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Upholding the Ban: The Role of Courts in Enforcing Prohibitions on Biological and Chemical Weapons

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Abstract

Both the Biological Weapons Convention (BWC) and the Chemical Weapons Convention (CWC) establish instruments and mechanisms intended to enforce their respective prohibitions. The majority of these mechanisms are predominantly political in nature and have frequently been subject to criticism, particularly in times of geopolitical instability. Nevertheless, recent years have seen a growing number of national and international legal proceedings initiated in the context of the prohibition of biological and chemical weapons. While these proceedings are not always directly based on the BWC or CWC, they contribute to enhancing the visibility of the relevant prohibitions and, albeit indirectly, to their enforcement. This working paper examines the role of national and international courts in the implementation of the prohibitions on biological and chemical weapons. As will be shown, both levels of adjudication often face procedural constraints that may hinder the effective application of these norms. At the same time, it is encouraging to observe that states are increasingly seeking to adapt international legal frameworks to strengthen the enforcement of such prohibitions, and are also exploring the use of human rights treaties as a complementary legal basis for upholding these norms. Overall, prohibitions relating to biological and chemical weapons appear to feature prominently in a growing body of judicial decisions, thereby enhancing their legal and normative visibility and contributing to their enforcement.

Zusammenfassung

Sowohl das Übereinkommen über biologische Waffen (Biological Weapons Convention, BWC) als auch das Übereinkommen über chemische Waffen (Chemical Weapons Convention, CWC) verfügen über Instrumente und Mechanismen, die der Durchsetzung der jeweiligen Verbote dienen. Der Großteil dieser Mechanismen ist primär politischer Natur und stand insbesondere in Zeiten geopolitischer Instabilität wiederholt in der Kritik. Gleichwohl ist in den vergangenen Jahren eine zunehmende Anzahl nationaler und internationaler Gerichtsverfahren zu beobachten, die im Kontext des Verbots biologischer und chemischer Waffen eingeleitet wurden. Auch wenn diese Verfahren nicht immer unmittelbar auf das BWC oder das CWC gestützt sind, tragen sie doch zur Sichtbarkeit der entsprechenden Verbotsnormen bei und leisten – wenn auch außerhalb der eigentlichen Vertragsregime – einen Beitrag zu deren Durchsetzung. Dieses Arbeitspapier untersucht die Rolle nationaler und internationaler Gerichte bei der Umsetzung der Verbote biologischer und chemischer Waffen. Wie gezeigt wird, sehen sich sowohl nationale als auch internationale Gerichte häufig mit prozessualen Beschränkungen konfrontiert, die eine effektive Durchsetzung der entsprechenden Verbotsnormen erschweren können. Dennoch ist das Zusammenspiel der verschiedenen Institutionen, wie nationaler als auch internationaler Gerichte einschließlich des Europäischen Menschenrechtsgerichtshofs, bemerkenswert. Denn die schiere Anzahl an Gerichtsverfahren und die zeitgleiche Verschränkung von Fragen der Rüstungskontrolle mit beispielsweise menschenrechtlichen Erwägungen verdeutlicht die normative Kraftwirkung der Verbotsnormen gegen chemische, aber letztlich auch biologische Waffen.

Content

I. Introduction

Both the Biological Weapons Convention (BWC)[1] and the Chemical Weapons Convention[2] (CWC) are often regarded as successful instruments of arms control. This perception is supported by their widespread ratification with near universal membership, the successful destruction of chemical stockpiles, a robust verification regime in the context of the CWC, and the relatively rare use of chemical warfare agents, as well as the complete absence of biological weapons use by state actors since the BWC's entry into force. These factors are frequently cited as evidence of the effectiveness of the two conventions.[3] However, a more nuanced examination reveals that the enforcement of the respective prohibitory norms, and the broader international legal standards they represent, often proves challenging. While both treaties contain—albeit to a limited extent—mechanisms for enforcement, these instruments have rarely, if ever, been employed in practice. This situation prompts consideration of alternative avenues for enforcement, particularly institutions capable of upholding the prohibitions on the use of biological and/or chemical weapons through judicial or quasi-judicial processes. In this context, national courts may come into focus. However, international judicial bodies—such as the International Court of Justice (ICJ), the International Criminal Court (ICC), regional human rights courts or tribunals such as the European Court of Human Rights (ECtHR) and could also, in theory, play a meaningful role in enforcing these prohibitions under international law. This working paper aims to provide a closer analysis of alternative enforcement instruments and the related, mostly international institutions, such as courts and tribunals. In addition, national court decisions will also be analyzed with a view to ascertaining to what extent national courts can contribute to upholding the ban on biological and chemical weapons. Under certain conditions, which will be examined in more detail in the course of this working paper, these institutions can complement and thus reinforce both the ban on the use of biological and chemical weapons. At the same time, political decision-makers are called upon to be aware of the relevance of these institutions with regard to the prohibition of biological and chemical weapons and should therefore promote such institutions.

The structure of this working paper is as follows. It begins by examining the enforcement mechanisms set out in the CWC and the BWC. These mechanisms are not traditional legal instruments but mostly political in character. However, as the analysis will demonstrate, these tools are far from sufficient to ensure the effective and sustainable implementation of the prohibition on biological and chemical weapons. Rather, it becomes evident that institutions operating outside the formal frameworks of the BWC and CWC also contribute—often in markedly different ways—to both upholding and enforcing the ban. Accordingly, the following chapters explore the role of national and international courts beyond the conventional normative structure of the BWC and CWC and assess their contribution to the prohibition of biological and chemical weapons. While national court proceedings have a certain relevance, particular attention is paid to the roles of the ICJ—formally envisaged under the CWC—the ICC, and even the ECtHR. These bodies contribute to the maintenance

1 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Washington, Moscow, London, 10 April 1972, in force 26 March 1975, UNTS Vol. No. 1015-I-14860.

2 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Geneva, 3 September 1992, in force 29 April 1997, UNTS Vol. No. 1975 33757.

3 See, for example, Constanzi, The Chemical Weapons Convention is Stronger Than You Think, https://www.armscontrol.org/act/2023-10/features/chemical-weapons-convention-stronger-you-think (Published: October 2023; accessed 30 September 2025) ; UN News, At 50, biological weapons treaty is an international success story, https://news.un.org/en/audio/2025/04/1161916 (Published: April 2025; accessed 30 September 2025).

of the prohibition, support its enforcement, and, in various ways, complement the regulatory framework established by the BWC and CWC. Conversely, a detailed examination of the role of national judicial proceedings, alongside the potential contributions of the ICJ, the ICC, and the ECtHR, reveals that these institutions can make only a limited contribution to the enforcement of prohibitive norms concerning biological and chemical weapons. Their primary influence lies in enhancing the visibility and normative weight of these prohibitions through the initiation of legal proceedings. Nevertheless, numerous legal—often procedural—obstacles underscore the limitations of their enforcement capabilities. Despite this, both the BWC and the CWC remain crucial instruments for upholding the international prohibition of biological and chemical weapons.

II. Definitions

Before examining the enforcement mechanisms within the frameworks of the BWC and the CWC in greater detail, it is necessary to first clarify the terms "compliance" and "enforcement". It should be emphasized at the outset that this working paper adopts a legal perspective and, as such, does not engage in an in-depth analysis of the conceptual meaning, scope, or interpretation of these terms beyond their legal context.

1. Compliance

Compliance refers to the legal obligation to observe the binding rules[4] of international law, such as, for example, the binding rules of a given treaty.[5] As regards treaty obligations Article 26 Vienna Convention on the Law of Treaties (VCLT)[6] stipulates that, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". This provision, also called *pacta sunt servanda*, reflects customary international law and constitutes one of the most fundamental principles of international treaty law.[7] It thereby forms the basic norm governing compliance. As a general rule, every binding provision of a treaty must be respected.[8] However, not all breaches are of equal gravity. The violation of certain provisions may carry significantly more weight than others. For instance, the use of chemical weapons amounts to a grave breach of international law—far more serious than the failure to fulfil procedural obligations such as periodic reporting. The VCLT also addresses the issue of a material breach, providing that such a breach may entitle the other contract-

4 There are at least five different sources of international law that are considered binding. Three of these sources are enumerated in Article 38 of the Statute of the International Court of Justice. According to Article 38, treaties, customary international law, and general principles of international law are sources of international law and thus are legally binding. In addition, Resolutions of the Security Council are also legally binding on all UN Member States pursuant to Article 25 UN-Charter. Furthermore, certain decisions by international organizations (such as Directives by the EU) are also legally binding on their respective Member States. Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, UNTS Vol. No. 892 119; Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, UNTS Vol. No. 993, 3. For details on EU law see *Hestermeyer*, European Union Law, Autonomy of, https://opil.ouplaw.com/display/10.1093/law-epil/9780199231690/law-9780199231690-e2231 (last accessed 30 September 2025).

5 See also *Bothe*, Compliance, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e46?prd=EPIL (last accessed 30 September 2025).

6 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, UNTS Vol. No. 1155 No. 18232.

7 *Aust*, Pacta Sunt Servanda, Max Planck Encyclopedia of Public International Law, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1449?prd=MPIL (last accessed 30 September 2025).

8 See also *Schmalenbach* in *Dörr/Schmalenbach* (eds.), Vienna Convention on the Law of Treaties: A Commentary (2018) 467-492.

ing parties to suspend the operation of the treaty or to adopt countermeasures—measures which must, of course, remain proportionate.[9]

2. *Enforcement*

Enforcement refers to *all* the mechanisms that are available to respond to a violation of an international norm, such as a treaty norm, by a State.[10] Enforcement measures might include political means, including diplomatic pressure and economic sanctions, but it may also encompass legal cases instituted before national courts, the ICJ or the ICC, among others. Although international law generally prohibits the use of force, military action may be undertaken against a state under certain narrowly defined conditions. Such action may be justified either based on Article 51 of the United Nations Charter, which enshrines the right to self-defense, or pursuant to Article 39 in conjunction with Article 42, following a Security Council determination authorizing the use of force.[11] This is permissible only if the state in question is deemed to have committed, or posed, a breach or threat to international peace and security. However, the Security Council may also impose non-military coercive measures. As will be demonstrated below, it has employed such measures in response to the use of chemical weapons by the former *Assad* regime. However, ultimately, it remains within the sovereign discretion of each state to decide whether to adhere to an international norm or to recognize and implement decisions of international judicial bodies such as the ICJ or the ICC. In the absence of a supranational authority comparable to that found in domestic legal systems—capable of enforcing compliance through coercive means such as arrest and imprisonment—the international legal order relies heavily on voluntary adherence to its norms. In this context, the primary incentives for compliance lie in the potential for political pressure, reputational harm, or the threat of proportionate countermeasures. These mechanisms are intended to encourage states either to conform to international legal obligations or, in the event of a breach, to restore the legal status quo. However, the effectiveness of such incentives varies significantly between states—a disparity that can be attributed not only to prevailing geopolitical dynamics but also to enduring economic and political asymmetries among states.[12]

III. Enforcement Mechanisms within the CWC and the BWC

Before examining the role of courts and tribunals in relation to the prohibition of biological and chemical weapons, it is necessary to briefly outline the enforcement mechanisms established under the CWC and the BWC. The CWC, in particular, possesses a relatively comprehensive and effective enforcement architecture. Nevertheless, it is not without its shortcomings. Its enforcement measures are centered on verification—namely, monitoring, inspections, but also fact-finding missions.[13] In cases of serious non-compliance, the sus-

9 See, for example, Article 60 Vienna Convention on the Law of Treaties.

10 *O'Connell*, The Power and Purpose of International Law (2011) 1-3. However, in her book, the author seems to focus on specific enforcement measures, such as the use of force and legal proceedings. For a more comprehensive overview of other measures of enforcement including self-help and diplomatic pressure see *Noortman*, Enforcing International Law: From Self-Help to Self-Contained Regimes (2016) 1-10.

11 *O'Connell,* The Power and Purpose of International Law, 153-192.

12 *Kierulf*, Disarmament (2017) 47; *Iwasawa*, Various Means of Enforcement in International Law, Harvard International Law Journal 2023 Vol. 65 No. 1, 1-24; *Kleinfeld*, Enforcement and the Concept of Law, Yale Law Journal Online 2011 Vol. 121, 293-315, available at https://www.yalelawjournal.org/pdf/1029_pxcrnhac.pdf (last accessed 30 September 2025).

13 For a detailed overview see *Trapp/Tang*, Enhancing the Management and Enforcement of Compliance in the Regime Prohibiting Chemical Weapons UNIDIR Report (2021), https://unidir.org/wp-content/uploads/2023/05/

pension of certain rights and privileges of a State Party would also be possible. What remains notably absent, however, are effective legal procedures capable of addressing violations in a judicial forum. Although the CWC theoretically allows for recourse to the ICJ, the procedural and political obstacles to initiating such proceedings are considerable, and as a result, this mechanism has yet to be invoked. Furthermore, with respect to individuals and their adherence to the Convention's rules, the CWC relies heavily on the effective domestic implementation of its provisions by States Parties. In contrast, the BWC is equipped with significantly fewer enforcement tools, which are largely limited to consultation processes and the possibility of referral to the United Nations Security Council.[14]

1. Enforcement Mechanisms within the CWC

The CWC provides for a range of enforcement measures. They can be summarized as fact-finding, verification, measures to ensure compliance pursuant to Article XII CWC and judicial means with the Organization for the Prohibition of Chemical Weapons (OPCW) occupying a central role in the implementation of the majority of these enforcement mechanisms.[15]

1.1 Fact-finding in the context of the CWC

In recent years, fact-finding within the framework of the CWC has emerged as one of the most effective—albeit politically contentious—mechanisms for addressing the use of chemical weapons. Fact-finding missions, however, do not originate explicitly from the text of the Convention itself. Rather, their legal basis has been established through a broad and purposive interpretation of the treaty's provisions. Nevertheless, in light of their considerable practical relevance and their substantial contribution to investigating incidents involving chemical weapons, a more detailed discussion of fact-finding missions within the CWC framework appears warranted at this juncture.

On 29 April 2014, the Director-General of the OPCW announced the establishment of a fact-finding mission (FFM) tasked with determining whether chemical weapons had been used in Syria. Since its inception, the FFM has published 21 reports on alleged instances of chemical weapons use and has confirmed their use in numerous cases.[16] Moreover, the OPCW-UN Joint Investigative Mechanism (JIM) was established pursuant to United Nations Security Council Resolution 2235 (2015).[17] Under the terms of this resolution, the mandate extended not only to investigating numerous chemical weapons attacks in Syria but also to identifying those responsible. The JIM ultimately concluded that several of these attacks had been perpetrated both by the former Assad regime and by ISIS-affiliated

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WMD_Compliance_Report_V04.pdf (last accessed 30 September 2025).

14 *Hoffberger-Pippan/Pippan*, Inherited obstruction: the complaint procedure under the Biological Weapons Convention and the UN Charter rule on obligatory abstention in the Security Council, Journal of Conflict and Security Law 2025 Vol. 30 No. 1, 121-138.

15 The establishment of the FFM is based on the general authority of the OPCW Director-General "to seek to uphold at all times the object and purpose of the Chemical Weapons Convention". OPCW, Responding to the Use of Chemical Weapons', https://www.opcw.org/our-work/responding-use-chemical-weapons#:~:text=-Fact%2DFinding%20Mission,-In%20response%20to&text=The%20FFM%20is%20required%20to,mandate%20expired%20in%20November%202017 (last accessed 30 September 2025). The authority of the Director General is reinforced by numerous decisions of the OPCW Executive Council as well as United Nations Security Council Resolution 2118 (2013). See United Nations Security Council Resolution 2118, S/RES/2118 (2013). Furthermore, the Syrian Arab Republic has accepted the establishment of the FFM. OPCW, Fact Finding Mission, https://www.opcw.org/fact-finding-mission (last accessed 30 September 2025).

16 *OPCW*, Fact Finding Mission, https://www.opcw.org/fact-finding-mission (last accessed 30 September 2025).

17 United Nations Security Council Resolution 2235, S/RES/2235 (2015).

actors.[18] In relation to the chemical weapons attacks in Ltamenah (2017), Saraqib (2018), and Douma (2018), the OPCW established the Investigation and Identification Team (IIT). Although the IIT was established in response to the incidents mentioned here, its mandate is by no means confined to these cases. In principle, it may be deployed whenever the FFM confirms certain incidents and the JIM has not yet undertaken an investigation.[19] These investigative mechanisms are of critical significance, notwithstanding the fact that their work has often been impeded—or in some cases outright obstructed—by a challenging geopolitical environment. Fact-finding, in contrast to legal proceedings, is principally concerned with establishing an adequate and credible factual record, rather than seeking redress from the state responsible for the use of chemical weapons or for permitting their use within its territory. Fact-finding, including the identification of perpetrators, plays a crucial role in upholding the prohibition of chemical weapons. Despite ongoing geopolitical disruptions, fact-finding missions—frequently led by the OPCW—have been conducted repeatedly. However, the scope of fact-finding is inherently limited to establishing relevant facts and does not amount to legal proceedings. Nonetheless, such procedures may play a meaningful role in supporting judicial processes. But only through judicial processes can states be held legally accountable under international law for the use of chemical weapons. Similarly, in cases involving individual perpetrators, it is solely through criminal proceedings that legal responsibility can be established and enforced.

1.2 Verification

The CWC establishes one of the most comprehensive and robust verification regimes in international arms control. Administered by the OPCW, the verification regime is designed to ensure that States Parties comply with their obligations under the Convention. At the heart of the CWC verification system lies a dual framework of declarations and inspections.[20] States Parties are required to submit initial and annual declarations regarding chemical weapons stockpiles, production facilities, and activities involving scheduled chemicals. These declarations are the basis for the OPCW's verification activities and must be accurate and comprehensive. They cover not only military stockpiles but also civilian chemical industries, particularly those producing or using substances that could be misused for weapons purposes.[21] The verification regime distinguishes between three categories of chemicals—Schedules 1, 2, and 3—based on their potential for use in weapons versus legitimate civilian applications. Schedule 1 chemicals have few or no peaceful uses and are subject to the most stringent controls. Schedule 2 and 3 chemicals have greater commercial utility but are still monitored due to their potential relevance to weapons production.[22] Verification is carried out through on-site inspections, which are both routine and challenge-based. Routine inspections are conducted at declared chemical weapons-related facilities and industrial sites handling scheduled chemicals. These include inspections of chemical weapons storage facilities, destruction facilities, and former production facilities to ensure full

18 For more information see *OPCW*, Syria and the OPCW, https://www.opcw.org/media-centre/featured-topics/opcw-and-syria#:~:text=The%20OPCW%2DUN%20Joint%20Investigative%20Mechanism%20(JIM)%20was%20established,Council%20or%20any%20subsidiary%20organs (last accessed 30 September 2025).

19 Conference of the States Parties, Decision Addressing the Threat From Chemical Weapons Use, C-SS-4/DEC.3 (27 June 2018).

20 *Carlson*, Experience and Challenges in Weapons of Mass Destruction Treaty Verification: A Comparative View in *Avenhaus* et al. (eds.), Verifying Treaty Compliance: Limiting Weapons of Mass Destruction and Monitoring Kyoto Protocol Provisions (2006) 213 (225).

21 *Marauhn*, Routine verification under the Chemical Weapons Convention, in *Bothe/Ronzitti/Rosas* (eds.), The New Chemical Weapons Convention: Implementation and Prospects (1998) 219-248.

22 *Dekker, den*, The Law of Arms Control: International Supervision and Enforcement (2001) 226-227. See also CWC, Annex A.

compliance with disarmament obligations. One of the most innovative features of the CWC is the provision for challenge inspections, which allow any State Party to request the OPCW to conduct an inspection of another State Party's facility if it suspects non-compliance. This mechanism is intended as a powerful deterrent against covert chemical weapons programs. Although no challenge inspection has yet been carried out, the mere existence of this mechanism adds significant credibility to the regime.[23] In addition, the CWC includes measures for monitoring the destruction of chemical weapons stockpiles and production facilities.[24] States Parties are obligated to destroy their chemical weapons under international supervision, and the OPCW verifies and certifies the destruction process. This verification includes continuous monitoring and on-site presence during destruction activities. The regime also encompasses confidence-building measures, including declarations on national chemical industries and assistance and protection against chemical threats.[25] These activities support transparency, cooperation, and mutual trust among States Parties. Despite its strength, the verification regime faces challenges, particularly in the context of technological evolution, dual-use chemical production, and geopolitical tensions.[26] Moreover, while the regime is legally binding, its effectiveness depends heavily on the political will of States Parties.[27]

1.3 Measures to Redress a Situation and to Ensure Compliance, including Sanctions Pursuant to Article XII CWC

One of the most prominent compliance measures with regard to Article XII is the restriction or suspension of the rights and privileges of a State Party. This may be implemented when the Executive Council (EC) has formally requested a State Party to undertake specific actions to remedy a situation deemed incompatible with the CWC. Should the State Party fail to comply with this request within the prescribed timeframe set by the EC, its rights and privileges under the Convention may be curtailed or suspended by the Conference of the States Parties (CSP) accordingly. However, the rights and privileges of a State Party may be restricted or suspended only after prior consultations have been conducted with the State in question.[28] In this context, it must be acknowledged that certain rights cannot be restricted or suspended by the Conference. These include, for instance, the right to remain a member of the Organization. The measures outlined here—namely, the temporary restriction or suspension of certain rights and privileges (excluding membership in the OPCW)—may be applied in response to violations of both procedural provisions and substantive core obligations.[29] For example, at the OPCW's Twenty-Fifth Session of the Conference of States Parties, 87 States Parties voted in favor and 15 against (out of 102 present) of sus-

23 It should be borne in mind, however, that there are academic voices that argue that the absence of use of challenge inspections reduces their credibility. See Patricia Köll, 'The chemical weapons prohibition regime: Organizational, Political and Technical Elements of Success' Master's Thesis (University of Vienna, 2011), 75.

24 See CWC, Part X. See also *Carminati* et al., Chemical Challenges, Prevention and Responses Including Considerations on Industrial Toxic Chemicals for Malevolent Use, CW Precursor Material for IEDs in *Martellini/Malizia* (eds.), Cyber and Chemical, Biological, Radiological, Nuclear, Explosive Challenges: Threats and Counter Efforts (2017) 73-90.

25 *Krutzsch/Myjer/Trapp*, The Chemical Weapons: A Commentary (2014) 315.

26 *Tucker*, Verifying the Chemical Weapons Ban: Missing Elements, Arms Control Association, https://www.armscontrol.org/act/2007-01/features/verifying-chemical-weapons-ban-missing-elements (last accessed 30 September 2025).

27 *Bothe*, Compliance, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e46?prd=EPIL (last accessed 30 September 2025).

28 Cf. Article VIII CWC. See also CWC Commentary, Article XII.

29 *Trapp/Tang*, Enhancing the Management and Enforcement of Compliance in the Regime Prohibiting Chemical Weapons, UNIDIR WMD Compliance Enforcement Series Paper No. 12 (2022) 5-7.

pending Syria's rights and privileges under the CWC—including voting, eligibility for Council election, and holding office—due to credible findings by the Investigation and Identification Team that Syrian government forces used chemical weapons, failed to declare and destroy its stockpiles, and ignored the EC's July 2020 compliance request.[30] The case of Russia and the attempted assassination of *Alexei Navalny* with the nerve agent Novichok demonstrates that the suspension or revocation of certain rights and privileges under the CWC is not always effective as deterrent, likely due in part to prevailing geopolitical tensions.[31] Despite repeated demands from the international community, no such measures were adopted in response to the attempted assassination of *Alexei Navalny* in 2020.[32]

In contrast, the collective measures referred to in Article XII are subject to a higher threshold of gravity. These measures require a certain degree of seriousness in the breach, which, as a rule, pertains to substantive violations rather than procedural infractions. According to Article XII para 3 CWC:

> "[in] cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I, the Conference may recommend collective measures to States Parties in conformity with international law".

In response to Syria's continued violations of the CWC, the CSP adopted a decision in 2023 to impose collective measures against the Syrian Arab Republic.[33] States Parties are called upon to prevent the supply, sale, or transfer—whether directly or indirectly—of chemical precursors, dual-use chemical manufacturing equipment, and related technologies to Syria, irrespective of their origin or means of transport. Additionally, States are urged to implement further restrictions under the CWC on the transfer of toxic chemicals, delivery systems, and associated materials that could contribute to Syria's chemical weapons capabilities.[34] Furthermore, according to Article XII para 4, "[t]he Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council". The most prominent case prompting action by the Security Council is the 2013 chemical weapons attack in Ghouta, Syria. In response, the Security Council adopted Resolution 2118 (2013)[35], which called upon the Syrian Arab Republic to cease its chemical weapons program and to destroy all its chemical weapons stockpiles. Concurrently, the Council emphasized that it retained the authority to take measures under Chapter VII of the UN Charter, including the potential use of military force.[36] Nonetheless, the effectiveness of the Security Council remains limited. Subsequently, Russia, exercising its veto power as a permanent member

30 Executive Council, Decision Addressing the Possession and Use of Chemical Weapons by the Syrian Arab Republic, 9 July 2020, EC-94/DEC.2; OPCW, Decision Addressing the Possession and Use of Chemical Weapons by the Syrian Arab Republic, 21 April 2021, C-25/DEC.9, para 7.

31 See, for example, *Meier/Kelle*, The Navalny poisoning: Moscow evades accountability and mocks the Chemical Weapons Convention, https://thebulletin.org/2021/10/the-navalny-poisoning-moscow-evades-accountability-and-mocks-the-chemical-weapons-convention/ (last accessed 30 September 2025).

32 See, for example, Statement to the Conference of States Parties (CSP-27) Organization for the Prohibition of Chemical Weapons (OPCW), November 29 — December 2, 2022, https://www.cwccoalition.org/wp-content/uploads/2022/11/CSP-27-Individual-NGO-Statement_-Russian-CWC-Compliance.pdf (last accessed 30 September 2025); *Stricker/Ruggiero*, U.S. Must Show Russia There Is No Impunity for Chemical Weapons Use, https://www.fdd.org/analysis/2022/09/29/no-impunity-chemical-weapons/ (last accessed 30 September 2025).

33 Conference of the States Parties, Decision Addressing the Threat from Chemical Weapons Use and the Threat of Future Use, C-28/DEC.12 (30 November 2023).

34 Ibid. Para 7 lit a-c.

35 United Nations Security Council, S/RES/2118 (2013), 27 September 2013.

36 Ibid. Para 13.

of the Security Council, blocked the adoption of further resolutions addressing Syria's use of chemical weapons.[37]

1.4 Judicial Means

The CWC also provides, at least theoretically, for legal proceedings. Article XIV para 2 CWC stipulates that:

> "[w]hen a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the interpretation or application of this Convention, the parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of the parties' choice, including recourse to appropriate organs of this Convention and, by mutual consent, referral to the International Court of Justice in conformity with the Statute of the Court".

The reference to the ICJ constitutes a so-called compromissory clause. This is a treaty provision that grants the parties to the agreement the right to submit disputes concerning the interpretation or application of the treaty to the ICJ.[38] However, the compromissory clause in question is formulated in a particularly narrow manner. A dispute may only be referred to the ICJ if both parties to the dispute consent to such proceedings. In practical terms, the Court's role under Article XIV, paragraph 2, of the CWC has, to date, remained limited in significance. This may, on the one hand, be attributed to the international community's predominant reliance on the mechanisms and instruments available within the framework of the OPCW. On the other hand, it may also reflect the fact that the conditions under which the Court can be engaged are narrowly defined and often procedurally complex. Another important aspect must be taken into consideration. The compromissory clause contained in the CWC applies exclusively to disputes concerning the interpretation or application of the Convention. However, issues related to the fulfillment or non-fulfillment of treaty obligations are not explicitly covered by this provision. As a result, a state that violates the CWC—such as by employing chemical weapons—could potentially evade legal accountability under this clause, simply because the situation may not constitute a disagreement over interpretation or application, but rather a breach of substantive obligations. Thus, the limited scope of the clause may restrict the Convention's effectiveness in addressing clear violations. For this reason, it may also be argued that the role of the ICJ, as envisaged in the CWC, does not pertain to law enforcement in the traditional sense, but rather to the resolution of international disputes.[39]

2. Enforcement Mechanisms within the BWC

Compliance mechanisms under the BWC differs fundamentally from compliance mechanisms under the CWC, primarily due to the divergent institutional structures of the two regimes. The CWC is characterized by a high degree of institutionalization, with the OPCW and its key bodies—most notably the EC and the CSP—playing a central role in ensuring compliance. In contrast, the BWC lacks a comparable institutional framework. To date, the BWC

37 *UN News*, Russia blocks Security Council action on reported use of chemical weapons in Syria's Khan Shaykhun, https://news.un.org/en/story/2017/04/555292 (last accessed 30 September 2025).

38 *Carney*, Compromissory Clauses and the Jurisdiction of the International Court of Justice, American Journal of International Law (1987 Vol. 81 No. 4) 855-887.

39 See also *Papadaki*, Complex Disputes and Narrow Compromissory Clauses: Ukraine's Institution of Proceedings against Russia, https://www.ejiltalk.org/complex-disputes-and-narrow-compromissory-clauses-ukraines-institution-of-proceedings-against-russia/ (last accessed 30 September 2025).

has been supported only by the Implementation Support Unit (ISU), which cannot be equated with an independent international organization and its associated structures, such as those found in the OPCW. The principal provisions concerning compliance within the framework of the BWC are set out in Articles V and VI of the Convention. According to Article V, "[t]he States Parties to this Convention undertake to consult one another and to co-operate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention". In the absence of a dedicated organization or treaty body tasked with monitoring compliance with the BWC—and which does not possess the attributes of an independent international organization—the States Parties must engage with one another directly to seek solutions in cases of alleged violations of either the formal or substantive provisions of the Convention.[40]

According to Article V BWC, "[c]onsultation and co-operation pursuant to this Article may also be undertaken through appropriate international procedures within the framework of the United Nations and in accordance with its Charter". In addition to the provision for mutual consultations among States Parties, the BWC also allows for the involvement of the United Nations Security Council. According to Article VI para 1 BWC:

> "[a]ny State Party to this Convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council."[41]

In the history of the BWC, the formal complaint procedure under Article VI has been invoked only once.[42] The Russian Federation accused both Ukraine and the United States of developing—or having developed—biological warfare agents in covert laboratories located on Ukrainian territory. After bilateral consultations between Russia and, respectively, Ukraine and the United States failed to yield a resolution, Russia referred the matter to the United Nations Security Council pursuant to Article VI of the Convention.[43] Unsurprisingly, the Security Council did not support Russia's claims; a proposed resolution was blocked by vetoes from the United States, France, and the United Kingdom while all other non-permanent members also abstained from voting.[44]

3. The Insufficiency of Enforcement Mechanisms in the Context of the CWC and BWC

The enforcement mechanisms provided under the CWC have, for the most part, already been applied in practice—with the notable exception of formal proceedings before the ICJ as well as challenge inspections. Nevertheless, these mechanisms often fall short of expectations due to geopolitical constraints and tensions. Moreover, the instruments outlined

40 For a comprehensive overview see *Lentzos*, Compliance and Enforcement in the Biological Weapons Convention Regime (UNIDIR 2019), https://unidir.org/files/2020-02/compliance-bio-weapons.pdf (last accessed 30 September 2025).

41 *Hoffberger-Pippan/Pippan*, Inherited obstruction: the complaint procedure under the Biological Weapons Convention and the UN Charter rule on obligatory abstention in the Security Council, Journal of Conflict and Security Law 2025 Vol. 30 No. 1, 121-138.

42 *Lawless*, Russia's Allegations of US Biological Warfare in Ukraine – Part I, https://lieber.westpoint.edu/russias-allegations-us-biological-warfare-ukraine-part-i/ (last accessed 30 September 2025).

43 For more details see *Jakob/Kloth/Mergler*, Investigation of Alleged Use of Biological Weapons – Strengthening the UN Secretary General's Mechanism, PRIF Report (July 2024), https://edoc.rki.de/bitstream/handle/176904/12652/prif0724_barrierefrei-2.pdf?sequence=1&isAllowed=y (last accessed 30 September 2025).

44 *Lawless*, Russia's Allegations of US Biological Warfare in Ukraine – Part II, https://lieber.westpoint.edu/russias-allegations-us-biological-warfare-ukraine-part-ii/ (last accessed 30 September 2025).

above cannot be equated with judicial proceedings. While the suspension or termination of certain rights and privileges, as well as the imposition of collective measures, are designed to exert political pressure on a non-compliant State Party, only Resolutions adopted by the United Nations Security Council, as well as judicial mechanisms, have the capacity to formally compel the violating party to restore the lawful situation. In addition, only judicial proceedings may provide for the award of damages, an avenue not available through the political enforcement measures of the CWC framework. In contrast, the BWC suffers from a near-total lack of institutional enforcement infrastructure. Unlike the OPCW under the CWC, the BWC has no comparable enforcement body, leaving compliance to state-to-state consultations and, in extreme cases, referrals to the UN Security Council under Article VI. However, this mechanism has only been used once—with Russia's claims against the US and Ukraine—ultimately proving ineffective due to political deadlock in the Security Council. Overall, both treaties face serious limitations: the CWC in terms of practical enforcement and political will, and the BWC due to its structural and institutional weakness.

IV. The Role of National Courts

This chapter explores the role of national courts in enforcing and upholding the prohibition of biological and chemical weapons. It begins by examining the obligations incumbent upon States Parties to the CWC and the BWC to implement the relevant provisions of these treaties within their domestic legal frameworks. This includes the enactment, modification, or amendment of criminal legislation, as well as the establishment or designation of appropriate institutional mechanisms—primarily courts—capable of enforcing the prohibitions set forth in the conventions. The principal function of national judicial proceedings in this context is to sanction individual violations of the applicable legal norms. However, as the second section of this chapter will demonstrate, national courts are generally ill-suited to holding foreign state officials—such as heads of state or government—accountable for the use of biological or chemical weapons. This limitation arises from the continued applicability of immunity doctrines under international law, which states are still obliged to respect. Whether states are gradually departing from these established rules of immunity, potentially giving rise to new norms of customary international law—particularly in cases involving serious international crimes—remains an open question that cannot yet be definitively answered.

1. National Implementation

As direct addressees of the various legal rules, States Parties are obliged to either pass new or amend existing criminal laws implementing the various provisions enshrined in the BWC and the CWC respectively.[45] It is important to note that the BWC does not contain an explicit provision prohibiting the use of biological weapons. Nevertheless, the prevailing view among scholars is that such a prohibition is implicitly embedded within the treaty's broader obligations.[46] This interpretative stance gives rise to the question of whether States Parties are consequently required to incorporate a prohibition on the use of biolog-

45 For an extensive overview of national implementation practices in the context of the BWC see *de Vries*, National Implementation of International Norms against Biological Weapons, CBWNet Working Paper No. 8 https://cbwnet.org/media/pages/publications/working-paper/national-implementation-of-international-norms-against-biological-weapons/60ab2f930f-1702984163/wp-8-website-version.pdf (last accessed 30 September 2025). See also *de Vries*, Recent Developments in the National Implementation of Biological Weapons Convention: What Happened Since Resolution 1540? Journal of Conflict and Security Law (2023 Vol. 28 No. 3) 569-592.

46 Cf. Stuart Casey-Maslen, 'Arms Control and Disarmament Law' (Oxford University Press 2021) 45.

ical weapons within their respective national legal frameworks. In this context, it is further assumed that the treaty's implementation provisions encompass the obligation to prohibit use at the domestic level as well.[47] According to Article IV BWC:

> "[e]ach State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere".

By the same token, Article VII CWC establishes several national implementation measures:

> "Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall: (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity; (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law."[48]

The provisions of Article IV BWC and Article VII CWC are designed to ensure that States Parties enact national legislation criminalizing not only the use, but also the possession, dissemination, and production of biological and chemical weapons. Non-compliance with such domestic legal obligations may lead to the initiation of criminal proceedings. National criminal jurisdiction is generally structured in such a way that it permits the prosecution of offenses committed within the territorial boundaries of the state concerned. In addition, domestic criminal proceedings may be initiated when the alleged offender (principle of active personality) or the victim (principle of passive personality) are a national of the respective state, even if the offense was committed abroad.[49] From the standpoint of several national legal systems, certain crimes—such as the use of biological or chemical weapons—are considered so grave that the so-called principle of universal jurisdiction applies. Under this principle, a state may initiate criminal proceedings based on its national legislation, even if the offense was neither committed within its territory nor by one of its nationals, and the victim also did not possess the citizenship of the respective state, aiming to exercise criminal jurisdiction. Put simply, no specific nexus—such as the place of commission or the offender's or the victim's nationality—is required for prosecution, as the exceptional gravity of the offense alone justifies the exercise of jurisdiction.[50]

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47 United Nations Guide to Implementing the Biological Weapons Convention (2023) available at https://www.un-ilibrary.org/content/books/9789211595093 (last accessed 30 September 2025).

48 For a detailed overview see *OPCW*, Manual on National Implementing Legislation on the Chemical Weapons Convention, https://www.vertic.org/wp-content/uploads/2021/08/Manual_NIL_EN.pdf (last accessed 30 September 2025).

49 Cf. *Brown*, Future for Syria and the Chemical Weapons Convention: the legislative implications, https://www.vertic.org/2024/12/future-for-syria-and-the-chemical-weapons-convention-the-legislative-implications/ (last accessed 30 September 2025).

50 See also *OPCW News*, CBW Criminalisation and Universal Jurisdiction (31 December 2001), https://www.opcw.org/media-centre/news/2001/12/cbw-criminalisation-and-universal-jurisdiction (last accessed 30 September 2025).

2. *National Court Decisions: Prosecuting Private Individuals vs. Prosecuting State Actors*

The legally sound implementation of the provisions outlined in the BWC and the CWC may ultimately give rise to national legal proceedings, primarily of a criminal nature, in which individuals are held accountable for unlawful conduct involving biological or chemical weapons. Broadly speaking, two distinct categories of proceedings must be distinguished. First, there are domestic legal proceedings—typically of a criminal nature—in which *private* individuals are prosecuted, for instance, for the unlawful transport of biological or chemical substances across national borders or the production or planned use by non-state actors. Such cases significantly contribute to the practical enforcement and ongoing reinforcement of the ban on biological and chemical weapons. Another important aspect that should not be overlooked concerns the question of whether, in addition to individuals, corporate entities themselves were held accountable for violations of the prohibition on biological and/or chemical weapons. Although this aspect is less widely recognized, it will also be briefly addressed in the following. Second, there are proceedings aimed at holding *state actors* accountable under the principle of universal jurisdiction. In this context, the rules governing immunity become particularly pertinent, as they often pose substantial obstacles to the successful initiation and conduct of such proceedings.

2.1 *Prosecuting Private Individuals before National Courts*

Several national prosecutions have addressed the illicit trafficking of chemical and biological weapons materials. However, such cases remain relatively rare and often fall under broader criminal or export control laws rather than direct enforcement of treaty obligations under the CWC or the BWC.[51] A particularly prominent case is that of *Frans van Anraat*, a Dutch businessman who was convicted by a Dutch court on 23 December 2005 for complicity in war crimes after supplying precursor chemicals used by the Iraqi regime to produce mustard gas during the Iran–Iraq War, which took place between 1980 and 1988.[52] It is important to bear in mind that the accused was convicted for having contributed to war crimes, but the crime in question took place *before* the entry into force of the CWC.[53] In the United States, *Ahmad Feras Diri*, a British national, pleaded guilty to conspiring to export restricted equipment related to chemical weapons detection to Syria, circumventing export control regulations.[54] While the court did not explicitly reference the CWC, its reasoning clearly reflects the underlying prohibition against contributing in any manner to the commission of war crimes, including the use of chemical weapons. In 2020, three individuals in the UK were prosecuted under the Chemical Weapons Act 1996[55] for possessing mustard gas canisters they had discovered in a former Ministry of Defence area and failed to report to the authorities. Despite knowing the danger, the group mishandled the chemical, poured some on the ground, and later dumped the remaining canisters into a lake before seeking medical attention and misleading the police. A large-scale response involving 27 agencies was launched to recover the canisters and mitigate environmental risks. This

51 For a comprehensive overview see *Brown*, Judicial enforcement of BWC and CWC implementing legislation, VERTIC Brief No. 34 (February 2022), https://www.vertic.org/wp-content/uploads/2022/02/VERTIC-Brief-34_TB_final.pdf (last accessed 30 September 2025).

52 Supreme Court of the Netherlands, *Frans van Anraat Case*, 30 June 2009, LJN: BG4822, Hoge Raad, 07/10742 (last accessed 30 September 2025).

53 *Brown*, Judicial enforcement of BWC and CWC implementing legislation, VERTIC Brief No. 34 (February 2022), www.vertic.org/wp-content/uploads/2022/02/VERTIC-Brief-34_TB_final.pdf (last accessed 30 September 2025).

54 United States District Court for the Middle District of Pennsylvania, United States of America vs. Harold Rinko, Ahmad Feras Diri, Moawa Deri and d-Deri Contracting and Trading, 20 November 2012, 3:12-CR—294.

55 Chemical Weapons Act 1996, c 6.

marked the first criminal prosecution under the Act, which implements the CWC by criminalizing a broad range of activities involving chemical weapons.[56] The case highlights the necessity of comprehensive national legislation and inter-agency cooperation to enforce international chemical weapons prohibitions and protect public safety effectively.[57] Cases involving biological weapons are less common. In 2018, German authorities arrested a married couple in Cologne after a foreign intelligence partner alerted them to the suspicious online purchase of castor seeds, leading to the discovery of over 3,000 seeds and 80 mg of ricin—a quantity with the potential to kill approximately 13,500 people. The couple had planned to use the toxin in a terrorist attack inspired by ISIS and had followed detailed instructions found online to extract the substance. In 2020, the Higher Regional Court of Düsseldorf convicted both individuals under Germany's War Weapons Control Act[58] for the deliberate production of a biological weapon, sentencing the man to 10 years and the woman to 8 years in prison.[59] It highlighted the importance of international cooperation in preventing bioterrorism, as the investigation was initiated based on foreign intelligence.[60] In 2017, a US court dismissed charges[61] against a white supremacist who possessed ricin because a legislative error had excluded the toxin from the official list of "select agents" referenced in Section 175b(c) of Title 18 of the US Code[62]. Although prosecutors argued that Congress intended to criminalize such possession, the court ruled that the statute's language could not be interpreted to include ricin, highlighting the legal consequences of imprecise drafting. This failure underscored how mistakes in legislation implementing the BWC can obstruct prosecutions and undermine biosecurity. In response, Congress passed the Effective Prosecution of Possession of Biological Toxins and Agents Act of 2019[63], correcting the drafting error and ensuring ricin possession is clearly covered under federal law. The case illustrates the complexity of implementing the BWC and the necessity of regularly updating and harmonizing legal instruments to reflect scientific and regulatory changes.[64] In 2025, US authorities charged two Chinese nationals with smuggling Fusarium graminearum, a harmful plant pathogen classified as a potential agroterrorism threat. The individuals were accused of violating US customs and smuggling laws, and while not prosecuted under BWC-implementing legislation, the case highlights increasing national awareness of biological threats.[65] Historically, the 1949 *Khabarovsk Trials* in the Soviet Union marked one of the earliest prosecutions of individuals involved in state-sponsored biological war-

56 *UK Environment Agency*, Press release: Trio receive jail term for dumping mustard gas bombs in a Lincolnshire lake, 12 June 2020, https://www.gov.uk/government/news/trio-receive-jail-term-for-dumping-mustard-gas-bombs-in-a-lincolnshire-lake (last accessed 30 September 2025).

57 *Brown*, Judicial enforcement of BWC and CWC implementing legislation, VERTIC Brief No. 34 (February 2022), https://www.vertic.org/wp-content/uploads/2022/02/VERTIC-Brief-34_TB_final.pdf (last accessed 30 September 2025).

58 Act Implementing Article 26 (2) of the Basic Law (War Weapons Control Act) as amended by the Announcement of 22 November 1990, (Federal Law Gazette I, p. 2506) (as amended by Article 3 of the law of 11 October 2002, Federal Law Gazette I, p. 3970).

59 Oberlandesgericht Düsseldorf, Urteil vom 26 März 2020, 6 StS 1/19.

60 Ibid.

61 United States v. Gibbs, Order, CR 17-00005 (N.D. Ga. Sep. 21, 2018) (Doc. 71), at 6.

62 United States Code, Title 18, § 175b(c).

63 S. 744 – Effective Prosecution of Possession of Biological Toxins and Agents Act of 2019 116th Congress (2019-2020), Public Law No: 116-31 (07/25/2019).

64 *Brown*, Judicial enforcement of BWC and CWC implementing legislation, VERTIC Brief No. 34 (February 2022) https://www.vertic.org/wp-content/uploads/2022/02/VERTIC-Brief-34_TB_final.pdf (last accessed 30 September 2025).

65 *Ahmadi*, Chinese nationals accused of smuggling 'dangerous biological pathogen' into US, BBC (4 June 2025), https://www.bbc.com/news/articles/c4gkdppymk4o (last accessed 30 September 2025).

fare, though these occurred prior to the adoption of the BWC.[66] To date, there have been no domestic legal proceedings in which corporate entities have been held directly liable for violations of the prohibition on biological and/or chemical weapons. For the sake of completeness, however, it should be noted that certain jurisdictions have established legal mechanisms to ensure that companies can also be held accountable for such violations, for instance through the imposition of administrative sanctions.[67]

2.2 Prosecuting State Actors: State Immunity as a Barrier for Prosecution

A number of states have empowered criminal courts to exercise *universal* jurisdiction over the most serious international crimes, including crimes against humanity and war crimes. Among these are Germany, Spain, and France.[68] The application of universal jurisdiction presents particular legal challenges when it comes to the prosecution of state organs of foreign countries. To date, there are only a handful of relevant cases, all of which concern officials from the former *Assad* regime, including high-ranking or former state representatives. In April 2021, Syrian victims together with NGOs filed criminal complaints in Sweden against the Syrian government for its use of sarin in the attacks on Al-Ghouta (21 August 2013) and Khan Shaykhun (4 April 2017), seeking accountability under Sweden's universal jurisdiction laws.[69] The complaints are supported by over three years of investigations, including survivor and medical witness testimony, evidence from defectors, open and closed source documentation, and analysis of command responsibility within the Syrian regime. Sweden's legal framework allows for prosecution of war crimes, crimes against humanity, and use of prohibited weapons even when the perpetrators are foreign nationals and the crimes occurred abroad; specific statutes invoked include Sweden's 2014 Act on Genocide, Crimes against Humanity, and War Crimes[70], and provisions of the Swedish Criminal Code[71] when applicable before that act. Although some prosecutions have taken place in Sweden against lower-level perpetrators present in Sweden, no arrest warrants have yet been issued for high-level officials of the Syrian government who orchestrated the attacks.[72] In 2023, the French judiciary took a significant step when the investigating judges of the French Magistrates' Court became the first to issue an arrest warrant against former Syrian President *Bashar al-Assad*, seeking to hold him accountable for, among other offences, the use of chemical weapons in Syria.[73] The legal basis for the issuance of the arrest warrant was Ar-

66 *Polunina*, The Khabarovsk trial. The Soviet riposte to the Tokyo Tribunal, in *Sellars* (ed.), Trials for International Crimes in Asia (2015) 121-144.

67 See, for example, Australia, Crimes (Biological Weapons) Act 1976, available at https://classic.austlii.edu.au/au/legis/cth/consol_act/cwa1976243/ (last accessed 30 September 2025).

68 Cf. *Burck*, The French Arrest Warrant for Assad – Breaking New Ground in the Prosecution of Chemical Weapons Use?, PRIF Blogpost (29 November 2023), https://blog.prif.org/2023/11/29/the-french-arrest-warrant-for-assad-breaking-new-ground-in-the-prosecution-of-chemical-weapons-use/ (last accessed 30 September 2025).

69 *Open Society Justice Initiative*, Universal Jurisdiction in Sweden: Victims of Syria's Chemical Weapons Attacks Demand Justice, (April 2021), https://www.justiceinitiative.org/uploads/c3cda961-388f-4d50-b8b7-e28e5598d1e2/faq_chemical-weapons-criminal-complaints-in-sweden_04192021.pdf (last accessed 30 September 2025).

70 Act on criminal responsibility for genocide, crimes against humanity and war crimes, issued on 28 May 2014, SFS 2014: 406.

71 Swedish Criminal Code (brottsbalken, SFS 1962: 700).

72 *Open Society Justice Initiative*, Universal Jurisdiction in Sweden: Victims of Syria's Chemical Weapons Attacks Demand Justice, (April 2021), https://www.justiceinitiative.org/uploads/c3cda961-388f-4d50-b8b7-e28e5598d1e2/faq_chemical-weapons-criminal-complaints-in-sweden_04192021.pdf (last accessed 30 September 2025).

73 *Reuters*, France issues arrest warrant for Syria's President Assad – source (15 November 2013) https://www.reuters.com/world/france-issues-arrest-warrants-against-syrias-president-assad-source-2023-11-15/ (last accessed 30 September 2025).

ticle 461-23 of the French Penal Code in conjunction with Article 689-11 of the French Code of Criminal Procedure.[74] It is important to emphasize that criminal liability under French law is not limited to those who directly engage in the use of chemical weapons. Military commanders and political leaders—such as former President *Bashar al-Assad*—may also be held accountable, in accordance with the principles of command responsibility enshrined in French criminal legislation. Nonetheless, the issuance of the arrest warrant gives rise to a number of legal and practical questions. Under French law, the exercise of jurisdiction under Article 689-11 of the Code of Criminal Procedure generally requires that the accused has a habitual residence in France.[75] Given that this condition is demonstrably not met in the case of former Syrian President *Bashar al-Assad*, the prospects for the effective initiation and conduct of criminal proceedings against him always appeared limited.[76] In the meantime, the Cour de Cassation has annulled the warrant.[77]

In addition to domestic legal constraints, considerations under international law must also be taken into account. As a general principle, sitting heads of state, heads of government, and foreign ministers enjoy under international law.[78] This doctrine provides that, during their time in office, such officials are immune from foreign criminal jurisdiction not only for acts performed in an official capacity, but also for private acts. Even after leaving office, they continue to benefit from immunity with respect to acts carried out in the exercise of their official functions. At the time the arrest warrant was issued, *Bashar al-Assad* was still serving as head of state. Accordingly, the issuance of the warrant was, in principle, incompatible with established norms of international law and may be considered unlawful.[79] While debates have emerged over possible exceptions to personal immunity in cases involving the most serious international crimes, such discussions have focused primarily—if not exclusively—on international judicial bodies, such as the ICC.[80] To date, no comparable exception has been recognized in the context of purely national proceedings, and extending such an exception to domestic jurisdictions remains legally contentious and difficult to justify under current international law.[81]

A potential solution to the issue at hand—one that would also serve to reinforce the role of national judicial mechanisms—would be the development or modification of the customary international law norm that currently accords full personal immunity to sitting heads of state, heads of government, and foreign ministers. Such a normative shift would re-

74 Code pénal: Chapitre Ier: Des différents crimes et délits de guerre (Articles 461-1 à 461-31), Article 461-3 Création LOI n°2010-930 du 9 août 2010 – Art. 7, Code de procédure pénale: Chapitre Ier: De la compétence des juridictions français (Articles 689 à 689-14), Article 689 – 1 Modifié par LOI n°2023-1059 du 20 novembre 2023 – Art. 22.

75 See Article 689-11 French Code of Criminal Procedure.

76 *Burck*, The French Arrest Warrant for Assad – Breaking New Ground in the Prosecution of Chemical Weapons Use? PRIF Blogpost (29 November 2023), https://blog.prif.org/2023/11/29/the-french-arrest-warrant-for-assad-breaking-new-ground-in-the-prosecution-of-chemical-weapons-use/ (last accessed 30 September 2025).

77 Kim Willsher, 'France's top court annuls arrest warrant for Bashar al-Assad', The Guardian (25 July 2025), https://www.theguardian.com/law/2025/jul/25/french-supreme-court-cancels-arrest-warrant-for-bashar-al-assad (last accessed 30 September 2025).

78 Cf. *Shaw*, International Law (2017) 523-536; *Watts/Foakes*, Heads of State, MPEPIL (July 2023), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1418 (last accessed 30 September 2025).

79 *Burck*, The French Arrest Warrant for Assad – Breaking New Ground in the Prosecution of Chemical Weapons Use? PRIF Blogpost (29 November 2023), https://blog.prif.org/2023/11/29/the-french-arrest-warrant-for-assad-breaking-new-ground-in-the-prosecution-of-chemical-weapons-use/ (last accessed 30 September 2025).

80 Cf. *Cryer* et al., An Introduction to International Criminal Law and Procedure (2007) 434.

81 Cf. *Lemos*, French Contributions to the issue of Head of State Immunity with regard to International Crimes, EJIL Talk (24 April 2024), https://www.ejiltalk.org/french-contributions-to-the-issue-of-head-of-state-immunity-with-regard-to-international-crimes/ (last accessed 30 September 2025).

quire the emergence of a corresponding usus, particularly among the so-called "specially affected states"[82]. The identification of such states is context-dependent and varies with the legal question at issue. In the present context—namely, the immunities of high-ranking state officials in relation to serious international crimes—the state practice of jurisdictions that recognize and actively apply the principle of universal jurisdiction will be of particular relevance in shaping the evolution of customary law.[83]

In addition, the formation of a new customary norm requires not only consistent state practice but also the presence of *opinio juris*—the belief that such practice is carried out of a sense of legal obligation. States that refrain from granting immunity in cases involving serious international crimes must do so not merely as a matter of policy or convenience, but with the conviction that international law mandates such an approach.[84] At present, however, the absence of sufficiently widespread and consistent practice, coupled with a lack of clear *opinio juris*, precludes the conclusion that a customary norm rejecting immunity for serious international crimes in the context of national proceedings is in the process of crystallizing.[85] It remains to be seen how states will position themselves in the future and whether a shift in legal consensus will gradually emerge. In the meantime, former President *Bashar al-Assad* has been deposed. However, even in the current circumstances, the legal situation remains largely unchanged: under international law, former high-ranking state officials continue to enjoy functional immunity for acts performed in an official capacity during their time in office. Only acts committed in a private capacity fall outside the scope of this protection.[86] Given that the alleged use of chemical weapons in Syria was carried out in *Assad's* role as head of state and commander-in-chief of the armed forces, it must, in principle, be classified as an official act.[87] As a result, such conduct would remain shielded by functional immunity even post-tenure. Ultimately, this means that *Assad's* removal from power has not significantly altered the legal barriers to prosecution. Most notably, existing rules on immunity continue to limit the practical role that national courts can play in addressing serious international crimes.[88]

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82 Draft Conclusions on Identification of Customary International Law, with commentaries, General Assembly A/73/10, 2018. See also *Heller*, Specially-Affected States and the Formation of Custom, American Journal of International Law (2018 Vol. 112 No. 2) 191-243.

83 *Burck*, The French Arrest Warrant for Assad – Breaking New Ground in the Prosecution of Chemical Weapons Use? PRIF Blogpost (29 November 2023), https://blog.prif.org/2023/11/29/the-french-arrest-warrant-for-assad-breaking-new-ground-in-the-prosecution-of-chemical-weapons-use/ (last accessed 30 September 2025).

84 International Court of Justice, *North Sea Continental Shelf Case* (Federal Republic of Germany vs. The Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, para 71. See also *Wood/Sender*, Customary International Law, MPEPIL (October 2024), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1393 (last accessed 30 September 2025).

85 *Lemos, French Contributions to the issue of Head of State Immunity with regard to International Crimes, EJIL Talk (24 April 2024),* https://www.ejiltalk.org/french-contributions-to-the-issue-of-head-of-state-immunity-with-regard-to-international-crimes/ (last accessed 30 September 2025).

86 *Burck*, The French Arrest Warrant for Assad – Breaking New Ground in the Prosecution of Chemical Weapons Use? PRIF Blogpost (29 November 2023), https://blog.prif.org/2023/11/29/the-french-arrest-warrant-for-assad-breaking-new-ground-in-the-prosecution-of-chemical-weapons-use/ (last accessed 30 September 2025).

Ibid.

87 It should be borne in mind, however, that there might be positions to the contrary. In Tadic, for example, the ICTY indicated that the use of chemical weapons could never be considered an official act. By the same token, in 2021, the German Bundesgerichtshof argued that the use of chemical weapons cannot be considered an official act, which, ultimately, would allow courts to prosecute individuals without having to fear barriers such as functional immunities. See, ICTY, Prosecutor vs. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), paras 120-124, https://www.icty.org/x/cases/tadic/acdec/en/51002.htm (last accessed 30 September 2025). See also Case number 3 StR 564/19 – Federal Court (Germany), 28 January 2021.

88 *Lemos*, French Contributions to the issue of Head of State Immunity with regard to International Crimes, EJIL Talk (24 April 2024), https://www.ejiltalk.org/french-contributions-to-the-issue-of-head-of-state-immunity-with-regard-to-international-crimes/ (last accessed 30 September 2025).

V. The Role of International Courts and Tribunals

In light of the procedural and international legal challenges outlined above, national courts continue to play only a limited role in the enforcement of the prohibition against the use of biological and chemical weapons when it comes to state actors. At the same time, it must be acknowledged that national court proceedings are primarily designed to hold *individuals* accountable and, as a matter of principle, cannot be used to attribute responsibility to other states for the use of biological or chemical weapons. The following chapter will thus turn to the role of the ICJ as the forum to hold States accountable for having violated international law. As will be demonstrated, the ICJ likewise occupies only a marginal position in the context of the prohibition of biological and chemical weapons, primarily due to the significant difficulties associated with establishing its jurisdiction. The Court's effectiveness remains fundamentally contingent upon the willingness of states to submit to its jurisdiction and to comply with its judgments. In a second step, attention will turn to the role of the ICC. In contrast to the ICJ, the ICC possesses jurisdiction over individuals and prosecutes those responsible for the commission of international crimes, irrespective of whether such acts were carried out in an official or private capacity. In this regard, the ICC may serve as an important pillar of support, given that national courts are precluded from prosecuting state organs of foreign states due to the continued applicability of rules on sovereign immunity. However, a central challenge facing the ICC in this context lies in the fact that the use of chemical weapons is not explicitly enumerated to same scope as contained in the CWC in the Rome Statute[89], the Court's founding instrument, and only a couple of States have ratified the latest amendment explicitly declaring the use of biological agents a war crime. As a result, the relevant legal provisions remain subject to interpretation, creating ambiguity regarding the scope of the Court's jurisdiction over such acts. In a third step, the potential role of the ECtHR will be examined. The use of biological and chemical weapons may, under certain conditions, amount to a violation of fundamental human rights, most notably the right to life, as well as other obligations arising under the European Convention on Human Rights[90]. It is also worth noting that the focus is placed on the ECtHR, as it currently remains the only regional court to have issued at least a limited number of judgments directly or indirectly concerning the prohibition of certain categories of weapons, particularly chemical weapons.[91]

1. *International Court of Justice: Strengthening Visibility of the Norm Prohibiting Chemical Weapons*

As previously noted, Article XIV of the CWC includes a so-called compromissory clause, which allows disputes concerning the interpretation or application of the Convention to be referred to the ICJ. To date, however, this mechanism has remained unused—likely due to the considerable political sensitivities surrounding such cases—despite the existence of numerous legal disputes related to the Convention's provisions.[92] Nonetheless, it is noteworthy that the ICJ has, in at least one instance, been seized on the basis of a different international treaty that might address the use of chemical weapons, albeit indirectly.

89 Rome Statute of the International Criminal Court, Rome, 17 July 1988, in force 1 July 2002, UNTS Vol. No. 38544 2187.

90 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 15, Rome, 4 November 1950, in force 3 September 1953, ETS No. 005.

91 For more information on other regional human rights treaties (and courts) see *Hoffberger-Pippan*, Less-Lethal Weapons under International Law: A Three-Dimensional Perspective (2021) 89-160.

92 *Krutsch/Trapp*, Chemical Weapons Convention: A Commentary (2025) 235.

On 8th June 2023, both Canada and the Netherlands initiated proceedings against Syria before the ICJ for having violated the UN Convention Against Torture (UNCAT)[93] by, among others, using chemical weapons.[94] Before turning to the substantive issues, it is necessary to briefly clarify certain outstanding questions regarding the jurisdiction of the Court. Article 30 of the UNCAT also contains a compromissory clause—a dispute settlement provision which stipulates that, in the event of a disagreement concerning the interpretation or application of the Convention, a State Party may refer the matter to the ICJ.[95] Since Canada, the Netherlands, and Syria are all parties to the Convention, the referral to the Court by Canada and the Netherlands was, in principle, admissible. A further step, however, is to assess whether the use of chemical weapons by the former *Assad* regime can, in fact, be qualified as torture. Pursuant to Article I UNCAT, torture is defined as follows:

> "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (…)".

In principle, the use of chemical weapons could also amount to torture. However, it is important to emphasize that all elements set out in Article 1 UNCAT must be satisfied. This includes, for instance, that an act constitutes torture only if it is carried out for a *specific* purpose, such as obtaining information or a confession from the victim. It is therefore questionable whether the *Assad* regime's widespread use of chemical agents against its own civilian population meets these criteria. The use would need to be deliberately targeted and directed at specific individuals.[96] However, the UNCAT also prohibits degrading and inhuman treatment or punishment. According to Article 16 UNCAT:

> "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

The Court has not yet issued a final ruling on the legal questions at issue. Given that the written submissions by Canada and the Netherlands made only limited reference to the *Assad* regime's use of chemical weapons against its own civilian population, it remains possible that the Court will refrain from addressing this aspect in detail in its final judgment. Should the Court choose to do so, it is unlikely to find a violation of Article 1, given the apparent absence

93 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, UNTS Vol. No. 1465 24841.

94 International Court of Justice, Joint Application instituting proceedings filed in the Registry of the Court on 8 June 2023, Application of the Convention Against Torture And Other Cruel, Inhuman, Or Degrading Treatment or Punishment (Canada and the Netherlands vs. the Syrian Arab Republic) 2023 General List No. 188, available at https://www.icj-cij.org/sites/default/files/case-related/188/188-20230608-app-01-00-en.pdf (last accessed 30 September 2025).

95 On compromissory clauses under international law in more general terms see *Tams*, The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction, SSRN Papers (5 June 2009) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413722 (last accessed 30 September 2025).

96 Zach, Definition of Torture, in Nowak/Birk/ Monina (eds), The United Nations Convention Against Torture and its Optional Protocol: A Commentary, 2nd Edition (2019) 23-72.

of key elements of the offence—such as the specific intent required under that provision. At most, the Court may consider the facts in light of Article 16. Whether it will in fact proceed in this manner, however, cannot be determined with certainty at this stage.[97]

Although the conditions for successful proceedings against Syria before the ICJ might not be fulfilled—whether under Article I or, more plausibly, under Article 16 of the UNCAT—the initiation of formal proceedings has nonetheless renewed the visibility of the prohibition norm of chemical weapons and reinvigorated its presence in public discourse. In the absence of any instances involving the use of biological weapons, there has, of course, been no corresponding legal proceeding before the ICJ. Nevertheless, it remains at least theoretically conceivable that, in the event such weapons were employed, proceedings could be initiated on the basis of the UNCAT. As with cases involving the use of chemical weapons, however, establishing the specific intent required to constitute torture—such as the deliberate infliction of severe pain or suffering—would likely present significant evidentiary challenges. At the very least, it should be acknowledged that the use of biological weapons could potentially amount to a violation of Article 16 of UNCAT (with the same caveats as for chemical weapons). A conclusive determination on these matters, however, can only be made within the context of actual legal proceedings, which themselves presuppose the occurrence of such acts. Fortunately, no such use of biological weapons has taken place to date.

2. *International Criminal Court: An Alternative Avenue, at Least Concerning Biological Weapons*

It is of particular significance that the Rome Statute does not expressly criminalize the use of biological or chemical weapons. Under Article 8(2)(b)(xvii) of the Statute, the employment of "poison or poisoned weapons", as well as "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices," is explicitly prohibited in the context of international armed conflict[98]. A corresponding prohibition applies in non-international armed conflicts for States Parties to the so-called Kampala Amendments—adopted in 2010 as part of a broader effort to expand the scope of the Court's jurisdiction—pursuant to Article 8(2)(e)(xiv).[99] It is important to bear in mind that until today the Statute remains silent on biological weapons as a *concrete* category. However, Articles 8(2)(b)(xvii) and 8(2)(e)(xiv) lend themselves to a broader interpretive approach that could, arguably, cover biological and ultimately chemical weapons as well.[100]

The terminology—particularly the inclusion of "asphyxiating, poisonous or other gases" and

97 Cf. *de Vries/Hoffberger-Pippan*, Chemical Attacks under the Convention against Torture: A New Possible Avenue? PRIF Blogpost (21 August 2023) https://blog.prif.org/2023/08/21/chemical-attacks-under-the-convention-against-torture-a-new-possible-avenue/ (last accessed 30 September 2025).

98 International armed conflict is defined as armed conflict between two or more states. By contrast, non-international armed conflict denotes an armed conflict between a state and a non-state actor or between several non-state actors among themselves. For more information see Emily Crawford and Alison Pert, International Humanitarian Law, 2nd Edition (2015) 45-49.

99 Amendment to article 8 of the Rome Statute of the International Criminal Court, Kampala, 10 June 2010, in force 26 September 2012, UNTS Vol. No. 2868 38544.

100 See, for example, *Trapp*, The Investigation Into the Islamic State and Chemical Weapons, Just Security (27 October 2015) https://www.justsecurity.org/27116/investigation-islamic-state-chemical-weapons/ (last accessed 30 September 2025); *Whiting*, The International Criminal Court, the Islamic State, and Chemical Weapons, Just Security (4 November 2015) https://www.justsecurity.org/27359/icc-islamic-state-chemical-weapons/ (last accessed 30 September 2025). With critical remarks see *Heller*, The Rome Statute Does Not Criminalise Chemical and Biological Weapons, Opinio Juris (5 November 2015) https://opiniojuris.org/2015/11/05/why-the-rome-statute-does-not-criminalise-chemical-and-biological-weapons/ (last accessed 30 September 2025).

"all analogous liquids, materials or devices"—derives from the 1925 Geneva Protocol[101]. The deliberate use of open-ended language such as "other gases" and "analogous materials" may be read as an attempt to capture a broad spectrum of non-conventional weapons, including a various types of biological agents. Nonetheless, the issue of definitional clarity resurfaced during the Kampala negotiations, when Belgium proposed an amendment to explicitly prohibit both chemical and biological weapons under the Rome Statute.[102] This proposal ultimately failed to garner sufficient support and was not adopted. The reasons for this lack of consensus are complex.[103] Notably, the same period saw contentious debates over whether to criminalize the use of nuclear weapons—a move that faced pronounced opposition, particularly from militarily advanced states. In what may be seen as a strategic response, some less affluent States may have resisted the explicit criminalization of comparatively inexpensive and readily deployable weapons, such as biological and chemical agents, as a form of political counterweight.[104] The signatory states to the Rome Statute finally agreed in 2017 that the use of biological agents qualifies as a war crime both in international and non-international armed conflict. Resolution ICC/ASP/16/Res.4[105] stipulates that the use of biological agents will be classified as a war crime in future. The entry into force of this provision follows the rules of Article 121, paragraph 5, of the Rome Statute, which ultimately took place in 2020.[106] This ended years of discussion as to whether the use of biological agents also falls under the prohibitions of the Rome Statute.[107] However, two aspects must be taken into account here. First, the ban on the use of biological agents only applies to those states that have ratified the amendment to the treaty. A total of 24 states have already done so.[108] On the other hand, this does not yet settle the question of an explicit ban on chemical weapons. This point of discussion remains open.

This raises the question of how the legal framework applies to those States that have not ratified the amendment to the Rome Statute, as well as how to address instances involving the use of chemical weapons. It is important to bear in mind that any discussion of the Rome Statute's scope must be situated within the broader framework of the principle of legality (*nullum crimen sine lege*), which occupies a central place in international criminal law.[109] This principle mandates that only conduct clearly and specifically criminalized in the

101 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925, in force 1929, 94 LNTS 65, UNTS No. 2318.

102 United Nations Reference: CN 733 2009, Treaties 8, Belgium, Proposal for Amendments (29 October 2009) https://treaties.un.org/doc/publication/cn/2009/cn.733.2009-eng.pdf (last accessed 30 September 2025).

103 *Geiß*, Poison, Gas and Expanding Bullets: The Extension of the List of Prohibited Weapons at the Review Conference of the International Criminal Court in Kampala, in *Schmitt/Arimatsu/McCormack*, Yearbook of International Humanitarian Law 2010, Volume 13, 337-352 (348).

104 *Geiß/Pues* in *Ambos*, Rome Statute of the International Criminal Court: Article-by-Article Commentary (CH Beck 2022[4)] 607.

105 Resolution ICC-ASP/16/Res.4, adopted at the 12th plenary meeting, on 14 December 2017, by consensus. Available at https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf (last accessed 30 September 2025).

106 Amendment to article 8 of the Rome Statute of the International Criminal Court (Weapons which use microbial or other biological agents, or toxins, New York, 14 December 2017, in force 2 April 2020, UNTS Vol. No. 38544.

107 *Geiß/Pues*, Article 8. War Crimes, in Ambos (ed.), Rome Statute of the International Criminal Court: Article-by-Article Commentary (CH Beck 2022) 317-686 (348).

108 See Amendment to article 8 of the Rome Statute of the International Criminal Court, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-d&chapter=18&clang=_en (last accessed 30 September 2025).

109 For more details see *Kreß*, Nulla poena nullum crimen sine lege, MPEPIL (2010) https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e854?d=%2F10.1093%2Flaw%3Aepil%2F9780199231690%2Flaw-9780199231690-e854&p=emailAg4LJZoegTqCw&print (last accessed 30 September 2025).

Statute can give rise to individual criminal responsibility. As it currently stands, no provision of the Statute explicitly outlaws the use of chemical weapons. At the same time, it must be acknowledged that the Statute's text is marked by a degree of normative ambiguity. A number of its provisions—many of which are derived directly from the Geneva Conventions—are formulated in broad, open-ended terms. For instance, rules pertaining to targeting practices exhibit a considerable degree of legal indeterminacy, which invites interpretive discretion.

Overall, the amendment to the treaty initiated by Belgium, which now explicitly prohibits the use of biological agents under certain conditions, is a welcome development. Nevertheless, the limited number of ratifications remains a significant concern, as does the unresolved issue of how to address the use of chemical weapons. The often broad and open-ended terminology of the Rome Statute appears to allow for an interpretation that includes the use of chemical weapons within its scope. However, such an interpretation ultimately encounters the legal barrier posed by the principle of *nullum crimen sine lege*.

3. The European Court of Human Rights: Embracing Complementarity

In addition to the ICJ, which has jurisdiction exclusively over inter-state disputes,[110] and the ICC, which prosecutes individuals for crimes under international criminal law,[111] there are also regional courts that address, inter alia, the prohibition of chemical and also biological weapons in the context of human rights law. As noted at the outset, this working paper focuses on the ECtHR, as its jurisprudence is particularly relevant to the question of the prohibition of chemical weapons and, by extension, biological weapons. Before examining the pertinent judgments in greater detail, it is necessary to briefly outline the procedural framework through which cases may be brought before the Court. There are two main types of applications to the Court: individual complaints and inter-state complaints. An individual complaint pursuant to Article 34 ECHR allows any person, non-governmental organization, or group of individuals who claims to be a victim of a violation of the rights set out in the ECHR to bring a case against a state party to the Convention provided that all domestic remedies are exhausted.[112] Furthermore, the complaint must be submitted within four months after the final national decision. Judgments are binding on the state concerned. The Committee of Ministers of the Council of Europe supervises the implementation of the judgment, including any compensation (just satisfaction under Article 41) and general or individual measures required to prevent further violations. The inter-state complaint allows one state party to the Convention to bring a case against another state party, alleging violations of the Convention. Unlike individual applications, the applicant state does not need to be a direct victim. The mechanism is often used to highlight systemic or large-scale violations, especially in times of political conflict or war. Though rarely used compared to individual applications, inter-state complaints can play an important role in holding states accountable for serious or widespread human rights abuses.

At least three decisions issued by the ECtHR demonstrate a salient connection between the ECHR and matters relating to the prohibition of chemical weapons. In *Van Anraat vs. the Netherlands*[113], the ECtHR declared inadmissible the application of *Frans van Anraat*, a Dutch businessman convicted for complicity in war crimes for supplying chemical weap-

110 *Shaw*, International Law (Cambridge University Press 2017[8)] 803-812.

111 Ibid. 298-305.

112 *Nowak*, Introduction to the International Human Rights Regime (2003) 168-169.

113 ECtHR, *Van Anraat vs. The Netherlands*, Decision as to the Admissibility of Application No. 65389/09, 6 July 2010.

ons precursors to the Iraqi regime during the Iran-Iraq War. In *Finogenov vs. Russia*[114], the Court addressed the use of an incapacitating chemical substance—reportedly a fentanyl derivative—by Russian security forces during the siege of the Moscow Theatre, an incident that was described by Russia as an "anti-terrorism operation". In *Navalnyy vs. Russia*[115], the Court examined the attempted assassination of Russian opposition leader *Alexey Navalnyy*, in which a nerve agent from the Novichok group—prohibited CWC—was employed. The judgment in the *Navalnyy* case is particularly significant, marking the first time in its history that the Court has invoked an arms control agreement in a judgment —not only by citing it, but also by employing it as an interpretive aid in the context of its own provisions, most notably Article 2 of the ECHR.[116]

However, two important considerations must be borne in mind. In both *Finogenov vs. Russia* and *Navalnyy vs. Russia*, the ECtHR addressed the use of chemical substances exclusively, without reference to biological agents. Only in its decision on the admissibility of *Van Anraat vs. the Netherlands* did the Court refer to the BWC alongside the CWC. However, it did so only as a means to ascertain customary prohibitions of chemical weapons at the time of the crime, which was before th.,e CWC had entered into force. Overall, the Court has more frequently engaged with the prohibition of chemical weapons—primarily due to the fact that such weapons have been employed in a wide range of contexts throughout recent history. In addition to the cases explicitly cited here, the Court has also issued several judgments concerning the use of riot control agents in so-called law enforcement scenarios.[117] In these decisions, it has consistently emphasized that riot control agents do not constitute chemical weapons per se under the legal frameworks applicable to all Council of Europe member states. However, as these cases do not pertain to the use of chemical weapons in the narrower sense—particularly not in the context of armed conflict or so-called targeted killings—they will not be examined in detail here.

The following chapter will examine these decisions in greater depth and explore the ECtHR's emerging complementary role when it comes to the prohibition of chemical but also biological weapons.

3.1 Van Anraat vs. The Netherlands

In the case *Van Anraat vs. the Netherlands* the applicant, *Frans van Anraat*, was convicted in the Netherlands for complicity in war crimes committed during the Iran-Iraq War (1980 – 1988), specifically for supplying chemicals used in mustard gas attacks.[118] He challenged his conviction before the ECtHR, arguing that it violated his right to a fair trial under Article 6 of the ECHR. The ECtHR dismissed *Van Anraat's* application as manifestly ill-founded.[119] The Court found that his conviction was based on foreseeable legal standards and did not violate the principle of *nullum crimen sine lege*. Importantly, in assessing the legality of his conviction, the ECtHR referred to the international legal context prohibiting chemical weapons, including the CWC and the BWC. Although the CWC was adopted after the events in

114 ECtHR, *Finogenov and Others vs. Russia*, Judgment of 4 June 2012, Application Nos. 18299/03 and 27311/03.

115 ECtHR, *Navalnyy vs. Russia*, Final Judgment of 6 September 2023, Application No. 36418/20.

116 For further details see *Hoffberger-Pippan*, The Prohibition of Chemical Weapons and the ECtHR: A Complementary Approach? In *de Vries* (ed.), Chemical and Biological Weapons: The Interconnectivity of Norms (International Humanitarian Law1, 76) (to be published in November 2025).

117 For a definition and a more in-depth discussion on the concept of law enforcement vis-à-vis armed hostilities see, inter alia, *Fortin*, The Accountability of Armed Groups Under Human Rights Law (2017) 36; *Melzer*, Targeted Killing in International Law (2008) 243.

118 ECtHR, *Van Anraaat vs. The Netherlands*, paras 3-7.

119 Ibid. Para 70.

question, the Court acknowledged these treaties as affirming a broader customary international law consensus that the use of chemical and biological weapons is prohibited, especially against civilians.[120] Thus, while the ECtHR did not apply the CWC or BWC directly (as they are not part of the ECHR legal framework), it interpreted them as evidence of existing international norms and customary law that supported the Dutch courts' reasoning. The case illustrates how the ECtHR integrates international disarmament treaties to interpret the legality of state actions and criminal accountability under the Convention.

3.2 Finogenov vs. Russia

On 23 October 2002, a group of approximately forty individuals affiliated with the Chechen separatist movement seized Moscow's *Dubrovka* Theatre, taking over 900 hostages.[121] The building was rigged with explosives, and 18 suicide bombers were positioned among the hostages. After a three-day standoff, Russian security forces launched a controversial rescue operation. On 26 October, a derivative of fentanyl was released into the theatre's ventilation system to incapacitate the hostage-takers. Special forces then stormed the premises, killing most of the suicide bombers, either while they were unconscious or in ensuing exchanges of gunfire. While the operation led to the rescue of over 730 hostages, 129 individuals died as a consequence—102 at the scene (including three from gunfire), 21 during evacuation or transport, and six in hospital.[122] Russian authorities were heavily criticized for failing to provide adequate emergency medical care following the gas deployment. According to witness accounts, the response was chaotic, with victims transported on public buses and many suffocating without timely medical intervention. The applicants, including the brother of two of the deceased, alleged that the Russian authorities failed to properly investigate the deaths. The Court found a violation of Article 2 ECHR (right to life), not for the decision to use the chemical agent per se, but for the insufficient post-operative medical assistance, which contributed significantly to the loss of life.[123] Although Russia classified the hostage-taking at the Moscow Theater as an anti-terrorist operation and acted accordingly, some scholars have argued that, strictly speaking, the events could also be characterized as a non-international armed conflict between Russia and Chechen rebel groups.[124] The Court, however, ultimately refrained from addressing this question directly. Nonetheless, what the Court's decision clearly demonstrates is an explicit condemnation of the substance used during the operation. While there was no direct reference to the CWC, the judgment can be seen as indirectly reinforcing the prohibition of chemical weapons by enhancing the visibility of the ban and situating it within a broader human rights framework.

3.3 Navalnyy vs. Russia

On 20 August 2020, *Alexey Navalnyy*—founder of the Anti-Corruption Foundation and a prominent critic of the Russian government—fell severely ill during a domestic flight from Tomsk to Moscow.[125] He was later transferred to Germany for treatment, where toxicological analyses revealed the presence of a Novichok-group nerve agent[126], a substance pro-

120 Ibid. Para 92.

121 ECtHR, *Finogenov and Others vs. Russia*, para 8.

122 Ibid. Para 24.

123 Ibid. Para 264.

124 See, for example, *Casey-Maslen*, Police Use of Force Under International Law (2017) 286.

125 ECtHR, *Navalnyy vs. Russia*, Final Judgment of 6 September 2023, Application No. 36418/20, para 5.

126 The chemical warfare agent Novichok has been explicitly included in Annex A (Schedule 1) of the Chemical Weapons Convention (CWC) only since 2019. This amendment to the annex was adopted in response to the

hibited under the CWC.[127] *Navalnyy* remained in a coma for an extended period and required lengthy rehabilitation. The ensuing ECtHR proceedings centered on Russia's failure to conduct an effective investigation into the attempted assassination, in potential violation of Article 2 ECHR.[128] The Court reiterated that the right to life imposes a procedural duty on States to investigate life-threatening attacks—irrespective of whether the perpetrators are State agents or private individuals. The Russian authorities claimed to have carried out a "pre-investigation" including witness interviews and forensic analysis, but failed to provide any substantive documentation to the Court. Moreover, despite clear findings by German laboratories and the OPCW confirming the use of a banned nerve agent,[129] Russian officials declined to initiate a comprehensive inquiry, citing alleged lack of cooperation by Germany. The Court held that the investigation lacked transparency, independence, and victim participation. It did not explore potential political motives or the involvement of State agents, nor did it adequately address the use of a chemical weapon. The Court found that such a response did not meet the standard of effectiveness required under Article 2. Importantly, the Court observed that the complexity and sophistication involved in producing and deploying Novichok strongly suggested State involvement: the attack "could hardly be achieved by individuals unconnected to State agencies"[130]. Investigative journalism, including reporting by Bellingcat and The Insider, supported this inference—yet Russian authorities failed to pursue this line of inquiry adequately.[131] The *Navalnyy* case is of considerable significance, as the Court, although not addressing the use of chemical weapons in the context of armed conflict, did consider an attempted targeted killing involving a chemical agent. Notably, the Court explicitly referred to the work, analyses, and findings of the OPCW, and derived specific human rights obligations for Russia. The judgment not only contributes to enhancing the visibility of the CWC and the OPCW, but also establishes a clear connection between the CWC framework and the protection of human rights.

3.4 The Role of the ECtHR: Embracing Complementarity

The three ECtHR decisions discussed above illustrate the important role the Court can play in reinforcing and upholding the prohibitions against chemical and, ultimately, biological weapons. The significance of the Court's findings in *Van Anraat v. the Netherlands* lies in its early recognition, as of 2009, of the prohibition of biological and chemical weapons as norms of customary international law. Moreover, the Court emphasized that such norms must also be known to individuals subject to the law, who are therefore expected to act in accordance with them. Individuals prosecuted under domestic law—for instance, for exporting toxic chemicals to a country engaged in armed conflict—cannot credibly claim ignorance of applicable legal obligations, including those derived from both domestic and

2018 poisoning of Sergei Skripal and his daughter, in which a Novichok agent was used. While the use of toxic chemicals is prohibited under the CWC regardless of whether a substance is explicitly listed in the annexes, the formal inclusion of Novichok serves to reinforce the recognition of its exceptional danger and underscores the international community's concern regarding the use of such agents. For more details see *Kelle*, Adding Novichok Nerve Agents to the CWC Annex on Chemicals: A Technical Fix and Its Implications for the Chemical Weapons Prohibition Regime, UNIDIR Report (UNIDIR 2022) https://unidir.org/wp-content/uploads/2023/05/UNIDIR_Adding_Novichok_Nerve_Agents_CWC_Annex_Chemicals.pdf (last accessed 30 September 2025).

127 See also *Costanzi/Koblentz*, Controlling Novichoks after Salisbury: revising the Chemical Weapons Convention schedules, Non-Proliferation Review (2019 Vol. 26 Special Issue 5-6) 599-612.

128 ECtHR, Navalnyy vs. Russia, Final Judgment of 6 September 2023, Application No. 36418/20, para 130.

129 OPCW News, OPCW Provides Technical Assistance to Germany Regarding Allegations of Chemical Weapons Use Against Alexei Navalny (September 2020) https://www.opcw.org/media-centre/news/2020/09/opcw-provides-technical-assistance-germany-regarding-allegations-chemical (last accessed 30 September 2025).

130 ECtHR, Navalnyy vs. Russia, Final Judgment of 6 September 2023, Application No. 36418/20, para 156.

131 ECtHR, Navalnyy vs. Russia, Final Judgment of 6 September 2023, Application No. 36418/20, 150.

international law. The added value of the *Finogenov* judgment lies in the Court's explicit condemnation of the use of a chemical substance whose lethality far exceeds that of conventional riot control agents, as well as its acknowledgment of the serious health risks posed by such substances. Even though the Court did not expressly refer to the CWC, the *Finogenov* ruling contributed to raising the visibility of the prohibition on chemical weapons and the broader legal and normative discourse surrounding their use. Indirectly, this also served to strengthen the relevant prohibition norm. In the *Navalnyy* case, the Court found a violation of human rights obligations on the grounds that Russia had failed to take adequate measures to investigate the incident and identify those responsible, despite a toxicological analysis having been conducted by the OPCW—the principal international body charged with overseeing compliance with the CWC. In so doing, t he Court not only elevated the visibility of both the OPCW and the CWC but also integrated the OPCW's findings into a human rights-based legal analysis. This integrative approach—linking disarmament norms with human rights obligations—may prove especially significant in addressing future incidents involving chemical weapons. Although the BWC lacks an institutional counterpart to the OPCW, the Court appears—as evidenced by *Van Anraat v. the Netherlands*—to recognize the normative weight of the BWC, despite its institutional limitations, and to incorporate it into its legal reasoning when appropriate.

VI. Conclusion: From Legal Pluralism to Complementary Institutions

National and international courts have the potential to play a significant role in upholding the prohibition of chemical and biological weapons. The enforcement mechanisms established under the CWC are predominantly geared toward verification and fact-finding, yet they lack robust legal procedures. Although the CWC, in principle, permits recourse to the ICJ for disputes concerning the interpretation or application of the Convention, this avenue has never been utilized—largely due to the substantial procedural hurdles that must be overcome to bring a case before the Court. In contrast, the enforcement tools provided by the BWC are even more limited than those of the CWC. Both legal regimes suffer from the absence of effective judicial proceedings. This deficiency pertains not only to proceedings brought against states but also to those targeting individuals responsible for the use of chemical or biological weapons.

Despite the formal legal barriers concerning state organs of foreign states, such as heads of state or government, national court proceedings continue to play a central role in ensuring individual accountability under international law. The cases referenced above addressed a range of scenarios, including the possession of biological or chemical agents and the supply of precursor chemicals to parties involved in armed conflict. While these proceedings did not always refer explicitly to the BWC or the CWC—often relying instead on national export control regulations or general criminal law—they nonetheless contribute to enhancing the visibility and normative force of the prohibitions enshrined in the BWC and CWC. It would, however, be desirable for national courts to make more frequent and explicit reference to the BWC and CWC in relevant cases. Moreover, States Parties to these conventions should ensure that their domestic legal frameworks are comprehensively aligned with, and reflective of, the obligations enshrined in the BWC and CWC.

Although the ICJ has not yet been engaged in a case brought under the CWC, it has nonetheless played a role in relation to the prohibition of chemical weapons. Relying on the UNCAT, which includes a compromissory clause, Canada and the Netherlands have initiated proceedings against Syria. Among the allegations is the use of chemical weapons by the *Assad* regime against its own population. However, even under the framework of UNCAT,

the likelihood of a successful legal outcome remains limited. Acts of torture, as well as inhuman or degrading treatment, are defined by stringent legal criteria. It is not straightforward to subsume the large-scale use of chemical weapons under Articles 1 or 16 of UNCAT. Similarly, the prospects for legal accountability before the ICC appear limited. Although biological weapons have been explicitly criminalized under the Rome Statute since 2017, this provision applies only to states that have ratified the corresponding amendment. Moreover, there is currently no equivalent provision addressing chemical weapons under the Statute. The ECtHR, by contrast, has the potential to play a significantly greater role in upholding the prohibition of biological and chemical weapons. To date, the Court has issued three judgments that engage with the CWC within a human rights framework. Notably, in the *Navalny* case, the ECtHR explicitly referred to the work and findings of OPCW, incorporating them into its own legal analysis. By invoking the CWC directly, the Court not only contributes to raising its visibility but also affirms the multi-normative validity of existing international legal standards concerning the prohibition of chemical weapons. While biological weapons have not yet been used in a context that would give rise to proceedings before the ECtHR, such a scenario cannot be categorically excluded. Should such an incident occur, it is conceivable that it could also entail human rights violations falling within the Court's jurisdiction. Overall, it can be concluded that national and international courts play a significant role in the enforcement of the prohibitions on biological and chemical weapons, despite various challenges. On the one hand, they can complement the sometimes limited enforcement mechanisms of the BWC and the CWC; on the other hand, they contribute to enhancing the visibility of the relevant prohibitive norms. In doing so, they reinforce the normative weight of these prohibitions and thereby support states in implementing appropriate measures through the enforcement of these norms at both national and international levels.

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