

# Reprisal Against the Use of Chemical Weapons: Examining Limits of the IHL in the Syrian Context

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**Abstract:** There has been repeated use of chemical weapons (CWs) in the Syrian civil war in violation of the international humanitarian law (IHL). International response to this breach came in the forms of negotiation, investigation, and armed reprisal. In light of the treaty and customary IHL, this paper examines the (il)legality of the use of CWs, individual and state responsibility for the use of CWs, and the scope and limitation of the armed reprisal against the CWs attack. Finally, it focuses on the implementation measures, both preventive and coercive, to strengthen IHL to promote deterrence of the use of CWs in Syria and elsewhere.

**Keywords:** Armed reprisal, common article 3, chemical weapon, Geneva Conventions, and international humanitarian law.

## 1. Introduction

Both treaties and customary IHL prohibit the use of CWs either in war or peace. Due to its indiscriminate effect, the CWs attack breaches the IHL principle of distinction and is prohibited irrespective of the nature of the armed conflict. The Chemical Weapons Convention (CWC), which came into force in 1997, also provides absolute restrictions on the use of CWs by the state parties. Yet, on account of poor enforcement of the IHL, the CWs were used by Syria, both before and after, it accepted obligations under the CWC.

Due to the paralyze of the Security Council (SC) and the absence of any accountability measure (both national and international), the USA, UK, and France (popularly known as P3) responded to the chemical attacks with force. Undoubtedly, the CW is prohibited and Syria breached the “means and methods” of war by using it directly against civilians. But, does the “breach” of the IHL allow P3 to make armed intervention disregarding *jus ad bellum*? Can armed reprisal be resorted to by a non-belligerent state?

Syria is a party to the CWC and Geneva Conventions (GCs) I-IV and the conflict within its territory is non-international in nature; hence, its obligation for the use of “prohibited weapons” in breach of the “targeting rule” is discussed with reference to the CWC and IHL applicable in non-international armed conflict (NIAC). The law on belligerent reprisal is articulated in the *Naulilaa* judgment,<sup>1</sup> 1949 GCs I-IV, and 1977 AP I; whereas, the modern regulation on the use of armed

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<sup>1</sup> *Portugal v. Germany* (1928) 1 RIAA 10011.

force could be traced in the UN Charter and resolutions. The IHL regulates reprisal only in international armed conflict (IAC), whereas the Syrian conflict is non-international in nature. Therefore, this paper illustrates the scope and limitation of reprisal against Syria only with reference to customary international law and the UN Charter. Also, it identifies the gaps in the IHL that allow states to get away with the breach of obligations. Finally, it underscores the preventive and coercive measures which are likely to promote compliance with the IHL and accountability for breaches.

## 2. Syrian Civil War and Chemical Weapons Dilemma

The Syrian conflict that started in March 2011 intensified gradually due to President Assad's refusal to dialogue and use of military force against the rebels. The proliferation of armed insurgency overwhelmed the security measures and the regime lost control over significant areas of Syria.<sup>2</sup> To avoid international monitoring and intervention, the government initially characterized the conflict as an internal disturbance; yet, in July 2012, considering the gravity and widespread nature of the armed conflict, the ICRC characterized it as a civil war - non-international in nature. Though, Syria is not a party to the AP II GCs and the conflict is NIAC, the ICRC's determination offers the non-combatants and civilians the protection of the common article 3 (CA3).<sup>3</sup>

The Syrian army, being unable to advance in urban war without massive destruction, resorted to the CWs as a strategic choice. The Independent International Commission of Inquiry on the Syrian Arab Republic between March 2013 and March 2017, documented 25 incidents of CWs attacks, of which twenty (20) were perpetrated by government forces primarily against civilians and the rest five (5) were launched by unidentified groups.<sup>4</sup> The OPCW-UN joint investigation confirmed the use of CWs in Ghouta, Syria on 21 August 2013, which claimed around 1200 civilian lives.<sup>5</sup> The alleged second and third attacks which occurred respectively in 2017 and 2018 also caused considerable casualties.<sup>6</sup>

Syria accepted responsibility for the 2013 attack but, denied involvement in any subsequent attack alleging that the rebel groups also held CWs<sup>7</sup> and might have

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<sup>2</sup> A. Baczkó, G. Dorronsoro, and A. Quesnay, *Civil War in Syria: Mobilization and Competing Social Orders (Problems of International Politics)* (CUP, 2018).

<sup>3</sup> 'Syria in civil war, Red Cross says' (BBC NEWS, 15 July 2012).

<sup>4</sup> Report dated 8 August 2017, UNGA - A/HRC/36/55, para 67.

<sup>5</sup> 'First Year Anniversary of Ghouta Chemical Attack', Syrian Network for Human Rights, 18 August 2014, <<http://sn4hr.org/blog/2014/08/18...anniversary-of-ghouta-chemical-attack/>> accessed 12 Feb 2020.

<sup>6</sup> At least 83 civilians killed and 293 were injured in 2017, and around 40 civilians killed in 2018. See, *Ibid*, (n 4), para 75; 'Syria war: What we know about Douma 'chemical attack'' (BBC, 10 April 2018) <<https://www.bbc.com/news/world-middle-east-43697084>> accessed 23 February 2020.

<sup>7</sup> Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 8 August 2017, UNGA - A/HRC/36/55, para 72.

used it to shift the blame on Asad. Though the incidents of CWs attacks in 2017 and 2018 were confirmed, the responsibility for launching the attack remained unresolved. Moreover, the credibility of the investigation report was questioned alleging that it was aimed at creating an excuse for the Western armed intervention in Syria.

### 3. Liability for the Use of CWs

The IHL regulates the conduct of hostilities by limiting means and methods of war and according protection to the combatants and civilians. The use of CWs is prohibited by numerous treaties, including the 1899 Hague Declaration concerning Asphyxiating Gases, 1925 Geneva Gas Protocol, and 1993 CWC. Rule 74 of the customary IHL also prohibits its use in all armed conflicts. The SC in its Resolution 2118 (2013) also reaffirmed that “the use of chemical weapons anywhere constitutes a threat to international peace and security.”<sup>8</sup>

In 1968, Syria acceded to the Geneva Gas Protocol. Though the Protocol prohibited the use of CWs, didn't bar improvement, production, and transfer; neither it required the destruction of existing stocks. Moreover, the member states' freedom to use CWs against the non-signatory states, and retaliation against the first to use CWs – rendered the Protocol ineffective.<sup>9</sup>

Syria acceded to the CWC in October 2013. In addition to an absolute prohibition on the use of CWs, the Convention bans their development, production, acquisition, stockpiling, retention, and transfer. The Convention also requires the destruction of existing CWs and production facilities. It creates a verification regime requiring the member states to provide national reporting on industrial chemical production and to accept both routine and short-notice inspections of treaty-related facilities.<sup>10</sup>

During the first CW attack in 2013, Syria was not a party to the CWC; so, the Syrian actions attracted liability only under the Gas Protocol and customary IHL. The alleged subsequent attacks, if assumed to be true, would draw additional responsibility under the CWC. Unfortunately, the Gas Protocol, CWC, and customary IHL don't provide any accountability either for the regime or for individual perpetrators. However, by deliberate and direct use of prohibited weapons against the civilians, the Assad regime breached the “targeting rule”, and committed a serious breach of CA3.<sup>11</sup> Yet, the “[C]ommon Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its

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<sup>8</sup> SC Res. 2118 (2013), 27 September 2013, para 1.

<sup>9</sup> Nebojša Raičević, 'The History of Prohibition of the Use of Chemical Weapons in International Humanitarian Law' (2001) 1(5) *Facta Universitatis Law and Politics Series*, 613 – 631.

<sup>10</sup> Nils Melzer, *International Humanitarian Law A Comprehensive Introduction* (ICRC 2019).

<sup>11</sup> Jose M. Rodriguez-Llanes, Debarati Guha-Sapir, Benjamin-Samuel Schlüter and Madelyn Hsiao-Rei Hicks, 'Epidemiological findings of major chemical attacks in the Syrian war are consistent with civilian targeting: a short report' (2018) 12(16) *Conflict and Health*.

provisions.”<sup>12</sup> The general nature of the obligation under CA3 does require neither Syria nor the international community to investigate or prosecute the alleged perpetrators. Also, a breach of CA3 in NIAC does not permit any belligerent reprisal by non-belligerent states to invoke regime accountability. Since 1949, Syria has been a party to the GCs, but never signed the AP II which offers criminal accountability for breach of the IHL in NIAC. Nonetheless, the Charter of the ICTY and ICTR recognized criminal liability for a serious breach of CA3 and the Tribunals have created instances of individual accountability for such breach.<sup>13</sup>

The CWs attack also draws liability under the Rome Statute which characterizes the use of “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” as a war crime. As, Syria is not a party to the ICC, and the P5 never agree on any coercive measure against Syria, any accountability measure by way of “referral” - either by Syria or the SC - is difficult to contemplate.

Prohibition on the use of CWs dates back to the 19<sup>th</sup> century. Customary IHL prohibits belligerent parties to use CWs against anyone in any situation irrespective of the nature of the armed conflict. Moreover, CWs may not be used even in retaliation for a previous CWs attack.<sup>14</sup> The absolute prohibition on CWs imparted by the CWC, and its acceptance by 193 states arguably have made it *jus cogens* norm from which no derogation is permitted. Hence, repeated use of CWS makes Syria responsible for an internationally wrongful act.<sup>15</sup>

#### 4. International Reaction and Reprisal Against Syria

In response to the 2013 CWs attack a joint armed reprisal against Syria was contemplated by the P3, but due to Russian diplomacy the reprisal was averted, and the crisis was resolved by Syria’s acceptance of the CWC obligations<sup>16</sup> and agreement for the elimination of the CWs stock under the mandate of the OPCW and SC.<sup>17</sup> President Obama did not resort to unilateral reprisal to avoid the stigma

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<sup>12</sup> *Tadic*, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, October 2, 1995, para. 128-129. Also, see M. Gandhi, “Common Article 3 Of Geneva Conventions, 1949: In The Era Of International Criminal Tribunals” (2001) ISILYBIHRL 11 <<http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html>> accessed 5 February 2022, where it has been opined that “in general, common article 3 is implemented by setting standards in military manuals, by offering training to armed forces of humanitarian laws, enacting national legislations and by fixing accountability on individuals who are responsible for violating common article 3. There is no internationally administered supervisory body for the implementation of this article. Only obligation imposed under this article is that an impartial humanitarian body, such as International Committee of the Red Cross (ICRC) may offer its services to the parties to conflict. State may or may not accept this offer.”

<sup>13</sup> ICTR Charter, article 4; ICTY Charter, article 3.

<sup>14</sup> ICRC Commentary on Rule 74 Customary IHL.

<sup>15</sup> Responsibility of States for Internationally Wrongful Acts 2001 (RSIWA), articles 1-2.

<sup>16</sup> On 14 September 2013, Syria deposited its instrument of accession to the CWC.

<sup>17</sup> Framework for Elimination of Syrian Chemical Weapons between the Russia and USA (S/2013/565), signed on 14 September 2013, in Geneva.

of intervention in the absence of UN authorization;<sup>18</sup> nevertheless, he used the “threat of force” to deter further use of CWs by Syria.<sup>19</sup> Being unable to agree on any coercive measure, the SC passed two resolutions<sup>20</sup> condemning the use of CWs and calling for restraint by Syria. Thus, international diplomacy and negotiation resolved the tension peacefully.

Subsequently, when the second CWs attack by the Asad regime was reported on 4 April 2017, President Trump ordered unilateral armed reprisal.<sup>21</sup> Accordingly, on 7 April 2017, missiles were fired targeting the Syrian airbase allegedly used for launching the CWs attack.<sup>22</sup> A week later a second armed reprisal occurred when P3 fired missiles at three CWs facilities in response to the third CWs attack.<sup>23</sup> The USA claimed the strike a proportional because it targeted only the facilities used for the CWs attack.<sup>24</sup> Without advancing any legal basis the US representative at the UN defined the reprisal as “justified, legitimate, and proportionate”; meanwhile the UK attempted to justify it as “humanitarian intervention;”<sup>25</sup> and, France defined it as a response to the unlawful use of CWs.<sup>26</sup>

This backdrop leaves questions – is there any difference between belligerent reprisal and armed reprisal? Is armed reprisal permitted in inter-state relations? Can a non-belligerent state resort to armed reprisal against a wrongdoer state for enforcement of IHL obligations? Does CWs attack or humanitarian crisis allow armed reprisal in the absence of UN authorization? The following section attempts to answer these questions.

## 5. Reprisal in International Law

The Arbitral Tribunal in *Nautilaa*-case describes reprisal as an act of self-help by the injured state against the wrongdoer state undertaken after an unsatisfied demand for an internationally wrongful act.<sup>27</sup> Due to its injurious effect, reprisal is

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<sup>18</sup> Jeffrey Lewis & Bruno Tertrais, ‘The Thick Red Line: Implications of the 2013 Chemical-Weapons Crisis for Deterrence and Transatlantic Relations’ (2017) 59(6) *Survival* 77-108.

<sup>19</sup> *Ibid.*

<sup>20</sup> Resolutions 2118 (2013) and 2209 (2015).

<sup>21</sup> Andrew Rafferty and Stacey Klein, ‘Trump Pins Blame for Syrian Attack on Obama Administration’ (NBC NEWS, 4 April 2017).

<sup>22</sup> ‘Syria War: Why Was Shayrat Airbase Bombed?’ (BBC NEWS, 7 April 2017).

<sup>23</sup> Julian Borger and Peter Beaumont ‘Syria: US, UK and France Launch Strikes in Response to Chemical Attack’ (*The Guardian*, 14 April 2018) <<https://www.theguardian.com ... strikes-us-uk-and-france-launch-attack-on-assad-regime>> accessed 22 Feb 2020.

<sup>24</sup> Courtney Kube, Alex Johnson, Hallie Jackson and Alexander Smith, ‘U.S. Launches Missiles at Syrian Base Over Chemical Weapons Attack’ (NBC NEWS, 7 April 2017).

<sup>25</sup> ‘Syria Action - UK Government Legal Position’, 14 April 2018, <<https://www.gov.uk/government ... syria-action-ukgovernment-legal-position>> accessed 25 February 2020.

<sup>26</sup> Sewell Chan, ‘U.N. Security Council Rejects Russian Resolution Condemning Syria Strikes’, (*New York Times*, 14 April 2018) <<https://www.nytimes.com ... SC-airstrikes.html>> accessed 25 Feb 2020.

<sup>27</sup> *Ibid* (n 1).

generally prohibited except to compel a wrongdoer state to return to the lawful course.<sup>28</sup>

The Tribunal suggests that reprisal could be an enforcement measure against a breach of an international obligation subject to the requirements of “subsidiarity” and “proportionality”. Before resorting to reprisal, the aggrieved state must demand redress from the wrongdoer state; if the demand remains unsatisfied only then proportionate armed reprisal might be the last resort. The Tribunal emphasizes that the reprisal should reflect good faith and humanity instead of retaliation. The ICRC also added that reprisal’s decision must come from the highest level of the government, and must cease as soon as the wrongdoer state complies with the obligation.<sup>29</sup>

In *Naulilaa*-case, the resort to reprisal is contemplated on account of a breach of IHL in the context of inter-state armed conflict. The ICRC also confirms this position and defines it as a “belligerent reprisal”. Yet, there is a group of scholars who describe reprisal as the “use of force short of war” against a breach of an international obligation and define it as a “non-belligerent armed reprisal”.<sup>30</sup> Both belligerent and non-belligerent reprisals involve the use of armed force and share a common objective i.e., enforcement of international obligation. Nonetheless, there is a difference in respect of entitlement; belligerent reprisal is the entitlement of the victim state, whereas non-belligerent reprisal is frequently resorted to by the states having no direct injury. Belligerent reprisal is regulated by GCs and APs; whereas, non-belligerent reprisal is regulated by articles 2(4) and 51 of the UN Charter.

Primarily, the use of CWs against civilians in violation of the CWC and IHL makes Syria open to reprisal. But the application of belligerent reprisal is limited to IAC and could be resorted to only by the victim state following the requirements of subsidiarity and proportionality. The conflict in Syria is non-international in nature, and the P3 are not a party to the conflict. The absence of belligerent nexus represents the existence of peace between Syria and P3. The Declaration on Friendly Relations requires the states to refrain from acts of reprisal involving the use of force in peacetime.<sup>31</sup> For not having belligerent nexus, the P3 are also unable to establish either their injury or standing for reprisal under customary IHL.<sup>32</sup> Moreover, nothing absolves the *Naulilaa* requirements of subsidiarity and

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<sup>28</sup> L. Oppenheim, *International Law*, Vol. II, 136 (1952).

<sup>29</sup> ICRC, Commentary on Rule 145, Customary IHL <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule\\_145](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule_145)> accessed 22 Feb 2020.

<sup>30</sup> Andrew D. Mitchell, ‘Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law’ (2001) *Law of Reprisals* 155-177.

<sup>31</sup> GA Resolution 2625 (1970).

<sup>32</sup> Heather Roff, ‘The Syrian Reprisal’ (HUFFPOST, 29 August 2013) <[https://www.huffpost.com/the-syrian-reprisal\\_b\\_3824721?guccounter=1](https://www.huffpost.com/the-syrian-reprisal_b_3824721?guccounter=1)> accessed 15 February 2020.

proportionality. The ICTY in *Martic*<sup>33</sup> and the *Kupreškic*<sup>34</sup> cases while acknowledging the possibility of belligerent reprisal in NIAC, reaffirms the requirements of subsidiarity, proportionality, and belligerent nexus.<sup>35</sup>

Due to the availability of the CWs, the Syrian rebel groups also possessed and used such weapons. The Independent International Commission of Inquiry on Syria also found evidence of CWs attack by them. Against such a backdrop, before initiating any armed reprisal against Syria, the determination of guilt for CWs attack was imperative. The American reprisal in 2017 occurred just after two days of the alleged attack; whereas, the joint reprisal in 2018 took a week pause after the alleged attack. The *Naulilaa* principles require that every unlawful act should be followed by a demand for redress before an injured state can resort to belligerent reprisal. Before armed reprisals against Syria, neither the guilt of the Assad regime was established by evidence, nor there was any demand for redress by the attacking states.<sup>36</sup> Moreover, the demand for redress made after the 2013 CWs attack does not *ipso facto* justify reprisal in subsequent times without any further demand or warning. Therefore, the reprisals against Syria are devoid of the subsidiarity principle. Furthermore, the reprisals lacked “good faith” as required by the *Naulilaa* case, because the joint reprisal intended to change the “Assad regime” rather than promoting “humanity” in Syria.<sup>37</sup> Nonetheless, the reprisals targeted only the military facilities related to the CWs and could be characterized as proportionate. Overall, reprisals on Syria fail to qualify as *de jure* belligerent reprisal due to the absence of belligerent nexus, and disregard of the subsidiarity principle.

Again, articles 2(4) and 51 of the UN Charter require the states to refrain from the threat or use of force against another state except for self-defense against armed attack. Apart from self-defense, the SC can authorize the use of force pursuant to any Chapter VII resolution. As the alleged CWs attacks were not directed against any state, there was no question of self-defense by the P3. Had the Syrian CWs attacks constituted a threat to or breach of international peace, only then the SC might have authorized armed reprisal under article 42 of the UN Charter. In the *Nicaragua* case,<sup>38</sup> the ICJ recognizes non-intervention as the right of every sovereign state and outlaws armed intervention even in the name of humanitarian assistance. Today, “non-intervention” is widely categorized as *ius cogens* norm

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<sup>33</sup> *Prosecutor v Martić*, Case No IT-95-11, Judgement, 8 October 2008.

<sup>34</sup> *Prosecutor v Kupreškic*, Case No IT-95-16-T, Judgment, 14 January 2000.

<sup>35</sup> Veronika Bílková, ‘Belligerent Reprisals in Non-International Armed Conflicts’ (2014) 63 ICLQ 31–65.

<sup>36</sup> Courtney Kube, Alex Johnson, Hallie Jackson and Alexander Smith, ‘U.S. Launches Missiles at Syrian Base Over Chemical Weapons Attack’ (NBC NEWS, 7 April 2017).

<sup>37</sup> Carsten Stahn, ‘Syria and the Semantics of Intervention, Aggression and Punishment on ‘Red Lines’ and ‘Blurred Lines’ (2013) 11 JICJ, 955-977.

<sup>38</sup> *Nicaragua v USA* (1986) ICJ Report at 100.

from which no derogation is permitted.<sup>39</sup> Armed interventions by the P3 in the name of humanitarian assistance without SC's authorization violated the Syrian sovereignty and non-intervention principle.<sup>40</sup> In a controversial argument, Howse and Teitel assert that a humanitarian intervention without SC authorization seems compatible with the UN Charter for the reason that the Charter requires a balance between concern for national sovereignty and the realization of human rights.<sup>41</sup> However, the majority legal opinion follows the ICJ's view that armed intervention by a state or group of states is unlawful unless authorized by the SC.<sup>42</sup> Nils Melzer observes that: "violations of IHL by one state cannot in themselves provide a legal basis for armed intervention by third States, whether in the form of 'humanitarian intervention,' or ... as the 'responsibility to protect'".<sup>43</sup>

If all CWs attacks are assumed to have been launched by the Assad regime, then Syria might be responsible for an internationally wrongful act.<sup>44</sup> Due to the membership in CWC, the P3 might have invoked Syria's responsibility through countermeasures to induce compliance with the covenant obligations.<sup>45</sup> Yet, the entitlement of countermeasure does not relieve the P3 from the obligation to comply with the principle of "non-intervention".<sup>46</sup> Moreover, the Vienna Convention on the Law of Treaties also prohibits reprisal against breach of a treaty provision.<sup>47</sup> The reprisals are part of the law enforcement measures rather than punishment or retribution. Stahn suggests that any forcible action to seek regime accountability for the use of CWs "would be a new type of reprisal, based on a breach of an 'obligation owed to the international community as a whole' (i.e., a new kind of 'humanitarian reprisal')", which has no place in international law.<sup>48</sup> In the absence of UN authorization, the non-belligerent reprisals on Syria do not qualify to be *de jure* countermeasures.

Although earlier, the SC has condemned non-belligerent reprisal without UN approval as illegal, now it seems to "be moving to some sort of acceptance of" non

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<sup>39</sup> Ibid.

<sup>40</sup> Rebecca Barber, 'Is Security Council Authorisation Really Necessary to Allow Cross-Border Humanitarian Assistance in Syria?' (EJIL: Talk, 24 February 2020) <<https://www.ejiltalk.org/is-security-council-authorisation-necessary-to-allow-cross-border-humanitarian-assistance-in-syria/>> accessed 24 Feb 2020.

<sup>41</sup> Robert Howse & Ruti Teitel, 'Why Attack Syria?' (Project Syndicate, 4 September 2013) <<http://www.project-syndicate.org/commentary/humanitarian-versus-punitive-purposes...>> accessed 25 Feb 2020.

<sup>42</sup> *Nicaragua v USA* (1986); Christian Henderson, *The Use of Force and International Law* (CUP 2018); Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 AJIL; Kenneth Anderson, 'Legality of Intervention in Syria in Response to Chemical Weapons Attacks' (ASIL INSIGHTS, 30 August 2013).

<sup>43</sup> Nils Melzer (n 10), 275.

<sup>44</sup> RSIWA, articles 1-2.

<sup>45</sup> RISWA, article 48.

<sup>46</sup> RSIWA, article 50.

<sup>47</sup> VCLT, article 60(5).

<sup>48</sup> Carsten Stahn (n 37).



*de jure* but reasonable reprisals.<sup>49</sup> The Reasonableness of a non *de jure* reprisal depends on its proportionality, nature of the target, and casualties.<sup>50</sup> Reprisals against Syria were a response to the CWs attack and targeted only the CWs installations. The SC's silence on the non-belligerent reprisal against Syria could be translated into its *de facto* acceptance.

## 6. Strengthening IHL to Deter the Use of CWs

The states violate the means and methods of war due to the poor implementation and accountability measures. Robert Heinsch recommends the adoption of both preventive and repressive measures to strengthen the application of the IHL.<sup>51</sup> His preventive measure includes dissemination of IHL, education and training, and appointment of legal advisor to the armed force which may add a direct positive impact on compliance. As a repressive measure, he suggests disciplinary sanctions and prosecution of IHL breach which are expected to have a deterrent effect on the future violation. The IHL must link criminal accountability and state responsibility to strengthen its enforcement. The measures discussed below are likely to improve the application of IHL to deter further use of CWs by Syria.

### 6.1 Preventive Measures

Common article 1 GCs requires the states to “respect and ensure respect” for IHL obligations. Both voluntary implementation and coercive enforcement might help to achieve this objective. To this end, national legislation must incorporate IHL obligations, and to make sure that rules are known and obeyed, widespread education and dissemination must be undertaken among all parties having a stake in mapping IHL obligations.

Implementation of the CWC obligations rests with the member states. Article VII of the CWC, requires the state parties to adopt legislative and administrative measures for national implementation of the covenant obligations. So far, 57 state parties out of 193 have enacted national legislation;<sup>52</sup> the majority of states including Syria have no national legislation to criminalize the use of CWs. States need to translate the obligations into their national legislation and military manuals for better implementation of the CWC. In this connection, the ICRC can play a crucial role in encouraging Syria and others to adopt national legislation ensuring the criminalization, investigation, and prosecution of IHL breaches

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<sup>49</sup> Fiona Mckinnon, ‘Reprisals as a Method of Enforcing International Law’ 4(2) (1991) LJIL 221-248; D. Bowett, ‘Reprisals Involving Recourse to Armed Force’ (1972) 66 AJIL 1; W.V. O'Brien, ‘Reprisals, Deterrence and Self-defence in Counterterror Operations’ (1990) 30 JIL 469.

<sup>50</sup> D. Bowett, *ibid.*

<sup>51</sup> In his lecture on “Implementation and Enforcement of IHL”, 24 February 2020, Leiden University.

<sup>52</sup> OPCW, Legislation Compendium <<https://www.opcw.org/resources/national-implementation/legislation-compedium>> accessed 27 February 2020.

including CWs attacks.<sup>53</sup> Furthermore, the creation of the national IHL committee can add incentives to these measures. Such a committee, generally composed of members of the defense, executive, legislature, judiciary, and academicians may suggest the national government regarding national implementation and dissemination of the IHL.<sup>54</sup> Also, they may influence the national policy not to purchase, produce, or use CWs.

The current armed conflicts around the globe are mostly non-international in nature, and both state and non-state belligerent groups are seen to breach IHL obligations. The use of CWs by Syrian rebel groups underscores the need to engage non-state actors to observe a universal ban on CWs. But, due to the state-centric obligation under the convention, the non-state groups stay beyond the reach of the CWC; the absence of state control in NIAC also worsens the situation. Therefore, comprehensive efforts at the national and international levels are required to ensure observance of the IHL by all belligerent parties. The ICRC and other NGOs can engage them to encourage mutual commitment. Criminalization of the breach of CA3 might add momentum to this initiative. Sassòli suggests that criminalization inspires parties to the NIAC including armed groups to conclude agreements to comply with all or parts of the IHL applicable in the IAC.<sup>55</sup> Such an agreement may include a prohibition of CWs, and the expectation of reciprocity might encourage belligerent parties to refrain from this prohibited weapon.

## 6.2 Coercive Measures

***Ensure compliance with the CWC obligations:*** In case of non-compliance with the CWC, the Executive Council may restrict or suspend the state party's rights and privileges under the CWC until it undertakes to conform with obligations.<sup>56</sup> The serious breach of obligation jeopardizing the object and purpose of the Covenant authorizes the Conference to recommend collective measures consistent with international law.<sup>57</sup> On account of the grave breach, both the Conference<sup>58</sup> and Executive Council<sup>59</sup> may bring the issue to the attention of the UNGA and UNSC for action. The role of the Conference and Executive Council during the Libyan and Syrian crises represents their inability to employ punitive measures due to member states' disagreement. The divide of the P5 also hinders the effective engagement of the SC against the breach of the CWC. Only the objective decision-making within the OPCW and UNSC can ensure compliance and accountability of the state parties including Syria.

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<sup>53</sup> Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?* ICRC, Geneva, 2011, Vol. I, Chapter 13: Implementation Mechanisms 441–444.

<sup>54</sup> Nils Melzer (n 10), 271.

<sup>55</sup> Marco Sassòli (n 53).

<sup>56</sup> CWC, article XII (2).

<sup>57</sup> CWC, article XII (3).

<sup>58</sup> CWC, article XII (4).

<sup>59</sup> CWC, article VIII (36).

**Criminalization as a deterrent:** The criminal repression against the use of chemical and biological weapons was repeatedly stressed by the SC in a number of resolutions, urging the states to adopt and enforce effective penal laws in this regard.<sup>60</sup> Though the 1925 Geneva Protocol is silent on criminalization, article VII of the CWC obliges member states to criminalize the use of CWs in their territory or by their nationals. Criminalization of the IHL breach including serious breach of CA3 can ensure the accountability of individual perpetrators without violating non-retroactivity.<sup>61</sup> Melzer suggests that “the conduct of belligerent parties and the individual politicians, soldiers, and civilians acting on their behalf is ... influenced by the prospect and stigma of criminal prosecution and sanctions.”<sup>62</sup> National criminalization and prosecution might deter the use of CWs by setting the instance of individual accountability.<sup>63</sup>

**Criminal accountability:** The Human Rights Watch observes that after the Joint Investigation identifies Syrian responsibility for CWs attacks, an attempt must be taken to ensure accountability of the perpetrators who ordered and executed these atrocities.<sup>64</sup> The *Anfal* case before the Iraqi High Tribunal is an example of individual accountability for the use of CWS.<sup>65</sup> Moreover, the ICTY, ICTR and ICC have set instances of accountability for breach of IHL in NIAC. Both the ICTY and ICTR were international ad-hoc tribunal created under the mandate of the SC. Under Chapter VII resolution of the SC, a similar tribunal might be created for accountability of the Syrian perpetrators who committed or ordered to commit CWs attacks. On account of disagreement in the SC, also the GA may, subject to the consent of the Syria, exercise powers under article 12 of the UN Charter to constitute a hybrid tribunal. Earlier the GA assumed this authority to establish Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Independent Commission Against Impunity in Guatemala.<sup>66</sup>

In case of gross violation of the IHL constituting international crimes, the ICC might exercise jurisdiction subject to referral either by the state or the SC. Due to political unwillingness and hostility in Syria, there is no prospect for national accountability under the Assad regime. As Syria is not a party to the Rome Statute,

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<sup>60</sup> S/RES/1540, 28 April 2004; S/RES/1673, 27 April 2006.

<sup>61</sup> Marco Sassòli (n 53).

<sup>62</sup> Nils Melzer (n 10), 267.

<sup>63</sup> Annita Larissa Sciacovelli, ‘The Criminalization of the Use of Biological and Chemical Weapons’ in Fausto Pocar, Marco Pedrazzi and Micaela Frulli (eds.) *War Crimes and the Conduct of Hostilities - Challenges to Adjudication and Investigation* (Elgar 2013).

<sup>64</sup> Human Rights Watch, “UN Security Council: Ensure Justice for Syria Atrocities”, <[https:// www.hrw.org/news/2016/08/30/un-security-council-ensure-justice-syria-atrocities](https://www.hrw.org/news/2016/08/30/un-security-council-ensure-justice-syria-atrocities)> accessed 27 February 2020.

<sup>65</sup> Al Anfal case, IHT, Trial Judgement, 24 June 2007; Appeal Judgement, 4 September 2009.

<sup>66</sup> Christian Wenaweser and James Cockayne, ‘Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice’ (2017) 15 JICJ 211-230.

and there is no prospect for self-referral, the ICC's intervention can't be contemplated in the absence of referral from the SC. But, due to the disagreement in the SC, engaging the ICC for accountability of the Syrian perpetrators remains a serious challenge.

Both the OPCW Fact-Finding Mission and OPCW-UN Joint Investigative Mechanism submitted their report to the SC with the proof of chemical attack and corresponding responsibility.<sup>67</sup> But, no enforcement measure ensued from the SC. The over-dependence on the SC, and its paralyze on the contrary, hindered coercive response against the breach of the CWC by Syria. Regrettably, the GA resolution on R2P also has failed to add any quality to the SC's decision-making.<sup>68</sup> Sassòli observes that the present UN system is inherently inappropriate for the implementation of the IHL because of its double standard.<sup>69</sup> Yet, it would be too ambitious to argue that the P5 may resolve not to use "veto" while considering a decision against a serious breach of IHL established beyond reasonable doubt by independent evidence.

***State responsibility for internationally wrongful act:*** Breach of the CWC and IHL obligations makes Syria responsible for an internationally wrongful act.<sup>70</sup> National implementation measures under the CWC and IHL could be explained to include Syria's obligation to investigate and prosecute the alleged perpetrators to put an end to the breach. The ECtHR in *Tagayeva v Russia*<sup>71</sup> and *Isayeva v Russia*<sup>72</sup> cases recognized the application of human rights law in NIAC. So, it could be argued that as a party to the ICCPR, Syria is obliged to ensure victims' right to effective remedy<sup>73</sup> which includes the right to prompt and effective investigation, prosecution, and reparation<sup>74</sup> against alleged breach of non-derogable human rights.<sup>75</sup> Denial of effective remedy constituted a new wrongful act that Syria must cease immediately.<sup>76</sup> Hence, Syria should be pressurized through the CWC Conference and UN organs to cease the continuing "wrongful act" by undertaking appropriate accountability and remedial measures.

### 6.3 Public Reaction, Naming, and Shaming

Due to modern communication technology and social networking, cross-border dissemination of information has become easier. The advent of social media

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<sup>67</sup> OPCW, Fact Finding Mission.

<sup>68</sup> UNGA Resolution, A/RES/63/308, 7 October 2009.

<sup>69</sup> Marco Sassòli (n 53).

<sup>70</sup> RSIWA, article 1.

<sup>71</sup> Judgment on 13 April 2017, application no. 26562/07.

<sup>72</sup> Judgment on 24 Feb 2005, application no. 57950/2005.

<sup>73</sup> ICCPR, article 2.

<sup>74</sup> HRC, General Comment No. 31, The Nature of the General Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004).

<sup>75</sup> Article 4(2) ICCPR provides list of non-derogable human right.

<sup>76</sup> RSIWA, article 30.

journalism during the Arab Spring and Middle Eastern conflicts proved its efficacy in creating world opinion against the regime's atrocities, and breach of IHL by Libya and Syria. Melzer claims that the media report on the systematic torture of prisoners by American soldiers in Abu Ghraib prison caused serious reputational damage which prompted the USA to prosecute the perpetrators.<sup>77</sup> At the national level, media reports generate public reaction against any breach of IHL which may encourage belligerent parties to compliance, dialogue, and peace. The naming and shaming of the regime at the international level is also likely to promote self-restraint, collective countermeasures, inquiry or investigation for determination of responsibility, or accountability.<sup>78</sup> The informal discipline in the form of public opinion, naming, and shaming promote *pacta sunt servanda* among the states. Such criticism though helped Syrian restraint from the use of CWs was not enough to influence accountability.

#### 6.4 Independent and Impartial Investigation

The OPCW-UN Joint Investigation reports which accused the Assad regime of the use of CWs in 2017 and 2018 were rejected by Syria and Russia alleging fabrication.<sup>79</sup> Member states also doubted OPCW's trustworthiness in carrying out its fact-finding mandate.<sup>80</sup> Many states and non-state actors came up with their own methodical research to allege that "the OPCW tampered with the evidence to produce an outcome desired by the geopolitical actors" and "tried to silence its own senior civil servants",<sup>81</sup> "Deliberate manipulation of evidence and obstruction of procedures designed to" have a specific outcome to create a ground for Syrian regime change – was alleged.<sup>82</sup> The allegation received some substance from the facts that, Assad surrendered its CWs to OPCW in 2013 and was not naïve enough to risk an armed reprisal by employing CWs anymore. Moreover, the so-called victims of the third chemical attack appeared in a press conference in the Hague in 2018 and described the incident as a staged event.<sup>83</sup>

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<sup>77</sup> Nils Melzer (n 10), 267.

<sup>78</sup> Ibid.

<sup>79</sup> Kai Kupferschmidt, 'Scientists clash over paper on Syrian sarin attack Weapons expert suggests Assad's regime was not to blame' (2019) 365(6460) Science.

<sup>80</sup> Richard Falk, 'Independent Panel Challenges OPCW Findings on 2018 Attack in Douma, Syria (Foreign Policy Journal, 1 Nov 2019) <<https://www.foreignpolicyjournal.com/2019/11/01/independent-panel-challenges-opcw-findings-on-2018-attack-in-douma-syria/>> accessed 17 February 2020.

<sup>81</sup> Ibid.

<sup>82</sup> Courage, 'Panel Criticizes 'Unacceptable Practices' in the OPCW's investigation of the Alleged Chemical Attack in Douma, Syria on April 7th 2018' (23 October 2019) <<https://www.couragefound.org/2019/10/opcw-panel-statement>> accessed 17 February 2020.

<sup>83</sup> "No Attack, No Victims, No Chem Weapons: Douma Witnesses Speak at OPCW Briefing at The Hague" (RT News, 26 April 2018) <<https://www.rt.com/news/425240-opcw-russia-syria-douma-witnesses>> accessed 28 Feb 2020.

The American abuse of scientific evidence in the Iraq war reinforced the suspicion regarding the credibility of any international investigation report. For determination of responsibility and enforcement of IHL obligations, independent and reliable evidence is prerequisite. For better implementation of the CWC, the OPCW needs to act in an independent, impartial, and credible manner. The breach of the CWC obligations should be investigated by the persons and in the manner, which must be transparent and trustworthy. International fact-finding mission with the mandate to: investigate violation of IHL, identify the perpetrators, collect and preserve evidence for future trial might enhance respect for IHL by creating a prospect for future prosecution.<sup>84</sup>

## 7. Conclusion

Reprisal as a means for enforcement of international obligation is subject to the strict conditions required by the customary IHL and UN Charter. Resort to reprisal, either belligerent or non-belligerent, without meeting *Naulilaa* requirements or UN approval - is illegal, whatever the purpose might be. Reprisals not involving force may be lawful even though taken unilaterally, while those involving armed force may be lawful only if consistent with the customary IHL or UN Charter.<sup>85</sup> Under the UN legal regime, reprisals are only admitted if carried out by economic, financial or other peaceful means. The P3 might have induced Syria through diplomatic correspondence, public appeals, deliberation before the UN or judicial measures without upsetting the settled international law.<sup>86</sup>

Both voluntary acceptance and coercive enforcement of the CWC and IHL are equally important for the prevention of CWs. National incorporation of IHL obligations, its effective dissemination, and formal and informal discipline for breach might promote IHL compliance. Experience from Syria reveals that the ineffectiveness of accountability mechanisms is a major drawback for enforcement of the IHL. Also, the objective role of the state parties in the OPCW and UNSC is decisive for deterrence of the use of CWs through enforcement of the state responsibility and individual accountability.

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<sup>84</sup> Andrew D. Mitchell, 'Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law' (2001) *Law of Reprisals* 155-177.

<sup>85</sup> Mary Ellen O'Connell, 'Unlawful Reprisals to the Rescue against Chemical Attacks?' (*EJIL: Talk!* 12 April 2018) <<https://www.ejiltalk.org/unlawful-reprisals-to-the-rescue-against-chemical-attacks/>> accessed 30 January 2020.

<sup>86</sup> Nils Melzer (n 10), 275.