph 5, UN SC, 2015

<sup>174</sup> op. paragraph 5, UN SC, 2015b

before the CWC was negotiated. In the next chapter, the authority of the OPCW to investigate alleged CW use in Syria in order to attribute responsibility to those who use them as outlined in CSP decision C-SS-4/Dec.3 is examined in the context of expressly conferred powers - through what the CWC treaty text explicitly states on purpose, structure and competences of the OPCW, as well the particular functions and powers of the OPCW individual organs. In addition, the authority and scope of the OPCW are briefly discussed in the broader context of attributed and implied powers of international organisations. The focus of this discussion is in the situations involving alleged use of chemical weapons.

### **3.2 OPCW authority to investigate alleged CW use with the objective to attribute responsibility**

#### **3.2.1 The powers and scope of activities of the OPCW under the CWC**

The Organisation for the Prohibition of Chemical Weapons, the OPCW, is established in the Article VIII (1) of the CWC<sup>175</sup>. Paragraph 1 of Article VIII stipulates that the responsibility of the organisation is to ensure that the CWC is implemented. Paragraph 6 of the Preamble of the convention emphasises that the objectives and purpose of the convention are reached through the implementation of its provisions. Therefore, every implementation action by the organisation must be aimed at achieving the overall objective and purpose of the treaty. Likewise, all questions about the interpretation and application of the CWC must be answered in light of the objective and purpose of the treaty.<sup>176</sup>

The tasks and duties of the OPCW are set out in its constitutional Article VIII of the CWC. The elaboration of these tasks in Article VIII is very broad, and does not define, but neither rules out on, any specific operational activities by the organisation. Rather, the general description of the tasks of the organisation as laid out in Article VIII (1) puts all focus to the duty of the OPCW to why the organisation was established:

*“...to achieve the objective and purpose of this Convention...”*

When the research question whether the decision to investigate alleged use cases in order to attribute responsibility to the perpetrators of chemical weapons use in the SAR is within the scope and competence of the OPCW is examined in the light of the objectives and purpose of

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<sup>175</sup> Article VIII (1): “The States Parties to this Convention hereby establish the Organization for the Prohibition of Chemical Weapons to achieve the object and purpose of this Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.” OPCW, 2005

the CWC, the result seems to be a clear yes. First and foremost, these activities are intended to uphold the international law which comprehensively prohibits the development, production, stockpiling, and use of chemical weapons through a customary norm that has built over centuries, as well as through treaty law developed during the 20<sup>th</sup> century. The objective and purpose of the CWC, the treaty that confers the implementing organisation OPCW its powers, is to exclude completely the possibility of the use of chemical weapons<sup>177</sup>. Furthermore, the process is involved with investigating alleged use of CWs, which would be a particularly grave violation of this international norm as well as that of the CWC treaty. More specifically, the use of CWs in Syria has already been confirmed through the previous work of the FFM that was established by the DG of the OPCW. Even further, a part of these incidents of CW use have been deemed to have been carried out by the SAR government, a state party to the CWC.

The use of implied powers as a sole basis of adoption of functions by an international organisation is somewhat problematic, however, as it has the possibility to violate the principle of attributed powers based on the consent of member states. A general proposition of the international law is that the rules of law can generally be made on the basis of consent of states only. Implied powers doctrine seems to suggest that organisations can engage in activities regardless of state consent, perhaps even in opposition to the interests of some or all of the organisations member states. Therefore, the implied powers must arise from “necessary implication”, and they must be able to be tracked to the intention and consent of the states. In other words, the implied powers must be rooted to the intention of the treaty drafters.<sup>178</sup>

The CWC states parties have consented to be bound by the treaty of the CWC, with the objective and purpose of total elimination of chemical weapons. The CWC state parties have delegated the tasks related to implementation of the CWC to the OPCW, an organisation created solely for this purpose. The most significant part of the implementation and one of the distinctive hallmarks of the CWC is its comprehensive mechanism for verification of compliance, as laid out in the treaty Articles. As examined in detail in the following chapters of this study, the provisions of the CWC cover the functional mechanisms for fact-finding, intended to clarify and resolve whether any non-compliance to the treaty has occurred including cases of alleged use, as well as measures to redress situations where non-compliance has been established. It can therefore be envisaged that it is essential for the OPCW, in order to carry out its implementation duties as laid out in the CWC, to have the powers to attribute

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<sup>176</sup> Article VIII (1) and the Preamble (6), OPCW, 2005; also Krutzsch & Dunworth in Krutzsch *et al.* (2014) Article VIII: The organization, C. Discussion of the text p.248

<sup>177</sup> paragraph 6 of the Preamble, OPCW, 2005

<sup>178</sup> Klabbers, 2015 Ch 2 The legal existence of international organisations pp. 24-25

cases of alleged CW use to a CWC state party during its compliance verification activities. This is needed in order to determine whether the state party in question is in compliance to the treaty. Attribution of responsibility to the perpetrators of CWs is therefore needed in the light of why the organisation was created and by necessary implication, seems to be well within the powers of the OPCW.

### 3.2.2 The CWC provisions on investigating alleged CW use cases

As discussed earlier, one of the hallmarks of the CWC is its comprehensive mechanism for verification of compliance. The subject of this study concerns with the OPCW powers to investigate alleged use of CWs, and the examination below concentrates on the CWC provisions on investigating alleged CW use cases as a part of verification of compliance to the treaty. Several different mechanisms for addressing suspected or observed non-compliance to the treaty are outlined in the CWC Article IX. Regarding general principles of initiating these processes, each state party to the convention has the possibility to initiate steps to address any compliance concerns<sup>179</sup>. Negotiations can be conducted in mutual co-operation between states parties by one party requesting clarification from the other on the subject in hand. A request can also be made by a SP to the OPCW EC to address the issue. As a last and most intrusive option, any CWC state party has also the right to request a challenge inspection to be carried out for clarifying and resolving questions concerning possible non-compliance<sup>180</sup>.

Article IX of the CWC titled Consultations, cooperation and fact-finding describes the principles laid out in the CWC to establish facts to prove whether activities are intended for purposes not prohibited, and to resolve any doubts the CWC SPs may have towards other SPs' compliance with their obligations. Article IX focuses on challenge inspections and *ad hoc* procedures rather than routine procedures, and the procedures for compliance control as laid out in Article IX should be separated from both routine inspections, and dispute settlement. This distinction is important because of the different trigger mechanisms involved, and also in respect of the procedural steps and principles applied. The article includes procedures for requesting clarification from other state parties in cases of suspected non-compliance, as well

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<sup>179</sup> Article IX (1): "States Parties shall consult and cooperate, directly among themselves, or through the Organization or other appropriate international procedures, including procedures within the framework of the United Nations and in accordance with its Charter, on any matter which may be raised relating to the object and purpose, or the implementation of the provisions, of this Convention." OPCW, 2005

<sup>180</sup> Article IX (8): "Each State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole

as procedures for challenge inspections. The purpose and the end-state of the procedures described in Article IX is the restoration of confidence in compliance, or identifying non-compliance and subsequently redressing the situation.<sup>181</sup>

Article X of the CWC titled Assistance and protection against chemical weapons contributes to the security of the CWC SPs. The Article provides for effective chemical protection of the SPs in response to threats that may emanate from a state not party to the convention, or a CWC SP in violation of its fundamental obligations regarding the convention. Article X is also of importance when threats posed by non-state actors are considered. Article X confirms the right of the CWC SPs to defend themselves against the use or threat of use of CWs. Furthermore, the Article establishes mechanisms to improve SPs protective capabilities, as well as to deliver assistance through the OPCW to a SP falling victim to CW use. Concerning the alleged use of CWs, the Article contains the procedure leading to investigations of alleged use, when a SP considers that CWs have been used against it.<sup>182</sup>

The essential tools for clarifying and resolving any questions concerning possible non-compliance to the treaty as well as addressing alleged use of chemical weapons are inspections, dispatched by the OPCW DG. In general, the OPCW conducts three types of inspections for the verification of compliance to the CWC: routine inspections of chemical weapons-related facilities and chemical industry facilities; short-notice challenge inspections according to Article IX, which can be conducted at any location in any SP about which another SP has concerns regarding possible non-compliance; and investigations of alleged use of CWs pursuant to Article X<sup>183</sup>.

The detailed procedures followed in these inspections are laid out in the CWC Annex on Implementation and verification, the Verification Annex. The procedures for short-notice challenge inspections requested by a state party pursuant to the Article IX of the convention are described in Verification Annex Part X. However, paragraph 19 of the Article IX states that challenge inspections based on alleged use are to be conducted in accordance with Verification Annex Part XI entitled Investigations in cases of alleged use of chemical

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purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention". OPCW, 2005

<sup>181</sup> Krutzsch *et al.* in Krutzsch *et al.* (2014) Introduction and general issues, V. Compliance management by the organisation p. 9; Marauhn in Krutzsch *et al.* (2014) Article IX Consultations, B. Role of the part and negotiation history p. 302

<sup>182</sup> Article X (8) (a): "Each State Party has the right to request and, subject to the procedures set forth in paragraphs 9, 10 and 11, to receive assistance and protection against the use or threat of use of chemical weapons if it considers that: (a) Chemical weapons have been used against it"; Article X (9): "The request, substantiated by relevant information, shall be submitted to the Director-General, who ... shall initiate, not later than 24 hours after receipt of the request, an investigation in order to provide foundation for further action."; also Trapp in Krutzsch *et al.* (2014) Article X: Assistance and protection, B. Role of the article p. 333

<sup>183</sup> OPCW, 2017d. Fact Sheet 5: Three Types of Inspection.

weapons. Part XI of the Verification Annex therefore governs the investigations carried out in cases of alleged use of chemical weapons under either Article IX, Consultations, cooperation and fact-finding, or Article X, Assistance and protection against CWs. It should be noted, that the Annexes are an integral part of the convention, and not in a subsidiary position regarding the CWC body text. Any reference to the CWC includes the annexes<sup>184</sup>.

Investigations of alleged CW use pursuant to CWC Articles IX or X follow similar procedures laid out in the Verification Annex Part XI. However, their primary objectives completely differ. Article X is invoked by a SP in order to receive assistance when chemical weapons have been used or threatened to be used against it. Under Article X, the objective of the alleged use investigations is therefore merely to establish whether chemical weapons were used in order to establish if the SP has the right to receive assistance and to assess what types of assistance are needed, without identifying any state or non-state actor as the aggressor. Under Article IX, the investigations of alleged use have the purpose of clarifying and resolving noncompliance by a SP alleged of having used CWs. For an alleged use challenge inspection on the basis of Article IX, it is therefore imperative to obtain sufficient facts to clarify above any reasonable doubt that CWs have been used by the SP alleged in the request.<sup>185</sup> The OPCW must therefore attribute the use of CWs to the SP in question through its technical investigative actions in order for the non-compliance by a SP (use of CWs) to be established. The inspections contribute to technical attribution, the factual and technical investigation both in terms of who the likely perpetrator is and the degree of certainty with which this can be established<sup>186</sup>. In addition to the investigations, attribution of non-compliance to the SP in question requires politico-legal evaluation, conducted by the EC. This is discussed in the following chapter.

The process of investigation of alleged use, as laid out in Articles IX and X and detailed in the Verification Annex Part XI, provides the OPCW with a robust tool to address the most grave violations of the treaty, the alleged use of CWs. As set out in CWC in the Verification Annex Part XI<sup>187</sup>, investigations into the sites of the alleged CW use are to be granted access to all sites the inspection team deems relevant to the effective investigation of the alleged use. A state party to the convention cannot refuse a challenge inspection requested pursuant to the

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<sup>184</sup> Article XVII, Status of the annexes. OPCW, 2005

<sup>185</sup> Runn in Krutzsch *et al.* (2014) Verification Annex Part XI, B. Role of the part p. 643

<sup>186</sup> aspects of attribution as discussed by Theeuwen, 2018, Attribution for the purposes of state responsibility p. 6

<sup>187</sup> Verification Annex Part XI (C) (15): "The inspection team shall have the right of access to any and all areas which could be affected by the alleged use of chemical weapons. It shall also have the right of access to hospitals, refugee camps and other locations it deems relevant to the effective investigation of the alleged use of chemical weapons." OPCW, 2005



Article IX<sup>188</sup>. Even further, the Part XI of the Verification Annex explicitly mentions that this investigation process is to be used for identification of the origin of any chemical weapons used. The Verification Annex Part XI Chapter D, Reports, paragraph 26 states, that:

*“If the inspection team collects through, inter alia, identification of any impurities or other substances during laboratory analysis of samples taken, any information in the course of its investigation that might serve to identify the origin of any chemical weapons used, that information shall be included in the report.”*

The primary research question of this study, whether the investigation of cases of alleged use of CWs in Syria with the objective to attribute liability to the state is within the competences of the OPCW as they are set out in the CWC treaty can be examined aligned with the provisions of the CWC presented above. The SAR is involved in an internal armed conflict where chemical weapons have verifiably been used, and a part of these incidents of CW use have already been attributed to the SAR government, a state party to the CWC. Through its technical and expert work under the OPCW TS, the investigations conducted by the FFM have previously confirmed the use of chlorine, sulfur mustard, and sarin as weapons in the SAR. However, analogous to an investigation into the alleged use of CWs under Article X, the FFM has not been vested with a mandate or an objective to identify who used these chemical weapons. In decision C-SS-4/Dec.3, the operative paragraph 10 of the decision mandated the OPCW TS to put in place arrangements to identify the perpetrators of the use of chemical weapons in the SAR by “identifying and reporting on all information potentially relevant to the origin of those chemical weapons”. In this, the decision invoked the provision of the Verification Annex Part XI explicitly dealing with establishing the origin of the CWs during investigations of alleged use cases.

In the landscape of the activities involving investigating alleged CW use as outlined in the CWC, the attribution mechanism established by the decision C-SS-4/Dec.3 can be seen to form a part of an alleged use investigation process, continuing and complementing the fact-finding work of the FFM. The final outcome of these activities is aimed at clarifying and resolving whether any non-compliance by a SP to the CWC has occurred, the process of which is outlined in Article IX of the CWC. However, an important question regarding the CSP decision C-SS-4/Dec.3 therefore remains why the OPCW member states have pursued addressing the situation via the *ad hoc* route of via a decision by a general vote in the CSP. The preferred route for investigating alleged CW use, clearly defined under Article IX of the CWC is another SP to the CWC submitting a request for challenge inspection for

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<sup>188</sup> Article IX (10): “For the purpose of verifying compliance with the provisions of this Convention, each State Party shall permit the Technical Secretariat to conduct the on-site challenge inspection...” OPCW 2005

investigation for alleged use. In addition, there is a possibility of the SAR itself requesting investigations for alleged use under Article X.

Investigations under Article X can be triggered by request of a SP against whom CWs have been used. Although the SAR in 2013 asked the UN SG to launch an urgent investigation to the alleged use of CWs in Syria under the auspices of his mechanism<sup>189</sup>, the SAR has more recently stated that the CW use in Syria is due to “terrorist proxies that have been trained, financed and provided with chemical weapons to stage incidents and stir up and inflame international public opinion against the Syrian government”<sup>190</sup>. In cases of CW attacks Syria, as a SP to the CWC, is entitled to receive assistance against the use of chemical weapons under the Article X of the CWC. However, this would include investigations set out in the CWC Verification Annex to establish whether the use of CWs has occurred and to assess what types of assistance are needed. As it has been established that the SAR government is responsible of using CWs against its own people in part of the CW use incidents<sup>191</sup>, it is therefore understandable that the SP in question, Syria, is not requesting assistance pursuant to Article X of the CWC, warranting detailed investigations to take place.

Another SP to the CWC requesting a challenge inspection under Article IX for alleged use of CWs by SAR when an incident involving CWs emerges is another an option. However, challenge inspections have not been utilised throughout the history of the CWC. Most prominent reason for this that can be derived from the inspection of the CWC treaty text, is that the CWC highlights consultations and cooperation as the primary means of resolving doubts of non-compliance. Article IX of the CWC<sup>192</sup> states that whenever possible, the SPs should first make “every effort” to clarify and resolve any matter causing doubts about compliance among themselves through exchange of information and consultations. However, the Article IX (2) also explicitly states that this is without prejudice to the right of any SP to request a challenge inspection, and that cooperation is to be used whenever possible. Therefore, while the text of the CWC in general highlights cooperation and consultation in solving any doubts concerning compliance, it does not clearly define the extent of these, neither places them as a prerequisite to issuing a challenge inspection request.

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<sup>189</sup> UN, 2020. Frequently asked questions about the United Nations mission to investigate the allegations of the use of chemical weapons in the Syrian Arab Republic.

<sup>190</sup> OPCW CSP SS4 NAT 17, 2018

<sup>191</sup> UNHRC, 2017. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (Advance Edited Version) p. 14

<sup>192</sup> Article IX (2): “Without prejudice to the right of any State Party to request a challenge inspection, States Parties should, whenever possible, first make every effort to clarify and resolve, through exchange of information and consultations among themselves, any matter which may cause doubt about compliance with this Convention...” OPCW, 2005

Another consideration that may hinder other SPs initiating a challenge inspection subsequent to an alleged use incident is the possibility of retaliatory challenge inspection requests. Article IX<sup>193</sup> of the CWC puts out provisions to prevent this kind of abuse of the challenge inspection system. The EC can decide by a three-quarter majority of its members against carrying out a requested challenge inspection. This is to be done if the EC considers the inspection request to be frivolous, abusive or clearly beyond the scope of the convention. Neither the requesting nor the inspected SP, if a member of the EC, can participate in the making of such a decision.

A challenge inspection, initiated by another CWC SP pursuant to the Article IX of the convention, is a detailed mechanism for clarifying and resolving whether use of chemical weapons by a CWC SP has occurred. Investigations of alleged use pursuant to the Article IX follow the processes described in Part XI of the Verification Annex. Part XI (D) 26 of the Verification Annex explicitly mentions that the alleged use investigation process is to be utilised to identify the origin of any chemical weapons used. It can therefore be seen, that fact-finding in the cases of alleged use of CWs with the objective to attribute liability to a state is clearly outlined in the CWC, in the context of challenge inspections for clarifying and resolving suspected non-compliance pursuant to Article IX. Concerning the attribution of responsibility to the CW use in the SAR, a challenge inspection initiated by other OPCW member states would therefore seem as a natural, yet unused option in case of emerging CW use cases in the area. Alleged use investigations following the clearly described core processes of the CWC, instead of ad hoc arrangements, would likely leave less room for political debate and division among the OPCW member states.

### **3.2.3 The CWC provisions on the OPCW powers to establish that a treaty violation has occurred**

Criticism directed towards decision C-SS-4/Dec.3 included arguments that the CWC does not contain any provision that states that the OPCW, or its policy-making organs have a mandate to establish a violation of an obligation under the CWC<sup>194</sup>. These questions are also relevant concerning the legal effects of the attribution decision C-SS-4/Dec.3. Based on the Chapter 3.2.2 examination of the mechanisms for investigating alleged use of CWs as set out in the CWC Articles and the Verification Annex, it is clear that the drafters of the CWC intended the treaty to be well equipped to deal with situations where a state party is suspected to be in violation of its treaty obligations. The factual and technical investigations by the TS according to Verification Annex Part XI of the CWC are an integral part of these processes. The final

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<sup>193</sup> Article IX (17), OPCW, 2005

objective of the procedures under Article IX is to establish facts to resolve any doubts the CWC SPs may have towards other SPs' compliance with their obligations. In addition to the investigations, attribution of non-compliance to the SP in question requires legal and political assessment on the outcome of the investigations. As set out in the CWC, this is the task and duty of the EC.

In general, the EC is in charge of managing the procedures for a SP requesting clarification from another SP concerning doubt of non-compliance<sup>195</sup>. In the cases of challenge inspections pursuant to Article IX, the requesting SP presents an inspection request for an on-site challenge inspection to the EC, and simultaneously, to the OPCW DG<sup>196</sup>. At this point, the EC has a task of considering and deciding on the merits of the request and whether the inspection is within the scope of the convention<sup>197</sup>. Although the OPCW DG is responsible for dispatching the inspection, the EC keeps the case under its consideration throughout the inspection procedure<sup>198</sup>. After the OPCW DG has submitted the final report concerning the inspection, as set out in the Article IX (22) the EC decides on whether any non-compliance has occurred; whether the request had been within the scope of the CWC; and whether the right to request a challenge inspection had been abused<sup>199</sup>.

Paragraph IX (22) and the following paragraph 23 illustrate the two distinct powers of the EC in addressing the procedural appropriateness of the challenge inspection, as well as substantively addressing the outcome of the inspection. The distinction of these two is important as the procedural review is governed primarily via legal considerations, but the assessment of the outcome is more of a political process. Paragraph 22 (a) on EC addressing whether any non-compliance has occurred mandates the EC to make this politico-legal assessment on how the facts in the inspection team's final report relate to the obligations of the inspected state party under the CWC.<sup>200</sup>

The work of the IIT mechanism established after decision C-SS-4/Dec.3 to extend fact-finding concerning the cases of CW use to attribute liability to the perpetrators in Syria does not follow the processes of either a challenge inspection under Article IX, or the alleged use investigations outlined in Article X. Rather, the decision text reverted to the Article VIII

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<sup>194</sup> See OPCW CSP SS4 NAT 17, 2018; OPCW CSP SS4 NAT 40, 2018; OPCW CSP SS4 NAT 54, 2018

<sup>195</sup> Article IX (3-7), OPCW, 2005

<sup>196</sup> Article IX (13), OPCW, 2005

<sup>197</sup> Article IX (17): "The Executive Council may, not later than 12 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 ... If the Executive Council decides against the challenge inspection, preparations shall be stopped, no further action on the inspection request shall be taken..." OPCW, 2005

<sup>198</sup> Article IX (16), OPCW, 2005

<sup>199</sup> Article IX (22), OPCW, 2005

paragraphs on the general powers and functions of the respective OPCW organs, establishing an *ad hoc* mechanism. The decision recalled paragraph 37 on that the TS is to carry out the verification measures provided for in the CWC, as well as paragraph 40 on that the TS is to inform the EC of any doubts, ambiguities or uncertainties about compliance with the CWC that have come to its notice in the performance of its verification activities<sup>201</sup>. The general tasks and duties of the OPCW organs as set out in the CWC, aligned with the apparent functions of the IIT mechanism, will be discussed in detail in the next chapter.

After non-compliance of a CWC SP has been established, Article XII of the CWC titled “Measures to redress a situation and to ensure compliance, including sanctions” describes measures that the OPCW CSP can take to remedy situations of non-compliance. Such measures may include restricting or suspending a state party’s rights and privileges under the CWC until it conforms to its obligations, or recommending collective measures to other states parties in accordance with the international law<sup>202</sup>. In particularly grave cases, the CSP may bring the issue, along with any relevant information and conclusions, to the attention of the UN GA and the UN SC<sup>203</sup>. The stipulations of the Article XII concern CSP actions in situations where a state party has been established to be in violation of its obligations to the treaty. In cases of the OPCW investigating alleged use of CWs by a CWC state party, attribution of the CW use to the SP alleged for using CWs through the technical inspections of the TS, as well as the politico-legal assessment of the EC, is therefore a clear prerequisite for taking any of the measures set out in the Article XII.

### **3.3 Powers and functions of the OPCW organs versus the mechanism established by decision C-SS-4/Dec.3**

The legal effects of the decision C-SS-4/Dec.3 can also be examined from the perspective how the tasks allocated to the different OPCW organs in the decision balance with the powers, functions and tasks of the respective organs, as they are set out in the treaty. This is important, because the whole scope of competence of an international organisation and the powers conferred to its individual organs rely on the constituent instruments, based on the states parties’ consent. The general powers and functions of the OPCW main organs, the CSP, the EC and the TC, are set out in the CWC Article VIII entitled the Organization. Concerning investigating alleged use of CWs, the responsibilities, tasks and duties of the individual

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<sup>200</sup> Marauhn in Krutzsch *et al.* (2014) Article IX Consultations, C. Discussion of the text pp. 324-325

<sup>201</sup> paragraphs 7-8, OPCW CSP SS4 DEC 3, 2018

<sup>202</sup> Article XII (1-3), OPCW, 2005

<sup>203</sup> Article XII (4), OPCW, 2005

organs are further elaborated in the treaty Article IX on consultations, cooperation and fact-finding, Article X on assistance and protection against chemical weapons, and the Verification Annex Part XI.

The powers and functions of the Conference of the State Parties are set out in paragraphs 19 through 22 of Article VIII. The CSP is the principal organ of the OPCW, and oversees the implementation of the CWC as a whole. The CSP can consider any questions, matters or issues within the scope of the CWC, including those relating to the powers and functions of the EC and the TS. It can also make recommendations and take decisions on any questions, matters or issues related to the CWC. These may be raised by a SP, or brought to its attention by the EC. In addition, the CSP oversees the activities of the EC and the TS and may issue guidelines to either of them in the exercise of their functions.<sup>204</sup> In cases of doubts of non-compliance, the specific tasks of the CSP as set out in Articles IX and X relate to the decision-making powers of the CSP. A SP has the right to request, if supported by one third of the SPs, the CSP to convene in a special session and consider doubts or concerns about possible non-compliance and measures it deems appropriate to resolve the situation<sup>205</sup>. If the EC has made specific recommendations to the CSP after the EC reaching conclusions on whether any non-compliance has occurred, the CSP considers the appropriate action in accordance with Article XII, measures to redress a situation<sup>206</sup>.

The powers and functions of the Executive Council are set out in paragraphs 30 through 36 of the Article VIII. The EC is the executive organ of the OPCW, responsible to the CSP, who has the right to delegate functions to the EC. The EC supervises the activities of the TS, and cooperates with the national authorities of the SPs. The EC also facilitates consultations and cooperation among SPs at their request. The EC has functions concerning establishing compliance and non-compliance to the treaty, set out of in the statutory provisions of Article VIII. In general, the need for such an executive organ arises mainly from the requirements of agility concerning decision-making, in particular concerning the need to deal with compliance concerns. The EC has a duty to consider issues or matters within its competence affecting the CWC and its implementation, including concerns regarding compliance, and cases of non-compliance. If the EC considers further action to be necessary, it can take measures including bringing the issue to the attention of the CSP as well as recommending the CSP to take measures to ensure compliance. Furthermore, Article VIII (36) stipulates that the OPCW EC will, in cases of particular gravity and urgency, bring the issue, including relevant information

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<sup>204</sup> Article VIII (19-22), OPCW, 2005

<sup>205</sup> Article VIII (12) (c); Article IX (7), OPCW, 2005

<sup>206</sup> Article IX (25), OPCW, 2005

and conclusions, directly to the attention of the UN GA and the UN SC, and inform all CWC SPs of this step.

The Technical Secretariat assists the CSP and the EC in the performance of their functions. The powers and functions of the TS and the OPCW DG are laid out in Article VIII paragraphs 37-47. The TS carries out the verification measures provided for in the CWC. Functions may be delegated to the TS both by the CSP and the EC. Concerning compliance to the treaty, the TS has the duty to report to the EC any doubts about compliance that have come to its notice in the performance of its verification activities, and that it has been unable to resolve or clarify through its consultations with the SP concerned.<sup>207</sup>

The OPCW Director-General is the chief administrative officer of the TS, responsible in their actions to the CSP and the EC. The tasks and duties of the OPCW DG regarding verifying compliance to the treaty and investigating alleged use of CWs are numerous, as set out in Articles IX, X and the Verification Annex. The verification Annex Part XI (A) (1) explicitly places the responsibility for establishing detailed procedures of investigations of alleged use of chemical weapons, initiated pursuant to Articles IX or X of the CWC, to the OPCW DG<sup>208</sup>.

Based on the aforementioned stipulations on the CWC on the powers and functions of the OPCW main organs in issues concerning compliance, the general sequence of operations involving cases of suspected non-compliance can be outlined as follows. The TS carries out the practical verification duties such as investigations on behalf of the OPCW, and reports to the EC on the matters of compliance that it has not been able to resolve in the course of its own work. The EC considers these, makes decisions concerning whether any non-compliance has occurred, and forwards to the CSP any issues in which the EC considers further action to be necessary. In addition, the EC has an independent power to forward serious issues directly to the attention of the UN GA and the UN SC. The CSP, as the principal decision-making organ of the OPCW, has the final say concerning the actions taken in cases of non-compliance, based on the conclusions and recommendations of the EC. The competence of the CSP, however, includes any substance matters entrusted to both EC and the TS.

The CSP decision C-SS-4/Dec.3<sup>209</sup> established an *ad hoc* mechanism based on the framework of the general powers and functions conferred to the OPCW organs. In the decision operative paragraph 10, the CSP decided that the TS will put in place arrangements to identify the perpetrators of the use of CWs in the SAR by “identifying and reporting on all information

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<sup>207</sup> Article VIII (37-40), OPCW, 2005

<sup>208</sup> Verification Annex Part XI (A) (1) “Investigations of alleged use of chemical weapons, or of alleged use of riot control agents as a method of warfare, initiated pursuant to Articles IX or X, shall be conducted in accordance with this Annex and detailed procedures to be established by the Director-General.” OPCW, 2005

potentially relevant to the origin of those chemical weapons”. According to the same paragraph the TS is to provide regular reports on its investigations to the CSP and to the UN SG for their consideration. Furthermore, operative paragraph 12 stated that the TS is to preserve and provide information to the UN IIM as well as to any relevant investigatory entities established under the auspices of the UN. In the decision operative paragraph 24, the CSP decided that the OPCW DG is to provide a copy of the decision and a report on its initial implementation to all CWC SPs and the UN SG, and thereafter provide a report on progress to each regular session of the EC.

<b>Powers of the OPCW organs concerning compliance matters under CWC Article VIII</b>	<b>Decision C-SS-4/Dec.3</b>	<b>Tasks and due process of the OPCW organs under the CWC</b>
<p>In VIII (19) the CSP is given a power to consider and take decisions on any questions, matters or issues within the scope of CWC, including those relating to the powers and functions of the EC and the TS.</p> <p>In VIII (20) the CSP is given a power to review compliance with CWC, oversee the activities of the EC and the TS, and issue guidelines to either of them in the exercise of their functions.</p> <p>In VIII (21) (f) the CSP is given a power to establish such subsidiary organs as it finds necessary for the exercise of its functions</p> <p>In VIII (21) (k) the CSP is given a power to take the necessary measures to ensure compliance with CWC and to redress and remedy any situation which contravenes the provisions of the CWC</p> <p>In VIII (30) the EC is given a power to carry out the powers and functions entrusted to it under the CWC, as well as those functions delegated to it by the CSP. The EC is responsible to the CSP and must act in conformity with the recommendations, decisions and guidelines of the CSP</p> <p>In VIII (31) the EC is given a power to promote the effective implementation of, and compliance with, the CWC and a power to supervise the TS</p> <p>In VIII (35) the EC is given a power to consider any issue or matter within its competence affecting the CWC and its implementation, including concerns regarding compliance, and cases of non-compliance</p>	<p>4th SS CSP was convened by request of SPs<sup>1</sup></p> <p>CSP SS4 convened and by a 2/3 majority decision, authorised<sup>1</sup>:</p> <p>The TS to put in place arrangements to identify perpetrators of CW use in Syria (op. para 10)</p> <p>The TS is to provide regular reports on its investigations to the CSP and to the UN SG for their consideration. (op. para 10)</p> <p>The TS is to preserve and provide information to the UN IIM as well as to any relevant investigatory entities established under the auspices of the UN. (op. para 12)</p> <p>The OPCW DG is to provide a copy of the decision and a report on its initial implementation to CWC SPs and the UN SG, and thereafter provide a report on progress to each regular session of the EC. (op. para 24)</p>	<p>In VIII (12) (c) it is stated that Special sessions of the CSP will be convened when requested by any member and supported by one third of the members</p> <p>In VIII (16-17) it is stated that majority of the members of the OPCW constitute a quorum for the CSP, with each member of the OPCW having one vote in the CSP</p> <p>In VIII (18) it is stated that CSP takes decisions on matters of substance as far as possible by consensus. If consensus is not possible at the end of 24 hours, the CSP is to take decision by a two-thirds majority of members present and voting</p> <p>In VIII (37) the TS is tasked to assist the CSP and the EC in the performance of their functions and carry out the verification measures, other functions entrusted to it, as well as those functions delegated to it by the CSP and the EC</p> <p>In VIII (38) (b) the TS is tasked to prepare such reports as the CSP or the EC may request</p> <p>In VIII (40) the TS is tasked to inform the EC of any problem that has arisen with regard to the discharge of its functions, including doubts, ambiguities or uncertainties about compliance with the CWC that have come to its notice in the performance of its verification activities</p> <p>In VIII (35) the EC is tasked to bring the issues affecting the CWC and its implementation to the attention of the SPs and CSP as appropriate</p> <p>In VIII (36) the EC is tasked to take measures, if it deems further action to be necessary while it considers concerns regarding compliance and</p>



		<p>cases of non-compliance, including bringing the issue to the attention of the CSP and making recommendations to the CSP</p> <p>In VIII (36) the EC is tasked to bring in cases of particular gravity and urgency, the issues, including relevant information and conclusions, directly to the attention of the UN GA and the UN SC</p> <p>In XII (1) the CSP is tasked to take the necessary measures listed in (2-4) to ensure compliance with the CWC and to redress situations which contravene the provisions of the CWC. These include bringing the issue, including relevant information and conclusions, to the attention of the UN GA and the UN SC</p>
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Figure 4. Outline of the powers and tasks of the OPCW organs in matters concerning compliance as set out in the CWC, together with the operative paragraphs of the CSP decision C-SS-4/Dec.3 establishing the mechanism for identifying perpetrators of CW use in Syria. 1: OPCW CSP SS4, 2018

Figure 4 presents the powers and tasks of the OPCW organs in matters concerning compliance, discussed in this and the previous chapter, aligned with the paragraphs of decision C-SS-4/Dec.3 establishing the mechanism for identifying perpetrators of CW use in Syria. Based on this examination, the established attribution mechanism can be seen to follow closely the respective mandates, as well as the tasks, duties and responsibilities allocated to the OPCW organs in the treaty Article VIII.

### 3.3.1 Decision-making in the CSP - procedural and voting requirements

The CSP rules and procedures for how meetings are conducted, and how decisions are made, are laid out in the CWC Article VIII, titled Organisation, in Chapter B, the Conference of the States Parties. In addition, the CSP in its first session approved the rules of procedure for the conference. These have been later amended by the 3<sup>rd</sup> review conference of the CSP<sup>210</sup>. To reach a quorum, a majority of the CWC state parties must be present at the CSP meeting<sup>211</sup>.

<sup>210</sup> OPCW CSP RC3, 2013. Rules of Procedure of the Conference of the States Parties of the Organization for the Prohibition of Chemical Weapons.

<sup>211</sup> Article VIII (16) "A majority of the members of the Organization shall constitute a quorum for the Conference". OPCW, 2005

Based on the 4<sup>th</sup> SS CSP meeting report<sup>212</sup>, it can be concluded that of the 193 CWC member states, 152 state parties were present at the 4<sup>th</sup> SS CSP, with 106 state parties voting, and 46 state parties abstaining from voting in conjunction in making the decision. The numbers indicate that the decision C-4-SS/Dec.3 was made in compliance to this CSP procedural requirement regarding quorum.

CSP makes decisions on questions of procedure by a simple majority of members present and voting. If the decision is very substantive, decisions should, if possible, be taken by consensus. If consensus is not readily attained in the meeting, effort is made to facilitate consensus by different negotiation mechanisms. However, paragraph 18 of the Article VIII states that if consensus is not reached, the CSP may still take a decision by a two-thirds majority of members present and voting.<sup>213</sup> According to the rule 71 of the rules of procedure of the CSP<sup>214</sup>, the phrase “Members present and voting” means members casting a valid affirmative or negative vote, and abstaining members are not counted as voting. Of the 106 states parties participating at the vote, 82 state parties voted for, and 24 against adopting the decision<sup>215</sup>, reaching the required two-thirds majority of members present and voting.

Regarding the decision C-4-SS/Dec.3, the adherence of the 4<sup>th</sup> SS CSP to the obligation to pursue consensus stated in the CWC Article VIII paragraph 18 remains somewhat unclear, as the 4<sup>th</sup> SS CSP documentation publicly available at the OPCW website, such as the report of the meeting, do not describe how the efforts to reach consensus were facilitated. The two-day timeframe of the meeting does allow for the 24-hour period of deferment outlined in the Article VIII (18). Orakhelashvili<sup>216</sup> reported contacting the OPCW public affairs office on the subject of facilitating reaching consensus at the meeting and receiving a statement that “all rules and procedures were followed by the states parties at the 4<sup>th</sup> SS of the CSP”.

Concerning the research question, whether the finding in the cases of alleged use of CWs with the objective to attribute liability to states within the scope and competence of the OPCW, the fact that the decision has been taken following the necessary procedural requirements of the organisation provides only limited insight. The question whether a resolution has been duly adopted from a procedural point of view, and the question whether that resolution is within

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<sup>212</sup> OPCW CSP SS4, 2018

<sup>213</sup> OPCW, 2019. Also Article VIII (18): “Decisions 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 Chairman 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 members present and voting unless specified otherwise in this Convention.” OPCW, 2005.

<sup>214</sup> OPCW, 2020. Conference of the States Parties. Rules of Procedure.

<sup>215</sup> OPCW CSP SS4, 2018

the scope and authority of an international organisation, has been seen as two separate issues in the international case law such as the aforementioned ICJ advisory opinion on the legality of use by state of nuclear weapons in armed conflict from 1996<sup>217</sup>. However, violations of established procedural and voting requirements would be an obvious target for challenging the decision and as such, warrant examination considering the subject of this study.

### **3.4 Can the change in OPCW tasks be interpreted as an amendment of the treaty?**

Amendment of a treaty means an alteration of the provisions of the treaty, which produces effects on all of the treaty parties. As treaties are consensual acts and amendments involve new obligations for the member states, any amendments must be approved by the state's treaty-making authorities. In effect, an amendment to a treaty gives birth to a new treaty. Treaty amendment and modification procedures are presented in the VCLT Articles 39 through 41. Article 39 stipulates that treaties may be amended by agreement between the parties, and that the general rules laid down in VCLT Part II apply to such an agreement except insofar as the treaty may otherwise provide. Article 40 describes how the amendment of multilateral treaties is governed. Article 41 is concerned with agreements to modify multilateral treaties between certain state parties only<sup>218</sup>.

In the CWC, special rules on amendment have been explicitly adopted, creating *lex specialis*, that supersedes the general rules of the VCLT. The provisions for treaty amendment are laid out in Article XV titled Amendments. Article XV makes a distinction between an amendment to the convention and a change, the former subject to the procedures in Article XV paragraphs 2 and 3, and the latter subject to the procedures presented in Article XV paragraph 5. All SPs have the right to propose an amendment or a change to the treaty. The procedures for the adoption of amendments and for the adoption of changes differ substantially. Changes are considered to be related only to matters of an administrative or technical nature, and they can be considered for the treaty Annexes only. However, Sections A and C of the Confidentiality Annex, Part X of the Verification Annex, and those definitions in Part I of the Verification

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<sup>216</sup> Orakhelashvili, 2019. The attribution decision adopted by the OPCW's Conference of States Parties and its legality. *International Organizations Law Review* pp. 1-18, p. 4

<sup>217</sup> "The question whether a resolution has been duly adopted from a procedural point of view, and the question whether that resolution has been adopted *intra vires* are two separate issues. The mere fact that a majority of states, in voting on a resolution, have complied with all the relevant rules of form cannot in itself suffice to remedy any fundamental defects, such as acting *ultra vires*, with which the resolution might be afflicted." ICJ, 1996 pp. 82-83.

Annex which relate exclusively to challenge inspections, can not be subject to change protocols<sup>219</sup>.

Amendments to the CWC can be considered by an Amendment Conference (AC) only. The text of a proposed amendment is submitted to the depositary as well as the OPCW DG for circulation to all SPs. An AC is convened if one third or more of the SPs notify the OPCW DG that they support further consideration of the proposal. Amendments enter into force for all SPs when they have been adopted by the AC by a positive vote of a majority of all SPs with no SP casting a negative vote, and 30 days after deposition of the instruments of ratification or acceptance by all the SPs casting a positive vote at the AC.<sup>220</sup>

A change process can be initiated by submitting the text of the proposed changes to the OPCW DG. The OPCW communicates the proposals and information to all SPs, the EC and the Depositary. OPCW DG evaluates the proposal to determine its consequences for the provisions and implementation of the CWC and communicates the information to all SPs and the EC. The EC examine the proposal in the light of all available information and notifies its recommendation to all SPs for consideration. If the EC recommends that the proposal is adopted, the proposal is considered approved if no SP objects to it within a given timeframe. Similarly, if the EC recommends that the proposal is rejected, it is considered rejected if no SP objects to the rejection. If a SP objects to either, the decision on the change is taken as a matter of substance by the CSP at its next session. It is the responsibility of the OPCW DG to notify SPs and the Depositary on approval of changes. In general, changes approved under this procedure enter into force for all SPs 180 days after the date of notification by the OPCW of their approval.<sup>221</sup>

As described, a formal amendment of a treaty is in general a very cumbersome process. Concerning the CWC specifically, an amendment to the convention would have various political, technical, military and economic implications. As making an amendment requires consensus, it is no use to start a formal amendment process without a clear indication of a common will for this among the state parties. Any amendment of the CWC to include new content with, for example, clearer provisions concerning attribution of CW use to their perpetrators, seems therefore impossible in the current political climate. Investigations of alleged use of chemical weapons, even when they are conducted as challenge inspections pursuant to Article IX, are conducted according to protocols laid out in Verification Annex Part XI, which is technically subject to a change protocol as defined by Article XV (4).

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<sup>218</sup> VCLT, 1969, Articles 39-41.

<sup>219</sup> Article XV (4), OPCW, 2005

<sup>220</sup> Article XV (2-3), OPCW, 2005

However, Article XV (4) rules that changes can be related only to matters of an administrative or technical nature.

It should be noted, that even a formal treaty can be recognised to have been amended by informal means through subsequent practise. Informal modification of a treaty by subsequent practise is based on the concept that by applying a treaty, the parties implicitly agree on its content, and the common treaty bond that imposes a duty to speak out in case of a party disagrees with a certain conduct. Silence means consent. The relevant practise of the parties is not limited to all treaty parties but may be imputable to only some parties, and others tolerate it without objecting<sup>222</sup>. The VCLT general rules of treaty interpretation stipulate that any subsequent practice in the application of the treaty establishes the agreement of the parties regarding its interpretation<sup>223</sup>. While the practise, in principal, must be accepted by state authorities permitted to engage the state through treaty relations, even practise of subordinate state organs contributes to these types of amendments. Higher authorities have to control the lower ones, and they will be considered to have acquiesced if they do not object to a practise for a prolonged period of time.<sup>224</sup>

International organisations have long been seen to utilise informal amendment processes rather than formally amending their constitutional instruments. This flexibility and adaptation is essential in keeping treaties up to date in the changing world. Informal amendments may be initiated by utilising authoritative interpretations, by means of an intense use of the implied powers doctrine; under appeal to the subsequent practise, or through the adoption of internal policy papers or strategic documents<sup>225</sup>. Regardless of the discussion if a formal amendment to the CWC treaty is warranted over OPCW establishing mechanisms solely aimed at attribution of responsibility for alleged use of CWs, the adoption of the decision C-SS-4/Dec.3, and its subsequent concordant implementation over years without formal actions from SP authorities could therefore be eventually seen to lead to an amendment to the convention through subsequent practise. From a legal point of view this would not be application of the CWC amendment Article XV, but the creation of a new norm on amendment by way of *lex posterior* for which all parties, acting together, elect to participate<sup>226</sup>.

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<sup>221</sup> Article XV (5), OPCW, 2005

<sup>222</sup> Kolb, 2017, Ch 10, Modification, pp. 193-195

<sup>223</sup> Article 31 (3) (b), VCLT, 1969

<sup>224</sup> Kolb, 2017, Ch 10, Modification p. 195

<sup>225</sup> Klabbers, 2015, Ch 2 The legal existence of international organisations pp. 29-30

<sup>226</sup> Kolb, 2017, Ch 10, Modification pp. 198-199

### 3.4.1 Settlement of disputes arising from the interpretation of the CWC

In general, interpretation of constituent instruments of international organisations may be carried out by judicial or arbitral tribunals. UN and UN specialised agencies may ask advisory opinions on legal questions arising within their scope or competence, including interpretation of their constituent instruments, from the ICJ. The constituent instrument of the organisation by itself may refer the disputes arising thereunder to international arbitration, or stipulate that any formal and definitive interpretation is to be carried out by a particular organ of the organisation. In addition, the organs of international organisations must have an understanding of their scope of function and powers for the purpose of carrying out their functions, which also creates a practical routine need for treaty interpretation. This can be done either formally and explicitly in a legal act of the organ, or impliedly - as a result of the practise of the organ.<sup>227</sup>

Settlement of disputes arising from the application or interpretation of the CWC is set out in Article XIV of the convention, entitled the Settlement of disputes. In case of such a dispute between SPs, or between a SP and the OPCW, the parties involved must resolve the differences together, primarily by negotiation or by other peaceful means. The parties may also utilise the EC, the CSP or by mutual consent, the ICJ in the settlement of interpretation disputes<sup>228</sup>. According to the Article XIV (3), the EC can contribute to the settlement of a dispute by whatever means it deems appropriate. This includes offering its good offices, calling upon the parties to a dispute to start the settlement process of their choice, and recommending time limits for agreed procedures. The CSP, on the other hand, has the power to establish or entrust OPCW organs with tasks related to settlement of disputes, in conformity with Article VIII, paragraph 21 (f) as set out in Article XIV (4)<sup>229</sup>. Paragraph 6 of the Article XIV provides that the provisions of Article IX on consultation, cooperation and fact-finding prevail over this Article. This means that a procedure such as a challenge inspection initiated under Article IX cannot be blocked or delayed by initiating a dispute settlement process under Article XIV<sup>230</sup>.

The adoption of the CSP decision C-SS-4/Dec.3 has created an obvious situation of dispute on the application of the CWC. Formal dispute settlement initiatives have not been made.

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<sup>227</sup> Akande in Evans (2018) Ch 8, International organizations p. 236

<sup>228</sup> Article XIV (2-5), OPCW, 2005

<sup>229</sup> Article XIV (4), OPCW, 2005. Article VIII 21 (f): The Conference shall... Establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Convention” OPCW, 2005

However, some SPs have taken steps that suggest harnessing the CSP power to establish OPCW organs with tasks related to settlement of disputes, conferred by Article XIV (4) of the CWC. Following the beginning of implementation of the CSP decision C-SS-4/Dec.3, Russia and China proposed in the 23rd session of the CSP in November 2018 charging the EC with forming a group of experts, including specialists on international law, tasked with providing a reasoned conclusion whether attributive activities are in line with provisions of the convention<sup>231</sup>. The chair of the group was to prepare an outcome report and present it to the governing bodies of the OPCW with conclusions drawn by specialists enabling further discussion on the legal basis of launching an attribution mechanism in the OPCW. The joint proposal by Russia and China, entitled “Preserving the integrity of the Organisation for the Prohibition of Chemical Weapons” was rejected in the CSP vote with 30 state parties voting for, and 82 against adopting the decision<sup>232</sup>.

Article XIV (5) of the CWC and Article VII of the OPCW - UN relationship agreement stipulate that both the CSP and the EC are empowered, subject to authorisation from the UN GA, to request the ICJ to give an advisory opinion on any legal question arising within the scope of the activities of the organisation<sup>233</sup>. This process might aid in resolving the current division among the CWC state parties concerning the issue, by contributing to the authoritative sources to address the question of attribution within the scope of the OPCW activities.

### **3.5 Activities outlined in decision C-SS-4.Dec.3 and the OPCW relationship with the United Nations**

The final research question of this study concerns with if the OPCW attribution of responsibility duties, as laid out in the decision, are in line with the division of OPCW tasks and the responsibilities, tasks and authority of the UN, and those of the UN SC in particular. Some criticism towards the CSP decision to direct fact-finding in alleged use cases into finding the perpetrators of CW use was based on views that the mechanism thus established encroaches on the tasks and duties, as well as the prerogatives of the UN<sup>234</sup>. These activities - perceived as identification of those responsible for CW use as well as taking punitive

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<sup>230</sup> Article XIV (6), OPCW, 2005; also Herbach in Krutzsch *et al.* (2014) Article IX Consultations, B. Role of the part and negotiation history p.388

<sup>231</sup> OPCW CSP S23 NAT 2, 2018

<sup>232</sup> OPCW CSP S23, 2018. Report of the 23rd session of the Conference of the States Parties.

<sup>233</sup> Article VII (1): “...apart from any question(s) concerning the mutual relationship between the OPCW and the United Nations.” OPCW EC, 2000

measures towards them - were seen, aside from international courts, to be solely entrusted to the UN SC when member states of the UN are concerned.

The coexistence and the mutually accepted relationship agreement, and the evolving working relationship of these two international organisations were examined in Chapter 3.1. Subsequently, the need of the OPCW to have the power to attribute CW use to the perpetrators were discussed from the point of view of the objectives and purpose of the treaty, as well as from the point of view of verification of compliance in cases of alleged use by a CWC state party, as set out in the treaty. In this chapter, we look into the mechanism established by decision C-SS-4/Dec.3 in the context of the OPCW relationship with the UN, in particular with the workings of the UN SC.

In general, the arrangements mentioned in the operative paragraph 10 of the decision C-SS-4/Dec.3 mandate creating a mechanism “to identify the perpetrators of the use of chemical weapons in the SAR by identifying and reporting on all information potentially relevant to the origin of those chemical weapons.” This means collecting, processing and reporting information with the objective to attribute responsibility. As discussed in Chapter 3.2.2, it can be viewed that the mechanism established in the decision utilises the scope of fact-finding enabled by the CWC for cases of investigations of alleged use by a state party to the CWC. The text of the decision does not refer to, or the arrangements described in the decision cannot be seen to include, any actions of enforcement to those whom the CW use is attributed to through these activities. Apart from describing the OPCW organs, the UN SG and the UN mechanisms to which the mechanism is to report, the text of the decision does not take any stand on what happens after the fact-finding by the TS has reached information sufficient to reach conclusions on the identity of those responsible for CW use. This refers the decision-making concerning the matters back to the powers and tasks of the OPCW organs, discussed in Chapter 3.3.

Article XII of the CWC on Measures to redress as situation and to ensure compliance establishes the measures the CSP can take to redress and remedy any situation, which contravenes the provisions of the CWC. These include restricting or suspending the SP’s rights and privileges under the CWC until it undertakes the necessary action to conform with its obligations under the treaty. Paragraph 4 of Article XII of the CWC decrees that the CSP will, in cases of particular gravity, bring the issue to the attention of the UN GA and the UN SC. These provisions of Article XII deal with situations at which the internal treaty

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<sup>234</sup> OPCW CSP SS4 NAT 53, 2018; OPCW CSP SS4 NAT 19, 2018



compliance mechanism is essentially exhausted and it is left to the CWC SPs to take joint action, or to ‘fall back’ on the UN<sup>235</sup>.

Under the Chapter VII of the UN Charter, the UN SC possesses an exceptional power to adopt acts that directly create legal obligations in general international law. These powers include a power to require a state to perform, or to refrain from performing, acts in order to maintain or restore international peace and security. The UN SC can also call upon states to impose sanctions or embargoes in the areas of economic relations, communications, transport and diplomatic contacts.<sup>236</sup> It can be viewed that the mechanism established in the decision C-SS-4/Dec.3, lacking any mention on specific sequelae or enforcement, does therefore not inherently overlap within the UN SC’s exclusive powers under the UN charter.

The operative paragraphs of the decision C-SS-4/Dec.3 seem to take effort to link the mechanism of attribution created in the decision to the treaty-established framework of the OPCW-UN relationship, and especially the practical working tradition and arrangements between the two IOs, evolved in particular over the course of the Syrian conflict. C-SS-4/Dec.3 (10)<sup>237</sup> limits the identification of the perpetrators of CW use in the SAR, based on the mandate established by this decision, to cases for which the OPCW-UN JIM has not already issued a report, and further to those instances where the OPCW FFM determines or has determined that use or likely use occurred. These wordings suggest that the mechanism established by the decision C-SS-4/Dec.3 is not intended to investigate any CW use cases in the SAR that have not been already investigated by the FFM. Several CW attacks in the SAR have happened prior to 2014 when the OPCW FFM in SAR was started, excluding these from the investigations under the arrangements. Furthermore, based on the paragraph, the TS is not intending to reopen any cases from whom the OPCW-UN JIM has already reported.

Finally, the text of the operative paragraph 12 of the decision C-SS-4/Dec.3 refers the findings collected by these investigations to the mechanisms already established within the UN framework and directed towards upholding accountability for CW use. In this, the OPCW TS is tasked to put in place appropriate measures to preserve and provide information to the IIIM

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<sup>235</sup> Den Dekker in Krutzsch *et al.* (2014) Article XII B. Role of the part and negotiation history p.365

<sup>236</sup> Article XII (4), OPCW 2005; also Hall in McConville & Chui (2017) Ch 10, Researching international law p. 274

<sup>237</sup> OPCW CSP SS 4 DEC 3 (2018) operative para 10: “...the Secretariat shall put in place shall put in place arrangements to identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic by identifying and reporting on all information potentially relevant to the origin of those chemical weapons in those instances in which the OPCW Fact-Finding Mission in Syria determines or has determined that use or likely use occurred, and cases for which the OPCW-UN Joint Investigative Mechanism has not issued a report; and decides also that the Secretariat shall provide regular reports on its investigations to the Council and to the United Nations Secretary-General for their consideration”.

established by the UN GA in resolution 71/248/2016<sup>238</sup>, as well as to any relevant investigatory entities established under UN. In this, should the immediate enforcement of the conclusions created by the OPCW attribution investigations fail for example in the UN SC, the CSP ensured that the technical expertise of the OPCW contributes to the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the SAR. In 2019, the OPCW DG reported that the OPCW had signed a memorandum of understanding with the IIIM regarding the sharing of information produced by the OPCW IIT with the UN IIIM<sup>239</sup>.

## 4 CONCLUSIONS

### 4.1 The CWC state parties have highly opposing positions on the subject of the OPCW attributing responsibility for alleged CW use in Syria

It is clear that the perceptions of the CWC state parties on the powers of the OPCW to attribute responsibility for CW use in the SAR as outlined in the decision C-SS-4/Dec.3 differ substantially. Those SPs opposing the established attribution mechanism see attribution of responsibility as something that is not at all implied within the treaty, neither within the decision-power of its implementing organisation OPCW. Those SPs in favour of the OPCW establishing a mechanism for attribution see it as an essential tool to fulfil the objectives and purpose of the treaty. In addition, the mandate for attribution is seen to be already conferred to the OPCW in the CWC treaty, as it is written.

The continuing violations of the CWC by a state party to the treaty raises concerns about upholding the international norm prohibiting these weapons and the continuing success of universal chemical disarmament. In order to fulfil the purpose and objectives of the CWC, the OPCW has to be able to react to the changing world situation regarding newly emerging use of CWs and violations of the treaty. Nevertheless, after now taking decisive action, the OPCW faces accusations of overstepping its mandate, even being biased towards the western countries and using double standards. The division in the OPCW, previously very successful in maintaining neutral and consensus-based operation, seems unfortunate.

OPCW SPs, especially those having opposing views towards the subject, have repeatedly invoked the principle of consensus-based decision-making since the attribution mechanism

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<sup>238</sup> UN GA, 2016. Resolution A/RES/71/248/.

<sup>239</sup> OPCW DG, 2019. Report by the director-general. Progress in the implementation of decision C-SS-4/Dec.3 on addressing the threat from chemical weapons use.

was established by the decision C-SS-4/Dec.3<sup>240</sup>. While it is true that the practise of making consensus-based decisions is the preferred OPCW practise and strongly supported by the stipulations in Article VIII (18), the practise can be seen to create some hindrance to the work of the OPCW and the effective implementation of the CWC. Although taking majority decisions makes it more possible to adapt to the changing environment such as seen with decision C-SS-4/Dec.3, building such a tradition also limits possibilities of the OPCW to seek remedying division in SPs, as seen with the majority rejection of some SPs initiative to form a group of experts tasked with providing a conclusion whether attributive activities are in line with provisions of the convention<sup>241</sup>. Formal dispute settlement initiatives concerning application of the CWC as set out in Article XIV of the convention have not been started. The OPCW requesting the ICJ to give an advisory opinion on the scope of the activities of the organisation in this matter remains a possibility.

#### **4.2 The decision to create a mechanism to attribute responsibility for CW use in the SAR - amendment of the CWC treaty or simple implementation of the already invested powers?**

The CSP decision C-SS-4/Dec.3 to establish a OPCW mechanism for attribution of responsibility for CW use has been challenged from various perspectives, ranging from perceived procedural violations to claims for these activities requiring a formal amendment to the treaty, all the way to attribution of CW use by the OPCW threatening the balance of the international security mechanism and encroaching on the prerogatives of the UN SC. This study aimed to discuss the legal effects of decision C-SS-4/Dec.3 in the broader concept of powers of IOs, the relationship of the OPCW and the UN, as well as through examination of the CWC treaty text, against the backdrop of the principles of international law concerning treaties and international organisations. While the questions concerning small procedural modalities and the broad objectives and purposes of the organisation were somewhat easier to address, the treaty provisions on clarifying and resolving cases of suspected non-compliance and cases of alleged CW use, and the powers and tasks of the OPCW and its particular organs, comprise a detailed and colourful tapestry against which the arrangements created in decision C-SS-4/Dec.3 needed to be compared.

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<sup>240</sup> see OPCW CSP S24 CHINA, 2019. China: Statement delivered by H.E. Mr Zhijun Wang, vice minister, Ministry of Industry and Information Technology, Beijing at the twenty-fourth Session of the Conference of the States Parties.; OPCW CSP S24 NAT 55, 2019. Russian Federation: Statement by mr O.N. Ryazantsev, head of the delegation of the Russian Federation, Deputy Minister of Industry and Trade of the Russian Federation at the twenty-fourth Session of the Conference of the States Parties.

<sup>241</sup> OPCW CSP S23, 2018. Report of the 23rd Session of the Conference of the States Parties.

As stated in the Preamble of the treaty, the objective of the CWC is to exclude completely the possibility of the use of CWs. The objective of the treaty is reached through its implementation, for the purpose of which the OPCW was created. One of the distinctive hallmarks of the CWC, and the most significant part of its implementation, is its comprehensive mechanism for verification of compliance. Establishing compliance of a treaty state party in alleged use cases requires the power to conclude whether the state party has used CWs or not. Therefore, by necessary implication, the power to attribute CW use to a CWC state party should be well within the authority and scope of action of the OPCW.

The CWC treaty text as a primary source proves that the CWC was intended to be well equipped to deal with situations of alleged use of CWs by a CWC state party. The mechanism of inspections dispatched by the OPCW DG as a tool for clarifying and resolving any questions concerning possible non-compliance to the treaty, as well as to investigate alleged use of CWs, is established in the CWC Articles IX and X and the Verification Annex. Concerning challenge inspections based on alleged use pursuant to the Article IX of the CWC, the OPCW must technically attribute the use of CWs to the SP in question through its investigative actions in order for the non-compliance by a SP (use of CWs) to be established. Explicit mentions of these investigations being used to attribute responsibility to the SP in question are limited to Part XI (D) (26) of the Verification Annex that mentions that the alleged use investigation process is to be utilised to identify the origin of any chemical weapons used, if possible.

A challenge inspection, initiated by another CWC SP pursuant to the Article IX of the convention, is a detailed mechanism for clarifying and resolving whether alleged use of CWs by a CWC SP has occurred. Concerning the attribution of responsibility to the CW use in the SAR, now addressed through the establishment of an *ad hoc* mechanism devised in decision C-SS-4/Dec.3, a challenge inspection initiated by other CWC SP remains an unused option. Whether the outcome of such a challenge investigations established the non-compliance of the SP Syria in question, or found that the case is to be attributed to some other party operating in the conflict area, alleged use investigations following the core processes of the CWC would likely leave less room for political debate and division among the OPCW member states.

### 4.3 The OPCW attribution activities in the context of the international security mechanism

Various CWC SPs have political stakes with the adoption and subsequent implementation of this decision, and it has therefore caused major division between the OPCW member states. The rationale concerning attribution and accountability in the alleged CW use cases over the last years in general has been characterised by large disagreements between world's states and different parties in the related conflicts. Power politics and national interests have prevented the global security mechanism, especially the UN SC, from effectively handling the SAR crisis. It seems that for the time being, the UN SC will not address the CW use in Syria either.

The collective international will to uphold the ban of CWs remains strong. Following the 4<sup>th</sup> SS of the CSP that adopted the decision C-SS-4/Dec.3, the UN GA on 5<sup>th</sup> December 2018 adopted resolution A/RES/73/45<sup>242</sup> that re-emphasised the unequivocal support of the UN GA for the decision of the OPCW DG to continue establishing the facts surrounding the allegations of the use of CWs in the SAR, and recalling decision C-SS-4/Dec.3 of the CSP, stressed the importance of its implementation. In the 74<sup>th</sup> session of the UN GA in December 2019, the UN GA reiterated these statements in its resolution A/RES/74/40<sup>243</sup>.

Practical aspects of the investigations of CW use incidents by the OPCW are a question that are often overshadowed by the legal and political debate. A major concern with conducting these investigations being for inspection teams to comprehensively and meaningfully reach sites of the alleged use and the available evidence, due to the security situation and ongoing fighting in the area. Under the Article 26 of the VCLT, every treaty is binding upon the parties to it and must be performed by them in good faith. The OPCW TS stated that the IIT was established based on expectations of full good-faith cooperation from all CWC SPs, in particular with the provision of relevant information and access to relevant places and persons<sup>244</sup>.

The first report of the IIT, established by the OPCW DG pursuant to the implementation of the decision, is pending. Since the end of the mandate of OPCW-UN JIM, there has been no other international mechanism with dedicated attribution powers related to CW use in SAR. The lack of a viable and clear international attribution mechanism may encourage the use of CWs. As attribution can serve to deter the use of CWs, investigating CW use cases with the objective to attribute responsibility can be seen as the OPCW fulfilling its duty and mandate

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<sup>242</sup> UN GA, 2018 Resolution A/RES/73/45.

<sup>243</sup> UN GA, 2019. Resolution A/RES/74/40.

<sup>244</sup> OPCW EC, 2019

to prevent the re-emergence of CWs. Furthermore, the decision C-SS-4/Dec.3 referred the findings of these activities to the relevant UN investigatory entities such as the IIIM, ensuring that the technical expertise of the OPCW contributes to the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the SAR.

Attribution as a process differs from accountability. Neither the OPCW-UN JIM was, or the OPCW IIT, established following decision C-SS-4/Dec.3, is tasked with determining legal liability. Additionally, the CWC is treaty, and the subject of any measures taken under the convention to address CWC non-compliance would be the CWC state parties. The United Nations Security Council can take enforcement measures addressing a threat to the international peace and security. The question of eventual individual accountability for CWC use is another question, as prosecuting individuals responsible of CW use under international or national criminal law requires different, judicial procedures. The UN SC could refer the situation of Syria to the ICC, exercising its Chapter VII powers, another option being the UN SC creating an ad hoc international criminal tribunal for CW use in Syria. National courts could 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 complex crimes that may require extradition and judicial assistance agreements.<sup>245</sup> However, these actions of the UN SC would again need the concurring vote of the five permanent members.

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<sup>245</sup> Naqvi, 2019. Crossing the red line: The use of chemical weapons in Syria and what should happen now. *International Review of the Red Cross*, 99(906):959-994 pp. 980-984

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