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CONTENTS

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ACHIEVING CHEMICAL WEAPONS CONVENTION COMPLIANCE IN THE AFTERMATH OF KHAN SHAYKHUN

Ash Stanley-Ryan*

On 4 April 2017, a chemical attack occurred in Khan Shaykhun, Syria, killing 80 people. This was later determined to be a use of Sarin gas, likely by the Syrian regime. It became clear soon after that the Chemical Weapons Convention's (CWC) compliance regime was unable to adequately respond to the attack, and the United States instead conducted a unilateral use of force against the Syrian regime. This article examines a risk of treaty formulation the situation reveals: that in order to gain wide-reaching acceptance, humanitarian treaties sacrifice strong compliance regimes and are unable to respond to serious breaches. Avenues for improving future compliance are examined, including amending the CWC; track-II diplomacy and working with private entities; and expanding the Responsibility to Protect doctrine. These are elements of a comprehensive solution, rather than a solution in themselves, and aim to avoid the risk of states taking the law into their own hands in cases of future breaches.

I INTRODUCTION

The use of chemical weapons in Syria represents one of the most flagrant breaches of international law in recent history. Following chemical weapons use in 2013, Syria, that year, acceded to the Chemical Weapons Convention (CWC), undertaking never to create, use or possess chemical weapons.[1] Despite this, chemical attacks have occurred in Syria every year since 2013, with little consequence for Syria, despite being a breach of international law.[2] The United States

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1 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1974 UNTS 45 (opened for signature 13 January 1993, entered into force 29 April 1997) [CWC], art I.

2 "Timeline of Syrian chemical weapons activity, 2012–2017" (June 2017) Arms Control Association <www.armscontrol.org>.

conducted a missile strike following the 2017 Shan Khayhun Sarin attack, and extended existing sanctions.[3] However, there was no binding response by the Security Council, and the Organisation for the Prohibition of Chemical Weapons (OPCW) did not recommend collective action. Why, despite the enforcement regime present within the CWC, was the strongest response one illegal at international law?[4]

This article argues that the Khan Shaykhun attack highlights an inherent challenge for disarmament and humanitarian treaties: they sacrifice strong compliance powers to encourage wide adoption. This compromise means that they are potentially unprepared for major breaches. The Khan Shaykhun attack exemplifies that, for the CWC, its compliance regime was insufficient to respond to a serious breach. The difficulty of undertaking an adjudicative or diplomatic response meant that force was one of the only viable options for enforcement, albeit still an illegal one.

There are multiple ways to potentially improve CWC compliance, ranging from amending the treaty through to encouraging and facilitating diplomatic initiatives. These may improve performance of the treaty and adherence to the ban on chemical weapons, and improve accountability when states breach their obligations.

In section II, I analyse the Khan Shaykhun attack and the varying narratives of the attack, concluding that the United Nations report is the most believable. In section III, I examine the CWC and its breach management provisions to identify what *should* have happened. In section IV, I consider how states could have responded (as opposed to how they actually did) to the Khan Shaykhun attack. I then identify key implications, including whether the CWC can properly respond to conflict situations in section V, before proposing a variety of (partial) solutions in section VI.

II BACKGROUND: THE SYRIAN CIVIL WAR AND THE USE OF CHEMICAL WEAPONS

A Events Prior to April 2017

Prior to the Syrian Civil War, there were no examples of a significant, wartime breach of the CWC. Non-compliance had mainly been in the context of accusations by one state against another, or of states failing to meet their reporting requirements under the verification regime.[5] The Syrian

3 United States Treasury "Treasury Sanctions 271 Syrian Scientific Studies and Research Center Staff in Response to Sarin Attack on Khan Sheikhoun" (24 April 2017) US Department of the Treasury <www.treasury.gov>; and Kelsey Davenport "Sarin attacks prompt US strikes" (2017) 47 Arms Control Today 22.

4 The use of force in international relations is restricted by the Charter of the United Nations, art 2(4).

5 David P Fidler "The Chemical Weapons Convention After Ten Years: Successes and Future Challenges" (2007) 11(2) ASIL Insights (online ed).

Civil War changed the enforcement landscape by presenting the first serious challenge in a conflict context.

On 21 August 2013, reports emerged of a major incident in Ghouta, Damascus.[6] These reports asserted a chemical weapon attack had occurred and were supplemented by audio-visual evidence. The Violations Documentations Centre placed the death toll as at least 588 and *Médecins Sans Frontières* treated over 3,500 individuals for exposure to a chemical agent,[7] determined by the United Nations to have been sarin nerve gas.[8] At this point in time, Syria was not party to the CWC.

The international response was clear and swift. The United States and Russia cooperated to convince Syria not only to accede to the CWC, but to immediately begin implementing it into domestic law – forgoing the ordinary 30-day implementation period.[9] By doing so, Syria obliged itself to declare and destroy both its stockpiles and chemical weapon production facilities. The Security Council's resolution of 27 September 2013 specifically obligated Syria to respect its CWC obligations and retained its right to impose chapter VII measures in the event of non-compliance.[10] This meant that, in cases of non-compliance, the Council could respond by authorising the use of force, but only by passing another resolution. This created the appearance of an enforcement regime with "teeth" and a chance at success.

Initially, hopes were high for the success of the Syrian disarmament. The compressed timeframe meant that Syria was projected to destroy its entire chemical arsenal within nine months.[11] 21 of 23 declared chemical weapons sites were made inoperable by the end of October 2013, and throughout 2014, an international effort was made to destroy Syria's weapons themselves, with the final declared weapons destroyed at the beginning of 2016.[12] The apparent success of this disarmament

6 "Attacks on Ghouta: Analysis of Alleged Use of Chemical Weapons in Syria" (10 September 2013) Human Rights Watch <www.hrw.org>.

7 "Syria chemical attack: What we know" (21 September 2013) BBC News <www.bbc.co.uk> [BBC "Syria Chemical attack"]; and Human Rights Watch, above n 6.

8 BBC, above n 7; and "'Clear and convincing' evidence of chemical weapons use in Syria, UN team reports" (16 September 2013) UN News Centre <www.un.org>.

9 Mark FitzPatrick "Destroying Syria's Chemical Weapons" (2013) 55 Global Politics and Strategy 107 at 108.

10 SC Res 2118, S/Res/2118 (2013).

11 Fitzpatrick, above n 9, at 109.

12 Yuta Kawashima and Alicia Sanders-Zakre "Timeline of Syrian Chemical Weapons Activity, 2012-2017" (June 2017) Arms Control Association <www.armscontrol.org>.

led multiple authors to claim it as evidence of the CWC's capabilities as a disarmament mechanism thanks to its "bold and flexible framework".[13]

The sheer speed of implementation appeared to speak to the success of the CWC's implementation, although it did face delays due to Syria missing its weapon removal deadlines.[14] Implementation also, however, had its challenges. Chlorine gas was used in attacks on 14 April 2014, and chlorine-based attacks continued through 2015 and 2016.[15] There was some evidence to suggest that these attacks, along with the use of mustard gas, were committed both by the Assad regime and Islamic State.[16] At the end of 2016, the OCPW-United Nations investigative mechanism determined that the Syrian government was responsible for the use of chlorine gas in a 2015 incident. The OPCW's response was to condemn the use, and to authorise further investigations of chemical weapons sites.[17]

These incidents are important for three reasons – all relevant to consideration of the April 2017 attack. First, they highlight that the Syrian government is not the only entity in Syria that could use chemical weapons. They also show that despite what appeared to be an effective disarmament process, breaches continued to occur. Finally, the initial response to those breaches by the OPCW, even where attribution was determined, was weak.

B The Khan Shaykhun Attack – Varying Narratives

The Khan Shaykhun attack can only be described as a tragedy and a major challenge to the disarmament process. On 4 April 2017, more than 80 people died when a chemical weapon – later identified as Sarin gas – was deployed into a civilian population.[18] Eye witness accounts describe a devastating scene, reinforced by the World Health Organization's (WHO) confirmation that at least 70 people were treated for exposure to toxic chemicals.[19] The WHO further stated that due to severe

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13 David Martin "The Chemical Weapons Convention: Hollow Idealism or Capable Mechanism? The Syrian Intervention as a Test Case" (2015) 37 Loy LA Int'l & Comp L Rev 31 at 31. See also Karim Makdisi and Coralie Pison Hindawi "The Syrian chemical weapons disarmament process in context: narratives of coercion, consent, and everything in between" (2017) 38 Third World Quarterly 1691.

14 "As deadline passes, UN joint mission urges Syria to complete chemical weapons removal" (27 April 2014) UN News Centre <www.un.org>.

15 Kawashima and Sanders-Zakre, above n 12.

16 United Nations "Joint Investigative Mechanism Presents Its Third Report to Security Council" (press release, 30 August 2016).

17 "OPCW Executive Council Adopts Decision Regarding the OPCW–United Nations Joint Investigative Mechanism Reports About Chemical Weapons Use in the Syrian Arab Republic" (30 November 2016) Organisation for the Prohibition of Chemical Weapons (OPCW) <www.opcw.org>.

18 BBC "Syria Chemical attack", above n 7.

19 World Health Organisation "WHO alarmed by use of highly toxic chemicals as weapons in Syria" (press release, 5 April 2017).

damage to surrounding hospitals in the Civil War, what medical infrastructure did exist was overwhelmed.[20]

The use of Sarin gas is an explicit breach of the CWC. It is listed in schedule one of the Convention as a toxic chemical and serves no other use besides causing death.

Multiple explanations were put forward for the attack. The Syrian and Russian explanations are dramatically different from that put forward by most other governments and media, as well as the findings of the United Nations.

Syria's government dismissed the event as a fabrication, claiming it was intended to allow the United States to conduct a missile strike.[21] Their armed forces released a statement saying it never had or would use chemical weapons.[22] President Assad denied even having any chemical weapons stockpile remaining, and stated the government had never used chemical weapons.[23] He addressed the issue as an "American pretext for an attack" and suggested that if the state did have and was willing to use chemical weapons, they would direct their use towards combatants, not civilians.[24] Notably, Syria's response emphasised prior compliance with the CWC.[25]

Russia, by contrast, acknowledged the presence of chemical weapons, but claimed that a rebel group was manufacturing them in a warehouse, which the Syrian air force bombed, causing toxic gas to leak.[26] Such an explanation would remove liability for the chemical weapon attack from the armed forces, and would likely instead raise questions of military necessity; whether it was militarily necessary to bomb the warehouse, if it was being used to produce chemical weapons, rather than using a less destructive neutralisation method.

Both explanations present challenges. The Syrian government's explanation runs against every other explanation and can only be true if every other party is, to some extent, lying. It could be reconciled with Russia's explanation if Sarin gas exposure was accepted and justification would then shift to destroying a production warehouse.

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20 Above n 19.

21 "Transcript of exclusive AFP interview with Syria's Assad" *The Peninsula* (online ed, Qatar, 13 April 2017) [*The Peninsula*].

22 Above n 21.

23 Above n 21.

24 Above n 21.

25 Above n 21.

26 "Syrian aviation airstrike in Idlib targeted chemical arms lab — Russian Defense Ministry" (5 April 2017) TASS <www.tass.com>.

However, Russia's explanation has many weaknesses. A warehouse and silos do exist near the attack site, but ground visits by western media organisations, including *The Guardian*, provided no evidence of their use for weapons manufacture – rather, they resulted in testimony from civilians that the warehouse had been abandoned for some months.[27] There was some suggestion from witness testimony to the OPCW that some form of weapon storage was being undertaken by rebels in the area.[28] The OPCW fact-finding mission stated that it believed that:[29]

> The release that caused exposure was likely to have been initiated in the crater in the road, located close to the silos in the northern part of the town. The team concluded that, based on such a release, the only determination that could be made was that sarin had been used as a weapon.

They went on to state that, as far as they could determine, the presence of Sarin in environmental samples, along with eyewitness accounts, lent credence to the hypothesis that this crater was the likely initiation point of the Sarin release, and that all factors pointed to a "deliberate release" of the chemical.[30]

Additionally, Sarin gas is not a commonly used weapon. The only other recorded use of it by a non-state actor is by the Aum Shinrikyo cult in Japan, who were not able to create a purified form of the gas and created a relatively limited amount of Sarin, which was used in the 1994 subway attacks.[31] When an experienced chemist was no longer involved in production, they created Sarin through sheer luck and access to precursor chemicals.[32] The Sarin synthesis process is complex and it is typically not kept in its completed form due to a short life before degrading.[33] Its precursor chemicals are banned under the CWC as well, increasing the difficulty of production.

If the Russian explanation was true, then at least one Syrian government chemical weapon was obtained by rebel forces. Whether released by them, or as a by-product of bombing a storehouse, this suggests that the disarmament process was incomplete. Conversely, if rebel forces produced the weapon, it begs the question of why Syria denied a chemical attack happened at all. On both a

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27 Karim Shaheen "'The dead were wherever you looked': inside Syrian town after gas attack" (6 April 2017) The Guardian <www.theguardian.com>.

28 *Note by the Technical Secretariat: Report of the OPCW Fact-Finding Mission in Syria Regarding an Alleged Incident in Khan Shaykhun, Syrian Arab Republic, April 2017* S/1510/2017 (2017) at [5.27]–[5.29].

29 At 1.7.

30 At 6.22.

31 Yasuo Seto "The Sarin Gas Attack in Tokyo and the Related Forensic Investigation" [June 2001] OPCW Synthesis 14.

32 AT Tu "Aum Shinrikyo's Chemical and Biological Weapons: More Than Sarin" (2014) 26 Forensic Science Review 115 at 118.

33 United States Congress Office of Technology Assessment *Technologies underlying weapons of mass destruction OTA-BP-ISC-115* (US Government Printing Office, Washington DC, 1993) at 126.

pragmatic political level and a moral one, doing so would place the government squarely in the firing line for international condemnation. Both narratives are flawed.

Reflecting these criticisms, the leading theory is that Syria's air force dropped a Sarin gas shell on a civilian area. The United Nations Independent International Commission of Inquiry (IICI) stated this in its report to the Human Rights Council in September 2017.[34]

If the IICI's finding is correct, then the Syrian government lied about its use of chemical weapons and breached the CWC, both by its possession and use of them. These are serious acts, and material breaches of the CWC – they strike at the heart of art I and comprises "[a] violation of a provision essential to the accomplishment of the object or purpose of the treaty".[35] Treaty breaches are internationally wrongful acts, typically resolved through adjudication or diplomacy.[36]

Anthony Aust raises the possibility of a fundamental breach as a sub-category of material breach, meaning one that "goes to the root of a treaty".[37] A material breach may work against the object or purpose of a treaty, but does not necessarily defeat the treaty's entire purpose; a fundamental breach throws the basis of a treaty into doubt. For example, when the Soviet Union shot down flight KAL 007 in 1983, multiple states with air services agreements with the Soviet Union immediately suspended them, since the agreements were fundamentally breached.[38] Bearing this distinction in mind, the use of chemical weapons is likely a fundamental breach of the CWC as it directly undermines the treaty's purpose.

The next issue that must thus be addressed is the CWC regime itself and its mechanisms for addressing breaches.

III THE CHEMICAL WEAPONS CONVENTION

A The Object and Purpose of the CWC

The CWC is the core body of international treaty law concerning chemical weapons. It aims to prevent their use or stockpiling in any circumstances by state parties, to create regimes for the destruction of chemical weapons and their production facilities, and to provide domestic legal mechanisms to punish breaches.[39] It is one of the most widely adopted disarmament treaties, with its

34 *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* A/HRC/36/55 (2017).

35 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 60.

36 For a definition of internationally wrongful acts, see *Responsibility of States for Internationally Wrongful Acts* GA Res 56/83, A/Res/56/83 annex at art 2.

37 Anthony Aust *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge, 2007) at 296.

38 At 296.

39 CWC, above n 1, art I.

members representing 98 per cent of the global population, landmass and chemical industry.[40] In some ways, it acts as an extension of the 1925 Geneva Protocol, addressing a number of key weaknesses, such as that treaty's retention of a retaliatory right to chemical weapons use.[41]

Anticipating that the definition of a "chemical weapon" could be open to interpretation, they are clearly defined as "toxic chemicals or their precursors, except where intended for purposes not prohibited under this convention", as well as munitions or devices designed to deliver or disperse them.[42] Toxic chemicals are "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[43] Precursors are any reactant used at any point in the production of a toxic chemical.[44]

This initially reads as a remarkably wide prohibition on state possession or use of chemicals, given the breadth of different chemicals used in creating chemical weapons: for example, isopropyl alcohol is used to produce Sarin nerve gas, but is also common in consumer products.[45] Banning such a chemical in all circumstances is untenable. The phrase "except where intended for purposes not prohibited under this Convention" ensures that the CWC restrictions are workable, rather than attempting to paint a broad brush across a complex area. This is bolstered by the annex on chemicals, which creates schedules of toxic chemicals and precursors for use in verification schemes. Sarin gas is one of the first entries on schedule one. Chlorine, with its industrial benefits but high toxicity, is a perfect example of the reason for the "purposes not prohibited" caveat and not scheduled or addressed in the CWC, but its use as a weapon still constitutes a breach; in such circumstances, it meets the definition of a toxic chemical.

B The CWC Breach Management Process

Creating defined obligations is only half of the CWC's function. It also creates a breach management process. This is managed in multiple ways throughout the CWC, culminating in art XII. It is a light-handed regime with only recommendatory powers until the Security Council is notified of a breach.

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40 "Facts and Figures" OPCW <www.opcw.org>.

41 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 94 LNTS 65 (concluded 17 June 1925, entered into force 8 February 1928); and United Nations Office for Disarmament Affairs "Chemical Weapons - UNODA" United Nations <www.un.org>.

42 CWC, above n 1, art II(1)(a).

43 Article II(2).

44 Article II(3).

45 United States Congress Office of Technology Assessment, above n 33, at 125.

The breach management process begins with avenues for consultation and discussion. These include the obligation to provide the OPCW information on national implementation measures, to allow early avoidance of non-compliance; the Technical Secretariat's engagement with state parties to consult on destruction plans; and consultation by the Executive Council to "[provide] for the opportunity to convince [the state] … that it should remedy a situation of non-compliance".[46] These early measures are not binding; rather, they are focused on cooperation: they are intended to incentivise states to voluntarily meet their obligations. Stronger measures are addressed by art XII as a final stage, highlighting the treaty's highly structured process of escalation for non-compliance situations.

Article XII has been called a "… keystone of a system of measures designed not only to remedy violations, but also to address non-implementation of the CWC".[47] It applies to "any situation which contravenes the provisions of this convention" – a wide-ranging term intended to cover all possible breaches without the Conference of the States Parties (Conference) having to formally determine a breach has occurred.[48] There are three different avenues to pursue compliance via art XII: rights suspension, recommendation of collective measures and referral to the United Nations.

Rights suspension occurs when the Executive Council has notified a state of its need to redress a situation, the state has failed to do so, and the Executive Council has recommended measures to the Conference. The interplay between arts VIII and XII means this needs to be preceded by an attempt at a consultation-based resolution.[49] The mechanism is focused on rights under the CWC. It could, therefore, mean sanctions in accordance with the CWC's objectives, such as restricting the trade of chemicals within the CWC's schedules to prevent weapon production. Its non-sanction responses could range farther, including suspending individual rights and benefits of membership. However, it still only allows for responses contemplated by the CWC's structure and the rights it imparts.[50] Given the relatively limited nature of these solutions, it appears that this mechanism is intended for moderate non-compliance.

Severe situations are addressed by art XII(a)(3) and (4). These respectively address situations where there is a risk of serious damage to the object and purpose of the CWC, and cases of

46 Guido Den Dekker "Article XII" in Walter Krutzsch, Eric Myjer and Ralf Trapp (eds) *The Chemical Weapons Convention: a Commentary* (Oxford University Press, Oxford, 2014) 364 at 366.

47 At 365.

48 At 368.

49 At 369.

50 At 370–371.

particular gravity. Their wording differentiates them from "situations", although it has been suggested they require the same recommendation process as rights suspension.[51]

Article XII(a)(3) allows, but does not oblige, the Conference to recommend collective measures in conformity with international law. This could mean a variety of actions ranging from economic sanctions to collective countermeasures, so long as they do not step into the realm of the use of force.[52] Such recommendations allow for more severe, but still non-forcible responses to significant breaches of the CWC, such as the use or stockpiling of chemical weapons.

Article XII(a)(4), referral to the General Assembly and Security Council, is a binding process (due to the word "shall") and has a gravity element. For the purposes of the CWC, this means considering the character of the violation, its extent and, in some situations, the attitude of the state party towards any measures taken by the OPCW.[53] At this point, the response is managed by a body capable of responding to threats to international peace and security – for example, the Security Council can mandate sanctions or authorise the use of force. This is the final step in the OPCW's process for breach management.

The obligation and enforcement process for the CWC regime can be summarised as follows:

(1) The use of chemical weapons, in any circumstances, is banned.
(2) The OPCW has enforcement mechanisms available to it, but these are of a limited scope – targeted towards managing situations before they escalate, via a tiered system of incentives and recommendations.
(3) Ultimately, binding enforcement action falls to the United Nations Security Council.

The Khan Shaykhun attack would constitute a severe breach with a high gravity due to its character and extent, making the initial consultative step inappropriate. It could allow the OPCW Conference to recommend collective measures; they did not. The Security Council discussed responses to the attack, but on its own initiative rather than OPCW referral. As the CWC's enforcement regime was not utilised, other potential avenues for response must be considered.

IV POTENTIAL RESPONSES TO A BREACH OF TREATY

States are not limited to the compliance methods listed within a treaty when responding to breaches. They can always utilise other, non-treaty methods to attain compliance, including adjudicatory processes, diplomatic initiatives and (in some circumstances) the use of force. In this section, I analyse those three categories in relation to Khan Shaykhun.

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51 At 372.

52 At 373.

53 At 375.

A Adjudicative

Adjudication typically occurs in disputes that have some prospect of resolution and that include two or more state parties. It has previously been resorted to in cases relating to treaty performance, such as the *Danube Dam* case and *Belgium v Senegal*.[54] *Danube Dam* concerned an international infrastructure endeavour; *Belgium v Senegal* concerned the obligation of extradition imposed by the Convention Against Torture. In *Belgium v Senegal*, the International Court of Justice (ICJ) was empowered to hear the dispute by that Convention's dispute settlement mechanism in art 30.

Adjudication can also occur via individual prosecutions before the International Criminal Court (ICC), an arbitral tribunal, or a hybrid tribunal, among other options. It could equally occur at the domestic level – for example, prosecuting a Syrian regime member in New Zealand under the International Criminal Court and International Crimes Act 2000 – but the variety of legal systems around the world makes this wholly reliant on, which state a person happens to enter, and on any potential amnesties granted as part of a future peace agreement.[55] This article only analyses the possibilities of an ICJ and ICC response.

No adjudicatory response has occurred to the Khan Shaykhun attack, in part because of the slow speed of the OPCW and the Joint Investigative Mechanism to attribute responsibility. Although these investigations are now concluded, without definitive evidence of responsibility, any adjudicatory process has a low likelihood of success and a high prospect of having its legitimacy questioned. Additionally, any form of restitution is difficult in the Syrian context due to the ongoing civil war and the nature of chemical weapons – the harm cannot be undone and the complexity of a conflict zone means providing reparations to affected persons is difficult at best.

1 The International Court of Justice

The ICJ hears disputes between states, and only on a consensual basis.[56] Whilst Syria is a signatory to the Statute of the Court, it has not declared acceptance of the compulsory jurisdiction of the Court.[57] This means it would need to consent to a case being heard. The ICJ could also be

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54 *The Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7; and *Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422. The latter case turned around the application of some provisions of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), especially art 7.

55 Universal jurisdiction in New Zealand is conferred for war crimes and crimes against humanity by s 8 of the Act.

56 Statute of the International Court of Justice, art 36.

57 See "Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court" (21 October 2017) United Nations Treaty Collection <www.treaties.un.org> for a list of states which have accepted compulsory jurisdiction.

requested by the Security Council or General Assembly to issue an non-binding advisory opinion on the legal consequences of the use of chemical weapons in Syria.[58] Advisory opinions serve as important statements of international law and lend legitimacy and weight to other options, such as diplomatic pressure.

If heard, a case or opinion on the Khan Shaykhun attack would likely be a question of state responsibility for an internationally wrongful act. It would require that the question put forward be a legal one in relation to the CWC, rather than a criminal question: "for example, "has Syria's conduct breached its obligations under the CWC or customary international law?". The outcome would not be focused on justice for individuals, but rather on harm to the international community as a whole, or to a particular injured state, per art 42 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[59]

Further, despite their capacity to lend legitimacy and provide an interpretation of the law, ICJ advisory opinions only have effect if adopted and embraced by states. Israel's response to the *Construction of a Wall* advisory opinion was to question its legitimacy, arguing that the opinion was heard on unstable evidentiary grounds and with a lack of regard for the risks Israel faced.[60] The Israeli government concluded that the advisory opinion and its conclusions should be precluded entirely from consideration by Israeli courts, and that cases involving the Palestinian Wall should be decided on "the factual and normative bases … developed by Israel's Supreme Court as exemplified in the *Bet Sourik* case."[61] They prioritised local jurisprudence and procedure over the opinion of the ICJ. This is a risk with any advisory opinion examining state conduct.

The ICJ also tends to avoid political questions, as evidenced by its careful wording in the *Kosovo* advisory opinion: it was not willing to declare that a declaration of independence was legal at international law, simply that it did not violate it.[62] If it perceived an advisory opinion request to be politically motivated, depending on the composition of the ICJ, the judges may avoid issuing any answer which could be used as a political tool. Given the limitations they face in effectiveness and state adherence, and their avoidance of political issues, an advisory opinion specific to Syria would likely be unsuitable.

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58 Charter of the United Nations, art 96.

59 *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* [2001] Vol 2, pt 2 YILC at 29.

60 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136; and Israel Ministry of Foreign Affairs "Unofficial Summary of State of Israel's Response regarding the Security Fence" (28 February 2005) <www.mfa.gov.il> at [16]–[20].

61 Israel Ministry of Foreign Affairs, above n 60, at [23].

62 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 at 53.

Although better than nothing, the ICJ is for these reasons likely not the optimal route for adjudicatory resolution. Cases are unlikely to be heard at all given the nature of the ICJ jurisdiction and advisory opinions are likely to have a limited effectiveness. Even if either a judgment or an advisory opinion were to be provided by the ICJ, it would be internationally focused rather than on issues of justice and accountability to the Syrian people.

2 The International Criminal Court

The ICC is an option for individual criminal responsibility. It can exercise jurisdiction against individuals for breaches of the Rome Statute. Jurisdictional approaches include ratification of the Rome Statute, Security Council authorisation and a "nationality" approach, where nationals of signatory states may be tried even without territorial jurisdiction.[63] The benefit of the ICC is that individuals responsible for a crime under the Rome Statute can be tried: for Khan Shaykhun, this could mean individuals in the chain of command, from officers to President al-Assad. The ICC process is a slow one, with just nine convictions since its inception, but it does see justice done for breaching international law and those responsible are held to account.[64] The ICC was considered in 2013 by the United Nations High Commissioner to be the appropriate body for prosecuting crimes in the Syrian Civil War, a perspective shared by the IICI.[65]

However, an ICC investigation is not available in this case unless the international political environment changes. Whilst Syria signed the Rome Statute, it has never ratified it.[66] Therefore, jurisdiction cannot automatically be exercised. It must instead be exercised either via state consent, a Security Council referral or a nationality jurisdiction claim. The likelihood of the current Syrian regime submitting voluntarily to the ICC's jurisdiction is low. A Security Council resolution conferring jurisdiction is unlikely: both China and Russia vetoed a 2014 proposal.[67] It challenged both Russian national interests and Chinese non-intervention policy. China and Russia have also both exercised their veto on other resolutions in relation to Syria, suggesting that any kind of Council-led punitive action is unlikely unless their foreign policy becomes more open to challenging state sovereignty.[68] The ICC Prosecutor noted that there was insufficient evidence in 2015 to

63 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), arts 12–14.

64 "About" International Criminal Court <www.icc.org>.

65 *Report of the independent international commission of Inquiry on the Syrian Arab Republic* A/HRC/22/59 (2013) at 7, 26.

66 "Syria" Coalition for the International Criminal Court <www.coalitionfortheicc.org>.

67 "Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution" (22 May 2014) United Nations <www.un.org>.

68 United Nations News Service "Russia, China block Security Council action on use of chemical weapons in Syria" (28 February 2017) United Nations <www.un.org>.

support a nationality jurisdiction claim over alleged crimes by *Daesh*.[69] There is even less basis for invoking this jurisdiction over the al-Assad regime, as a group of Syrians acting against other Syrians. The combination of factors means that unless either the regime changes or the international community's foreign policy goals shift, ICC referral is unlikely.

The major adjudicatory avenues are poorly suited to the Syrian Civil War and the Khan Shaykhun attack, at least for now. An ICJ hearing for breach of an international obligation is possible, but would provide limited remedy. An ICC investigation would have a broader scope than just the Khan Shaykhun attack, but is unlikely to eventuate due to political considerations.

B Diplomatic

Diplomatic responses largely are dictated by the national interest of states. Much happens behind closed doors and is, therefore, opaque. As a result, government rhetoric and statements are the first step for diplomatic analysis. They are not, however, the only publicly visible forms of diplomacy.

Beyond rhetoric, diplomatic actions to encourage compliance tend to be either severing a relationship, offering incentives, or threatening force. The latter of these three options is termed coercive diplomacy and was the previous United States administration's approach to Syria.[70] Prior to the first use of chemical weapons in Syria, President Obama stated that:[71]

> [the United States] have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus [from non-intervention].

This represented a form of indirect coercive diplomacy – less direct than the threat of intervention in Kosovo in the 1990s,[72] but more direct than earlier United States statements with regard to Syria.[73] The United States' actions directly following the first use of chemical weapons in Syria were incentive-based diplomacy: the state made a calculated decision to attempt to incentivise

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69 "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS" (8 April 2015) International Criminal Court <www.icc-cpi.int>. Daesh are also known as ISIS, ISIL or Islamic State (IS).

70 Jack Schlossberg "A Conversation with President Obama on Political Courage" (15 May 2017) Medium <www.medium.com>.

71 White House, Office of the Press Secretary "Remarks by the President to the White House Press Corps" (20 August 2012) The White House: President Barack Obama <www.obamawhitehouse.archives.gov>.

72 United States Government *Public Papers of the Presidents of the United States: William J Clinton: 1999 Book 01* (US Government Publishing Office, Washington DC, 1999) at 432.

73 James Ball "Obama issues Syria a 'red line' warning on chemical weapons" *Washington Post* (online ed, Washington DC, 20 August 2012).

Syria to remove chemical weapons from its territory rather than responding with force.[74] Recent United States actions have included unilateral sanctions against 271 employees of the Syrian Scientific Studies and Research Center – essentially a freezing order on any assets held in the United States and a ban on any commercial interaction between United States and Syrian citizens.[75] This is an example of both relationship-severing diplomacy and the use of intimidation in foreign affairs. Not only does it seek to punish Syrian government workers by severing specific relationships, and in doing so attempt to force a shift in Syrian policy, but it also shows that the American government can identify and target individuals.

By contrast, Russia's approach to Syria has been to act publicly as a diplomatic shield. Syria is a strategic partner for Russia, which leases a naval base in Tartus – their only ocean access to the Mediterranean.[76] Russia's public response following the Khan Shaykhun attack was to support the Syrian government. In the Security Council, this manifested as vetoing a draft resolution which would have condemned the attack and spoken to the importance of accountability.[77] Russia stated the draft resolution pre-emptively identified the Syrian government as the attack's perpetrators, ignored Russian concerns, and was not impartial.[78] The result of this veto was that the Security Council took, and has taken, no action in response to the Khan Shaykhun attack. This represents a form of power-based diplomacy, where Russia has exercised its legal powers within the Security Council framework to protect a strategic partner.[79]

Some states have used diplomatic responses to hold the Syrian government to account as much as individually possible, and others to attempt to protect the state. This divergence has prevented concerted, coordinated international responses. It also highlights that diplomatic avenues are only as powerful as states let them be, and that their effectiveness can be weakened if strong states dissent.

One other diplomatic option could be the use by other states of art 60 of the Vienna Convention on the law of Treaties to suspend the operation of the CWC in relation to Syria. This would be counterproductive to the aim of achieving treaty compliance since it could preclude treaty-based enforcement action. It may also not be possible, since the CWC may constitute a treaty of a humanitarian character under art 60(5), to fully suspend its operation.

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74 Schlossberg, above n 70.

75 United States Treasury, above n 3.

76 Reuters Staff "Russia, Syria sign agreement on expanding Tartus naval base" (21 January 2017) Reuters <www.reuters.com>.

77 Above n 77.

78 United Nations Press, above n 77.

79 The veto is a function of Charter of the United Nations, art 27. See "Voting System and Records" United Nations Security Council <www.un.org>.

C The Use of Force

Force is rarely used to respond to breaches of international obligations due to its explicit ban under the Charter of the United Nations – a peremptory norm. The only accepted exceptions are self-defence and Security Council authorisation, including the post-2005 World Summit interpretation of Responsibility to Protect (R2P).[80] R2P is the principle that, in situations where states "manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity", the Security Council can authorise an intervention to protect the state's population.[81] The best example of R2P's use is the North Atlantic Treaty Organization's Libya intervention.[82] While the intervention achieved a change of government, its long-term effectiveness is questionable and it may have contributed to a reticence against invoking R2P in future.[83]

The United States' response to the Khan Shaykhun attack was to fire 59 cruise missiles at the al-Shayrat military airbase, suspected of hosting planes used to drop the chemical weapon.[84] This was done without Security Council authorisation, without invoking R2P, and not as an act of self-defence. The United States aimed to destroy infrastructure and make the airbase unusable, and they warned the Russian Federation in advance to minimise casualties. Despite this, six people were killed.[85] On 26 June 2017, the United States threatened another strike, claiming it had evidence of "potential preparations for another chemical weapons attack".[86] This strike did not materialise.

Arguably, not all uses of force are restricted by art 2(4) of the United Nations Charter – for example, no response occurred in the Security Council to Operation Entebbe, where the Israeli armed forces conducted a military operation at an airport in Uganda, despite the Ugandan government bringing the event to their attention. This has been taken by some authors to signify that

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80 *2005 World Summit Outcome* GA Res 60/1, A/Res/60/1 (2005) at [138]–[139], available at "Paragraphs 138-139 of the World Summit Outcome Document" International Coalition for the Responsibility to Protect <www.responsibilitytoprotect.org>.

81 International Coalition for the Responsibility to Protect, above n 80.

82 See SC Res 1970, S/Res/1970 (2011) at preamble; SC Res 1973; S/Res/1973 (2011); and UN News Centre "Libya: Ban welcomes Security Council authorization of measures to protect civilians" (18 March 2011) United Nations <www.un.org>.

83 Giselle Lopez "Responsibility to Protect at a Crossroads: The Crisis in Libya" in Anthony Chase (ed) *Transatlantic Perspectives on Diplomacy and Diversity* (Humanity in Action Press, New York, 2015) 119.

84 *Security Council Meeting Minutes* S/PV.7919 (7 April 2017) at 2.

85 At 2.

86 Bryan Bender and Anni Karni "White House threatens Syria over possible chemical attack" (26 June 2017) Politico <www.politico.com>.

2(4) does not apply to heavily limited action.[87] This is not a settled aspect of international law, and some authors consider this distinction "conceptually confused" and somewhat artificial.[88]

Even if the missile strike does not constitute an armed attack, this does not change its illegality at international law as a use of force. The criteria for "use of force" and an "armed attack" are different. In the *Nicaragua* case, the ICJ held that an armed attack is a matter of "scale and effect", differentiating it from a "frontier incident",[89] and the *Oil Platforms* case added a need for a specific intention to cause harm.[90]

These definitions were intended to show where an "armed attack", invoking a right to self-defence, had occurred. For the purposes of analysing the Syrian Civil War, they clearly indicate two key points:

(1) The United States was not acting in self-defence against an armed attack; and
(2) The United States' attack may not constitute an armed attack, due to its limited scale and effect.

This does not change the illegality of the missile strikes. The peremptory norm at international law is against the *use of force* – armed attacks are a specific form of force.[91] The strike is still in breach of the peremptory norm, by definition of being a targeted military action in the territory of another state.

Also important is the selectivity of the United States in choosing when and how to use force. The country did not respond to any other chemical attack in Syria with a military response, nor has it responded in this way to the far more widespread death of civilians due to conventional warfare. This makes any humanitarian justification, including R2P, unpalatable. Such an explanation suggests a sliding scale of humanitarian severity, where the displacement of ten million people and the deaths of 300,000 are not enough, yet the use of a particular type of weapon is.

Most of these considerations are hypothetical. Whilst there have been attempts to legitimise the strike as legal, these have not been undertaken by the United States government – the President

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87 Mary Ellen O'Connell "The Prohibition on the Use of Force" in Nigel D White and Christian Henderson (eds) *Research Handbook on International Conflict and Security Law* (Edward Elgar Publishing, Northampton, 2015) 89 at 106–107.

88 Tom Ruys "The Meaning of 'Force' and the Boundaries of the Jus ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?" (2014) 108 AJIL 159 at 159.

89 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at 103 [*Nicaragua*].

90 *Oil Platforms (Iran v United States of America) (Judgment)* [2003] ICJ Rep 161 at 186–187.

91 See *Nicaragua*, above n 89, at 101, where an armed attack is referred to as "the most grave [form] of the use of force".

justified it as a matter of "vital national security interest".[92] The State Department and United States National Security Advisor, HR McMaster, have insinuated that kinetic military action may be permitted by Security Council resolutions, but have made no strong effort to elaborate this.[93] In part, this is likely due to the lack of international condemnation. Most states and major organisations, including the European Union, the United Kingdom, Australia and Saudi Arabia, supported the strikes as legitimate reaffirmations of the prohibition against chemical weapons. Syria, Russia, China and Iran were among the only negative reactions.[94] Three of these countries have strategic interests in the region, and one has a policy of non-intervention. This limited negative response suggests the United States may have felt no need to legally justify its actions.

V IMPLICATIONS OF THE ATTACK

There are three salient implications of the attack and its responses:

(1) The CWC and its enforcement and compliance mechanisms have not prevented or punished chemical weapons' use in Syria;
(2) The Security Council's lack of response to the use of chemical weapons in Khan Shaykhun highlights the restrictions geopolitical considerations impose on its powers; and
(3) The unilateral use of force by the United States highlights that the use of force is still the ultimate, albeit unlawful, method of coercion at international law.

A The CWC and its Enforcement and Compliance Mechanisms

The underlying purpose of the CWC is to prevent the creation and use of chemical weapons. Where it cannot pre-emptively prevent use from ever occurring, it is structured to provide voluntary remedy structures.

With regard to Syria, non-performance of treaty obligations could be excused to an extent. The CWC has never had to operate in the context of a major civil war before, nor has it been so quickly enacted into domestic law. It would be understandable that delays could occur in the implementation

92 "Remarks on United States Military Operations in Syria from Palm Beach, Florida" (6 April 2017) Daily Compilation of Presidential Documents.

93 "Remarks With National Security Advisor HR McMaster" (6 April 2017) US Department of State <www.state.gov>.

94 Russian Government "Foreign Ministry statement on US military action in Syria on April 7, 2017" (7 April 2017) Ministry of Foreign Affairs of the Russian Federation <www.mid.ru/en>; and Colin Dwyer "How Is The Rest Of The World Reacting To The U.S. Strike On Syria?" (7 April 2017) NPR <www.npr.org>.

process – and in fact, this happened. The timeline for disarmament was varied multiple times,[95] and it was generally accepted that not all sites would be immediately accessible due to the conflict.[96]

That said, non-performance and outright breach are distinguishable. Whereas non-performance can, to a degree, be excused, outright breach cannot. The use of chemical weapons crosses the non-performance boundary to become a "fundamental breach".[97] The CWC's compliance mechanisms did little to prevent this, because they are designed for considered and tiered compliance, rather than responding to developing situations. Rapid, binding responses to threats against peace and security are the primary responsibility of the Security Council, and treaty organisations tend not to encroach on its territory. As a result, compliance regimes like the CWC's encounter difficulty when faced with serious situations.

Some treaties, including the CWC, place enforcement power with the Security Council; this has its own problems.

B The Security Council's Lack of Response

The Security Council is the sole body entrusted to authorise the use of force. It must exercise a high level of discretion when making this decision; allowing the use of force in circumstances beyond exceptional ones undermines the Council's legitimacy, by suggesting it is willing to forcibly exact outcomes. However, the Council knowing of a situation where a civilian population has been attacked with a banned weapon, in violation of a treaty signed by the responsible state, and then doing nothing, highlights its major failing: that the veto power and political considerations prevent the use of its powers to enforce international law. The Security Council enforcing sanctions, an investigative organ, a peacekeeping contingent or allowing a limited armed intervention are all options which could have decisively bolstered the law against the use of chemical weapons.

By allowing political considerations to impede its function, the Security Council missed a valuable opportunity to reinforce and develop international law against the use of force. It could have shown, first, that when a humanitarian treaty is manifestly breached in a conflict, the international community may justifiably respond; and secondly, provided guidance as to *how* it should respond, but failed to do so. Given Russia's continued use of the veto, the Security Council is unlikely to show strong leadership on this in the immediate future.[98]

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95 Daniel Horner "Syria Misses Chemical Removal Deadline" (1 May 2014) Arms Control Association <www.armscontrol.org>.

96 *Report from the Director-General of the Organization for the Prohibition of Chemical Weapons on the Progress in the Elimination of the Syrian Chemical Weapons Programme* S/2015/295 (28 April 2015).

97 Aust, above n 37, at 296.

98 See for example "Russia uses veto to end UN investigation of Syria chemical attacks" (24 October 2017) The Guardian <www.theguardian.com>.

C The Unilateral Use of Force

Domestic legal systems function as a series of written and unwritten rules and commands, usually created by a sovereign and enforced via courts and clear consequences. This does not cleanly translate to the international plane. Commands exist, but there is no clear enforcement or consequence structure. The logic applied to domestic legal systems – an individual complies with the law because otherwise their rights are curtailed – cannot be applied at the international level. It should instead be treated as a horizontal plane, with 194 actors in the United Nations system (including the UN itself as an actor).

This has two results. First is the principle of state consent, elaborated in the *Lotus* case: "The rules of law binding upon States … emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law".[99] States are bound by peremptory norms and by treaties they consent to, rather than some over-arching legal system. Second, if a state chooses *not* to adhere to international law, the only sanctions it can face are those provided by the international community. If the international community follows its own structures and rules, those exclude the use of force due to the peremptory norm against its use, reinforced by art 2(4) of the Charter of the United Nations.

What the Khan Shaykhun attack and state responses show is that the use of force, although nominally excluded, is still the ultimate form of coercion at international law. If a state's territorial integrity is threatened, and that state lacks the capacity to respond or the popular international support to be defended, it will likely adhere to whatever demands are being made of it.

VI OBSERVATIONS AND WAYS FORWARD

Disarmament treaties fundamentally rely on adherence by the international community, both to their disarmament obligations and their compliance regimes. They are often drafted, and signed by, states that agree with their purpose or which have already undertaken the disarmament process. Therefore, their compliance mechanisms are often not designed to deal with major or fundamental breaches. A prominent example of this is the recent Nuclear Weapons Prohibition Treaty: its enforcement mechanisms are intended for low-intensity disputes, not for the actual use of nuclear weapons in conflict, and aim for negotiated resolution wherever possible.[100] That states will follow the treaty is assumed, and relatively weak systems are likely more acceptable to signatory states. This presumption of good faith combined with political reality leads to limited enforcement, compliance and dispute resolution regimes. States tend either not to implement compliance regimes,

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99 *The Case of the SS Lotus (France v Turkey)* (1927) PCIJ (Series A) No 10 at 18.

100 Treaty on the Prohibition of Nuclear Weapons A/CONF.229/2017/8 (opened for signature 20 September 2017, not yet in force): see specifically art 11.

as with the Nuclear Prohibition Treaty, or to create a non-binding system, as with the CWC and the Ottawa Mine Ban Treaty.[101]

An overarching lesson to draw from the Khan Shaykhun chemical attack and the broader use of chemical weapons in Syria is that this assumption is dangerous. While compliance regimes focused on pressure and collective action work for minor breaches, if a state commits a major breach, then other states and relevant organisations need to be capable of properly responding. The CWC's regime was not capable of coordinating an effective international response, partly due to its non-binding nature. Recommending collective measures including sanctions only goes so far, particularly when some members cannot implement sanctions without Security Council authorisation.[102]

States and international institutions have created a system that, at least for the CWC, is generally workable, but is weak in terms of its potential compliance strategies. This challenge is not unique to the CWC, and other disarmament regimes with similar compliance regimes, such as the Nuclear Weapons Prohibition Treaty, face similar risks. It creates a further risk that countries will act unilaterally, even if doing so is illegal, to enforce obligations they perceive as important.

Resolving this challenge is not easy, and every solution has flaws. A small number of possible responses are examined below – these are by no means exhaustive. Each of them would see its greatest success as part of a comprehensive package of actions, rather than individually.

A Adjudicative

The Syrian Civil War highlights two problems with the current system of international adjudication: jurisdiction is not always universal; and a fragmented system of multiple courts is further stymied by the political considerations of states.

This is not a challenge for every treaty. The Genocide Convention, for example, includes specific dispute resolution clauses that require disputing states to appear before the ICJ if one of them requests it.[103] This was the process undertaken in *Croatia v Serbia* to establish the ICJ's jurisdiction.[104] Although ultimately the Court found the Convention had not been breached, the

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101 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 2056 UNTS 211 (opened for signature 3 December 1997, entered into force 1 March 1999), art 8.

102 For example, New Zealand: an Autonomous Sanctions bill is in its introductory phase, but the country has no unilateral ability to implement sanctions at the time of writing.

103 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (opened for signature 9 December 1948, entered into force 12 January 1951), art IX.

104 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Preliminary Objections)* [2008] ICJ Rep 412.

ability to take a claim as serious as genocide to the ICJ shows the potential strength of such provisions. However, unless expressly restricted, reservations from such clauses are generally also legitimate.

Amending the CWC's equivalent provision, art XIV, would require the removal of the term "mutual consent" from the article. This is a significant political shift and, if implemented, would directly challenge the sovereignty of signatory states. Amending the CWC is also deliberately difficult, requiring a consensus vote followed by ratification by all states who voted in favour.[105] It would only take one state party voting against to prevent an amendment.

A more viable, albeit limited, alternative is an optional protocol that makes the Court's jurisdiction compulsory. This was the method undertaken for the Vienna Convention on Diplomatic Relations.[106] This was not highly effective; the Optional Protocol was adopted in 1961 and entered into force in 1964, but to date only has 70 parties compared to 190 for the Convention.[107] As an optional protocol would only bind those parties who sign and ratify it, the greatest risk in relation to the CWC is the same – that no states that are actually likely to breach the protocol will ever sign it, and the issue shall remain unresolved.

The same risks apply to the ICC, though arguably to a greater extent. The ability to try individuals who otherwise would typically hold diplomatic immunity means that states are even *less* likely to voluntarily sign away a portion of their sovereignty, particularly if the person making that decision, as in Syria, would be likely to appear before the Court.

The issue of court fragmentation on the international plane is even harder to resolve, and reflects the risks that fragmentation of the system as a whole poses. It is entirely possible that dependent on which court was used, different outcomes could be reached in the same situation, as happened with the ICTY and the ICJ. Genocide claims pursued by states failed, but prosecutions at the personal level for war crimes and crimes against humanity succeeded.[108]

For an adjudicative solution to work, it would need both widespread support and the selection of the appropriate court at the international level. While plausible, this is not an ideal solution, and would require challenging fundamental characteristics of the international legal system.

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105 CWC, above n 1, art XV.

106 Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes 500 UNTS 241 (opened for signature 18 April 1961, entered into force 24 April 1964).

107 "Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes" (updated 21 October 2017) United Nations Treaty Collection <www.treaties.un.org>.

108 Philippa Webb *International Judicial Integration and Fragmentation* (Oxford University Press, Oxford, 2013) at 30–35.

B Diplomatic and Political

Although diplomatic efforts in relation to the use of chemical weapons in Syria have been deadlocked, diplomacy is still a useful tool for encouraging compliance with international obligations. Three potential approaches are examined: self-imposed limits on the veto, "track-II" diplomacy, and utilising the UN Global Compact (UNGC). These options are cumulative; their strongest effects would be seen if they were implemented in tandem.

The UN Security Council is a complex diplomatic organ, with many of its important decisions made in private consultations, sometimes informed by Arria-formula meetings; public meetings are often a procedural step to ratify decisions already made.[109] The five permanent members hold a veto on substantive matters.[110] This lack of transparency combined with a veto power means that the Security Council can be hamstrung in situations such as the Khan Shaykhun attack.

However, in theory, there is nothing to prevent the Security Council's permanent members from agreeing that in situations of humanitarian disaster, they shall not exercise their veto power. The Security Council is capable of determining its own rules of procedure, as illustrated by its consensus process: substantive motions, including resolutions, can be adopted without a vote.[111] It does not actively exercise this ability in relation to resolutions, and it would only take one state dissenting to block such an act.

There are indications that some permanent members may be moving towards self-limiting their veto power. France has actively shown an intention not to veto in cases of war crimes, genocide or crimes against humanity,[112] and has created a code of conduct for the veto's use.[113] This initiative would, if widely adopted, resolve the challenge of a paralysed Security Council. The most significant barrier this procedure faces is adoption by other permanent members, particularly the United States, Russia and China – the United Kingdom and France have not exercised their veto in nearly 30 years.[114]

Another diplomatic option is the use of "track-II" diplomacy to incentivise change at a non-state level. Track-II diplomacy is notoriously hard to define, as it essentially comprises everything other than official meetings between states: it can be undertaken by individuals on their own initiative,

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109 "'Arria-formula' Meetings" United Nations Security Council <www.un.org>.

110 Charter of the United Nations, art 27.

111 *Repertoire of the Practice of the Security Council (19th Supplement)* (2014–2015) at 91.

112 *Security Council Working Methods* S/PV.7285 (23 October 2014) at 8.

113 Merrow Golden "Could a Code of Conduct Work? The Prospects of the French Proposal Limiting the Veto on the United Nations Security Council" (2017) 55 Colum J Transnat'l L 101.

114 "Vetoes - Security Council - Quick Links - Research Guides at United Nations Dag Hammarskjöld Library" (2017) Dag Hammarskjöld Library <research.un.org>.

individuals with state support, or non-governmental organisations.[115] It aims to build connections at a more personal level and can find common ground in situations where diplomats and governments cannot.[116] These personal connections mean that track-II diplomacy can also revive failed high-level government interactions. Although track-II diplomacy tends to be thought of in a conflict resolution context, this is by no means its only function: one such dialogue in 2015, between New Zealand and Taiwan, addressed security arrangements and Asia-Pacific economic integration.[117]

Whether undertaken by individuals or organisations, the benefit of a track-II system is that it can reshape government approaches. The work of Terje Larsen, a Swedish academic, was fundamental for helping to facilitate the Oslo accords via private meetings – a key step in attempting to resolve the almost intractable conflict between Israel and Palestine.[118] Similarly the ICRC has, via track-II diplomacy directly with non-state actors, encouraged adherence to international humanitarian law in non-international armed conflicts.[119]

Similar initiatives could be undertaken, whether at the individual level or by NGOs, to encourage states to fulfil their obligations to humanitarian treaties – such as the CWC. They could help in resolving a number of the political challenges that prevent other, legally oriented solutions from being practical, by creating non-political pressure on states, and would be a valuable tool in reinforcing the value and validity of humanitarian and disarmament treaties. Track-II diplomacy on its own would not solve any of the issues related to compliance and enforcement, but could clear some of the roadblocks to substantive solutions.

A third option is to utilise the UNGC, a voluntary initiative from the Office of the Secretary-General, which aims to encourage corporate social responsibility in accordance with the Sustainable Development Goals.[120] The UNGC has explicitly noted the important role that business can play in a constructive sense, bringing communities together and using good business practice to complement and facilitate government initiatives for peace.[121]

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115 Jean-Robert Leguey-Feilleux *The Dynamics of Diplomacy* (Lynne Rienner Publishers, Boulder (CO), 2009) at 331.

116 Charles Homans "Track II Diplomacy: a Short History" (20 June 2011) Foreign Policy <www.foreignpolicy.com>.

117 Will Seal "Track II – common interests unite Taiwan and NZ" (2015) Asia New Zealand Foundation <www.asianz.org.nz>.

118 Leguey-Feilleux, above n 115115, at 335–337.

119 At 341–342.

120 United Nations Global Compact <www.unglobalcompact.org>.

121 "Peace" United Nations Global Compact <www.unglobalcompact.org>.

A principle of the UNGC is that corporations should not be complicit in human rights abuses.[122] They should avoid acting in ways that would detriment human rights, and also should aim to prevent impacts "directly linked" to their operation, products or services, even if not caused by the corporation itself.[123]

This provides a valuable opportunity to create change in the chemical industry, making it more difficult for states to breach (or continue breaching) the CWC. Companies that produce precursor chemicals with a legitimate use, or base elements such as chlorine, run the risk of their product being used as a weapon. If those companies are signed on to the UNGC, then continuing a business relationship where their products are used for war would be in breach. If industry leaders signed on to the UNGC – as 226 chemical production companies already have – they could affirm, publicly and to their shareholders, that any use of their product as or relating to a weapon would result in a termination of the relevant business relationship.[124] If this were to be consistent across the chemical industry, it could minimise flow of precursor chemicals and weapon elements where a breach of the CWC has occurred, making it a vital part of any breach management process – acting as a voluntary, corporation-led sanctions regime.

C Responsibility to Protect

The use of force is still illegal at international law, with few exceptions. Extending those exceptions by widening the scope of the R2P is a viable, but problematic, option for responding to major breaches of humanitarian treaties.

The 2005 World Summit Outcome Document restricted R2P only to apply when the Security Council authorises it. While not legally binding, this is an important statement of consensus on a principle of international law. In the Syrian Civil War, even before the use of chemical weapons in 2017, every criteria for R2P except Security Council authorisation was arguably met. The government of Syria had manifestly failed to protect its population from war crimes and crimes against humanity and, by all accounts, was in fact committing such crimes against its own people.

If R2P were reconceptualised to exist without requiring the consent of the Security Council, it could be a more useful doctrine for such situations. It could, for example, have rendered the American response lawful, and would legitimise wider intervention, as in Libya in 2011.

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122 "Principle 2" United Nations Global Compact <www.unglobalcompact.org>.

123 Office of the High Commissioner for Human Rights *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations, New York, 2011) at 13–14.

124 Figure found via a search of the United Nations Global Compact participant list at <www.unglobalcompact.org/participation>.

The international response to the missile strike, as well as the United States' ongoing conduct, suggests that a gradual expansion of R2P may be underway – whether as a result of active state practice, or tacit acceptance by states. However, the actual scope and effect of this shift is still unclear. President Macron declared in February 2018 that if chemical weapons are used against civilians in Syria, France would take military action against chemical production sites.[125] The United States has acted similarly: in June 2017, the White House stated that it believed another chemical attack was being planned, and stated that Syria's government would ""pay a heavy price" if one occurred.[126] Following another chemical attack in April 2018, the United States, United Kingdom and France undertook limited military action against targets in Damascus on 13 April, justified as a matter of deterrence and national security interest.[127]

These statements and acts have not been received negatively by the majority of the international community; on the contrary, many developed states responded with either understanding or support.[128] A positive reception may signal a shift in how R2P is conceptualised by states. The World Summit Outcome document defined the principle as:[129]

> … collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis … should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The actions and rhetoric of the United States and its allies could suggest the beginnings of a shift towards limited individual action, without Security Council authority, in response to breaches of treaties of a fundamentally humanitarian nature. This would better reflect the original suggestion that R2P encompasses a responsibility to react to situations of compelling human need, but also that any intervention be proportionate to the defined human protection objective.[130] It could alternatively reflect a view well stated by Monica Hakimi: that R2P should constitute a bundle of discrete duties that can be triggered for some, but not all, states rather than necessarily the international community as a whole.[131] A shift towards either of these conceptions would increase the flexibility of R2P.

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125 Marine Pennetier and Michael Rose "'France will strike' if proven chemical weapons used in Syria: Macron" (14 February 2018) Reuters <www.reuters.com>.

126 "Statement from the Press secretary" (26 June 2017) The White House <www.whitehouse.gov>.

127 Quinta Jureric "Transcript: President Trump's Remarks on Syria Airstrikes" (14 April 2018) Lawfare <www.lawfareblog.com>.

128 See above at section IV(C) of this article.

129 *2005 World Summit Outcome*, above n 80, at [139].80.

130 International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (International Development Research Centre, Ottawa, 2001) at XI-XII.

131 Monica Hakimi "Towards a Legal Theory of Responsibility to Protect" (2014) 39 Yale J Int'l L 247 at 267.

This flexibility would carry with it the considerable political and legal risk. Not only would it be prone to political interpretation, and potential abuse as a doctrine of law, but it would also be likely to disproportionately affect smaller and weaker states. R2P has only been invoked in the context of powerful states against weaker ones; a conception of R2P which explicitly accepts individual action risks the doctrine being used as a tool for foreign policy, rather than for protection. It also would directly challenge the Charter's general prohibition on the use of force.

Intervention without follow-through also risks creating the same situation that occurred in Libya: the removal of an oppressive government, and the creation of a power vacuum. In this way, an expanded right to use force in response to acts like the use of chemical weapons could make the human rights situation in a state *worse*. Further, the triggering of R2P in response to a chemical attack, but not to the civilian cost of the Syrian Civil War as a whole, risks creating a hierarchy of wrongs.[132]

At present, it is simply too early to establish if this notion of an expanded R2P is accurate. The Al-Shayrat and 13 April 2018 missile strikes, despite the generally accepting international reception, are not sufficient practice to crystallise a major change to R2P. They may still represent a shift in interpretation by specific states, fragmenting the doctrine. If the missile strikes do represent a shift in customary international law relating to R2P or the use of force, there is no guarantee that a wider scope will actually improve the situation in Syria, or prevent future treaty breaches. Expansion also presents a risk to the rules-based international system by legitimising the use of force, and is likely to be a breach of the Charter of the United Nations, art 2(4). Any expansion on the lawful use of force is a dangerous step, and a reconceptualisation of R2P is no exception.

VII CONCLUDING REMARKS

The Syrian Civil War is a tragedy that illustrates many of the challenges that face international law today, including the difficulties facing the enforcement of disarmament and humanitarian treaties in conflict zones. These treaties are premised on the idea that they will never be breached, because the states who sign on to them are states that are willing to abide by their terms. Therefore, they lack the capacity to respond to serious and fundamental breaches effectively. This means that states perceive a need to revert to other options for enforcing humanitarian treaties, including judicial avenues, diplomatic initiatives and the use of force.

Handing responsibility to the Security Council is a reasonable solution to breaches of the CWC and reinforces the Council's legitimacy, but risks political interference. Judicial resolution faces challenges due to the voluntary nature of international law; neither the ICJ nor the ICC is a guaranteed avenue for any kind of response. Judicial resolution is further complicated by issues of fragmentation, state interest and the nature and scope of international courts' jurisdiction.

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132 See above at section V(0) of this article.

As a result, international actors are left with few other options, which explains – but does not legitimise – the United States decision to unilaterally use force against the Al-Shayrat airbase. The United States has shown a continued intention to respond to the use of chemical weapons in Syria with force.[133] Putting aside the possibility of domestic reasons for taking a hawkish stance, this suggests that the United States views the existing enforcement mechanisms of the CWC with scepticism. If this is true, then it strongly suggests that there is value in continuing to examine and pursue ways to strengthen the system that underlies the prohibition on chemical weapons. It also suggests that the United States, and potentially its allies, see a wider scope for the lawful use of force. No matter the form this takes, it could represent the beginnings of a challenge to the rules-based international system's limitations on force.

The international community has a variety of options it could consider for strengthening these regimes, and in particular to strengthen the CWC. This article has examined solutions in three defined categories. Although a myriad of options likely exist outside of these, they provide a structured consideration of ways to improve international humanitarian law compliance by states, and to preclude the perceived need for states to take unilateral action.

There are multiple points of potential failure in the enforcement and compliance regime. To make a strong, effective and enforceable disarmament regime, the international community should consider a number of options – which could include, but are not limited to, those outlined here. The beauty of international law is in its flexibility, meaning that, with enough international support, redefining and strengthening the regime is in fact possible. The major challenge to this is the palatability of such changes to states. The Security Council, for example, has been a major impediment to any meaningful collaborative action in response to the Khan Shaykhun attack. The same states that have stymied the Security Council's ability to respond are also capable of blocking any meaningful attempt at its reform. Arguably, substantial changes in favour of enforceability of international obligations should be treated as an end goal, and in the interim, smaller, but meaningful changes – like embracing and expanding the role of the UNGC in regulating private industry's contribution to rights abuses – are the first steps that should be taken towards improving compliance with the CWC. Such changes are not strictly shifts in the international legal order, but rather in the realities of international relations that the law sits alongside.

A failure to respond to the challenges that the Khan Shaykhun attack has revealed risks another such situation happening in the future, and the international community being similarly unprepared. The flaws with the CWC exist in any disarmament regime, and require a level of real and meaningful change to resolve. If the international community continues to treat disarmament treaties and customary restrictions on weapons as self-enforcing law, it risks reducing them to rhetoric.

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133 Wesley Morgan "Mattis warns Syria not to use chemical weapons again" (2 February 2018) Politico <www.politico.com>; and "Remarks by President Trump at the United Nations Security Council Briefing on Counterproliferation | New York, NY" (26 September 2018) The White House <www.whitehouse.gov>.