CHAPTER 26

Ensuring Compliance with International Obligations Applicable to CBRN Weapons: Supervisory Mechanisms, Sanctions, and Inter-State Litigation

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1 Introduction

The effectiveness of international rules aimed at eliminating or curbing the build-up of CBRN weapons is ultimately dependent on the extent to which States are compelled to comply with the binding international obligations. Whilst arms control and disarmament law (ACDL) forms an assorted net of highly technical and detailed obligations,[1] its enforcement remains today a sticking point. On the one hand, supervisory mechanisms, entrusted to verify that States Parties to relevant agreements abide by their terms, rely on a cooperative strategy and consensual solutions to achieve compliance, rather than on unilateral or multilateral enforcement.[2] On the other hand, the use of coercive powers by the Security Council, as an enforcement mechanism of last resort, may face being vetoed, or simply may not succeed in bringing violators back in line.[3]

It is, therefore, the purpose of this chapter to piece together the patchy framework of different mechanisms aimed at inducing compliance with international obligations applicable to CBRN weapons, mapping them according to the four phases of the emergency management cycle and highlighting deficiencies, strengths, and connections. The chapter examines, firstly, the verification system devised for the most relevant multilateral ACDL treaties (Section 2.1), as well as the investigative bodies established by the United Nations (UN) to determine the circumstances surrounding the development or use of CBRN

1 For a detailed analysis of the relevant obligations, see Part 3 of this volume on CBRN weapons.

2 T Marauhn, 'Dispute resolution, compliance control and enforcement of international arms control law' in G Ulfstein, T Marauhn, A Zimmermann (eds), *Making Treaties Work. Human Rights, Environment and Arms Control* (CUP 2007) 243, 271.

3 See Sections 3.2 and 4 in this contribution.

weapons (Section 2.2). It will then look at the adoption of sanctions, as 'socially organised acts of constraint',[4] to counter CBRN weapons, namely, the collective measures laid down in relevant treaty regimes (Section 3.1) and the coercive measures imposed by the Security Council (Section 3.2), often adopted as a consequence that is triggered by the violation of an international obligation, with a view to ensuring, and/or restoring, full compliance with the law. The soundness of the foregoing instruments will be tested against a case study dealing with one of the most recent dire uses of chemical weapons, which prompted numerous investigations from different international institutions, thus bringing forth the issue of coordination and cooperation among the tasks entrusted to them (Section 4). Lastly, some final remarks will be devoted to inter-State dispute settlement mechanisms concerning the application or interpretation of obligations applicable to CBRN weapons, in light of some recent (and prospective) litigation brought before the International Court of Justice (Section 5).

2 A Bird's-Eye View of Supervisory Mechanisms

2.1 *Verification under Arms Control and Disarmament Regimes*

Genuine compliance with ACDL is usually tested through institutionalised supervision, made up of inspections or other fact-finding activities. Supervisory mechanisms have been envisioned in a wide array of international agreements. Focusing on multilateral treaties with a universal reach,[5] monitoring systems have been included in 'conventional weapons' agreements,[6] treaties banning

4 While the notion of 'sanction' in international law is still fraught with ambiguity, it is here intended to encompass 'coercive measures taken in execution of a decision of a competent social organ, ie an organ legally empowered to act in the name of the society or community that is governed by the legal system', as defined by Abi-Saab (A Pellet, A Miron, 'Sanctions', *Max Planck Encyclopedia of Public International Law* (August 2013) para 8). Therefore, 'unilateral sanctions', as well as measures undertaken by States within the scheme of international responsibility, more properly labelled as 'countermeasures', are not examined in the present analysis.

5 The analysis of bilateral and regional agreements goes far beyond the scope of this chapter. For a comprehensive list of relevant treaties and related compliance mechanisms, see <https://www.nti.org/learn/treaties-and-regimes/treaties/> (all links were last accessed on 31 May 2021).

6 See eg the Arms Trade Treaty (2013) which envisages a verification system based on reporting obligations (art 13).

nuclear tests,[7] or prohibiting certain emplacement of nuclear weapons,[8] as well as disarmament conventions, such as the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW), which has just entered into force.[9] In particular, there are two instruments – the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC) – that deserve closer attention, as they incorporate the most sophisticated verification system based on the mantra 'trust but verify', which encompasses obligations of notification, reporting duties, routine inspections and more intrusive ad hoc procedures. Conversely, the treaty regime covering biological weapons – the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC) – lacks an international monitoring system and the attempt to integrate one failed definitively in 2001.[10]

As far as the CWC is concerned, the Organisation for the Prohibition of Chemical Weapons (OPCW) supervises an international monitoring verification apparatus, which is arguably the most intrusive control regime established thus far in the field of ACDL.[11] In order to validate the information given by States in their initial and annual declarations,[12] the OPCW Technical Secretariat, acting as an independent and impartial fact-finder, conducts routine verification actions, which range from on-site inspections to regular

7 For instance, the Comprehensive Nuclear-Test-Ban Treaty (1996), albeit not yet in force, provides for several measures of verification, including the International Monitoring System (art IV). By contrast, the Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water (1963) does not foresee any international verification system.

8 See eg Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil Thereof (1971), which envisages verification through observation and inspections.

9 The TPNW does not establish new verification mechanisms but relies on the existing safeguards agreements established with the International Atomic Energy Agency. On the TPNW, in general, see M Pedrazzi, 'The Treaty on the Prohibition of Nuclear Weapons: A Promise, a Threat or a Flop?' (2018) 27 ItYBIL 215.

10 On the BWC regime, see more in-depth ch 23 by Poli. It should be noted that, in order to support implementation of the BWC, review conferences (which take place once every five years), an Implementation Support Unit and confidence-building measures play a crucial role (G Venturini, 'Control and Verification of Multilateral Treaties on Disarmament and Non-Proliferation of Weapons of Mass Destruction' (2011) 17 UC Davis JIntL & Policy 345, 371–372).

11 L Tabassi, 'The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction' in G Ulfstein, T Marauhn, A Zimmermann (n 2) 273.

12 Art III, VI CWC.

visits by teams selected by trained inspectors, whose final reports are usually confidential to the State under inspection.[13] The CWC also provides a procedure whereby any State Party can request the OPCW Executive Council to help clarify situations of possible non-compliance of another State Party with the CWC, through consultation and mediation.[14] Remarkably, a further special safety net offered by the CWC's monitoring system are the so called 'challenge inspections'. As a matter of fact, at the request of a State Party, the OPCW Secretariat may conduct inspections of any facility or location, without the right of refusal, to clarify any questions of possible non-compliance,[15] except if the request is considered frivolous, abusive or beyond the scope of the CWC by a three-quarters majority vote by the Executive Council.[16] Although a powerful tool capable of introducing an element of enforcement, challenge inspections have never been requested in practice – probably due to their perception as hostile acts[17] – not even with regard to the critical situation concerning the Syrian Arab Republic, where, instead, several ad hoc investigative actions have been put in place.[18]

In case of doubts or concerns regarding non-compliance with the CWC arising from the verification activities, the OPCW can take 'corrective' actions made up of several incremental steps. Firstly, the Technical Secretariat can try to solve a non-compliance issue through dialogue and consultation with the State concerned before informing the Executive Council.[19] Subsequently, if the issue is not solved, the Executive Council can consult with the State involved, and may request the latter to take measures to remedy the critical situation within a specified time.[20] Moreover, it can inform all States Parties, bring the issue to the attention of the Conference, make recommendations regarding 'measures to redress a situation and to ensure compliance, including sanctions', as stipulated in Article XII,[21] and, eventually, in cases of particular gravity, it shall bring the situation directly to the attention of the UN General

13 According to D Feakes, 'Evaluating the CWC Verification System' (2002) Disarmament Forum 11, 17 'much of the regime of international monitoring is conducted bilaterally between the Secretariat and individual states parties without the involvement of other states parties'.

14 Art IX, paras 3–7 CWC.

15 Art IX, paras 8–25 CWC.

16 Art IX, para 17 CWC.

17 Tabassi (n 11) 286.

18 On the use of chemicals as weapons in Syria, see more in-depth Section 4 in this contribution.

19 Art VIII, para 40 CWC.

20 Art VIII, para 36 CWC.

21 On these measures, see Section 3.1 in this contribution.

Assembly and the Security Council. The possibility to address the Security Council is foreseen also in Article VI BWC, whereby a State Party, which finds that any other State Party is acting in breach of the obligations established therein, is empowered to lodge a complaint directly with the Security Council for further investigation.[22]

By a similar token, the NPT compliance control system, although limited to non-proliferation obligations, provides for verification to be carried out by a competent international institution, the International Atomic Energy Agency (IAEA), and possibly for the enforcement phase to be carried out under the authority of the Security Council.[23] As already discussed in this volume,[24] bilateral Comprehensive Safeguards Agreements, or other types of agreements on safeguards, are concluded with the IAEA, whereby non-nuclear weapons States declare the existence of materials which are then subject to safeguards, including reporting duties, routine inspections, as well as unannounced inspections, aimed at verifying the fulfilment of the obligations assumed under the NPT, with a view to preventing the diversion of nuclear material for peaceful uses to nuclear weapons or other nuclear explosive devices.[25] Pursuant to the IAEA Statute, the IAEA Board has the competence to assess whether a State is not complying with the safeguards agreement and, if so, to request that the State remedy the situation.[26] In case of failure, the Board of Governors has no purely coercive means to restore compliance – except by issuing 'penalties', which will be analysed later[27] – although it can notify the UN Security Council or the General Assembly of non-compliance with safeguards undertakings. Notwithstanding its control system, the IAEA didn't prevent two particularly troublesome situations occurring in relation to Iraq in 1991 and the Democratic People's Republic of Korea (DPRK) in 1993, the latter ultimately withdrawing from the NPT in 2003.[28] Only on certain occasions, has the supervisory activity conducted by the IAEA led the Security Council to adopt a sanctions regime

22 Art VI BWC requires States Parties to cooperate in carrying out any investigation initiated by the Security Council.

23 On the IAEA verification procedure, see, generally, J L Black-Branch, D Fleck (eds), *Nuclear Non-Proliferation in International Law. Volume II: Verification and Compliance* (Asser Press 2016); L Rockwood, 'The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and IAEA Safeguards Agreements' in G Ulfstein, T Marauhn, A Zimmermann (n 2) 301.

24 See ch 24 by Spagnolo.

25 Art III IAEA Statute.

26 Art XII.C IAEA Statute.

27 See Section 3.1 in this contribution.

28 For an overview of these cases, see L Rockwood (n 23) 315–319; M Bothe, 'Weapons of Mass Destruction, Counter-Proliferation', *Max Planck Encyclopedia of Public International Law* (August 2016) para 15.

under Chapter VII of the UN Charter, sometimes within the NPT regime and sometimes outside.[29]

There is no doubt that the verification systems under consideration represent a crucial 'negative' incentive to induce compliance with the agreements, to enhance transparency and to build confidence between States Parties. Yet, a key role in ensuring fulfilment of the terms set out in the agreements is also played by the so-called 'positive' incentives, which consist of a number of benefits, including technical and economic assistance, granted to diligent States that meet their obligations. To give a few examples, the CWC provides emergency assistance and protection should a chemical weapons attack, or a threatened attack, occur;[30] moreover, it promotes economic and technological development of States Parties, by establishing an obligation to facilitate, and the right to participate in, 'the fullest possible exchange of chemicals, equipment and scientific and technical information relating to the development and application of chemistry for purposes not prohibited under [the CWC]'.[31] Likewise, States Parties to the NPT undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy, and also cooperate, if possible, in contributing to further development of nuclear energy for peaceful purposes, with due consideration for the needs of the developing countries.[32] Furthermore, the NPT ensures that non-nuclear-weapon States have access to research and development on the benefits of nuclear explosions conducted for peaceful purposes.[33]

By verifying, and inducing, State compliance with the CWC and NPT provisions, supervisory mechanisms are primarily concerned with the 'prevention' phase of the CBRN emergency management cycle. However, if a CBRN event is likely to have occurred, eg chemical weapons are believed to have been used, there are a number of mechanisms that can be activated, namely, the investigation of alleged use and emergency assistance, which relate more to the 'recovery' and 'response' phases of the cycle, respectively. At any rate, the most critical issue of the international verification system relates to the scope of its application which, evidently, excludes States not party to relevant agreements, in relation to which investigations and coercive measures can be undertaken autonomously under the UN aegis.

29 See Section 3.2 in this contribution.

30 Art X CWC.

31 Art XI CWC, para 2(b).

32 Art IV, para 2 NPT.

33 Art V NPT.

2.2 *The UN Investigative Mechanisms*

In response to the risk posed by CBRN weapons, the UN has developed a wide spectrum of investigative bodies, managed by the UN itself or jointly with other organisations, to shed light on the development or use of CBRN weapons and to ensure accountability for serious violations of human rights and international humanitarian law.[34] To that end, the Security Council; the General Assembly; the Human Rights Council; the Secretary-General; and the High Commissioner for Human Rights, can establish commissions of inquiry, fact-finding missions, inspection regimes, and similar bodies.

A key instrument that stands out in the UN practice is the Secretary-General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons (SGM), established in the late 1980s with the mandate to launch a prompt investigation into allegations concerning the possible use of chemical, bacteriological (biological) and toxin weapons, upon request from any UN Member State, and to report the results of any investigation to all Member States.[35] In great detail, the SGM grants the Secretary-General the authority to deploy a fact-finding team to the site of the alleged incident, with approval and coordination from the territorial State, in order to ascertain in an objective and scientific manner, the facts of alleged violations of the 1925 Geneva Protocol, which bans the use of chemical and biological weapons, or other violations of relevant rules of customary international law.[36] Once the SGM is triggered, a mission team, selected from a roster of experts and laboratories provided by Member States, is composed, according to the Guidelines and Procedures adopted by the General Assembly in 1989.[37] From the very first

34 On this trend, in general, see Z D Kaufman, 'The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations' (2018) 16 JICJ 93, and, more recently, G Le Moli, 'From "Is" to "Ought": The Development of Normative Powers of UN Investigative Mechanisms' (2021) 19 Chinese JIntL 625.

35 The authority granted to the Secretary-General, which can be traced to art 99 UN Charter, was first provided by the General Assembly in 1987 (UNGA Res 42/37 (30 November 1987) UN Doc A/RES/42/37C), and one year later, by the Security Council (UNSC Res 620 (26 August 1988) UN Doc S/RES/620(1988)).

36 <https://www.un.org/disarmament/wmd/secretary-general-mechanism/>.

37 UN Doc A/44/561. The Guidelines have recently undergone a process of review, conducted by the Office for Disarmament Affairs in 2007, together with other organisations, resulting in a revision only of the Appendices to take into account the developments in the biological area. A proposal to revise the mechanism, tabled by the Russian Federation in October 2020, which aimed at awarding the Security Council a much more prominent role (UN Doc A/C.1/75/L.65/Rev.1), has recently been rejected (<https://www.un.org/press/en/2020/gadis3657.doc.htm>). The motion faced strong opposition from several Member States, including European countries that noted that 'the SGM is an independent

time the Secretary-General carried out investigations into the use of chemical and biological weapons in the Iran-Iraq war, the SGM has been activated on a (limited) number of occasions: in Mozambique and Azerbaijan in 1992,[38] and more recently in Syria.[39]

For its part, the Security Council, whose investigative and fact-finding powers are expressively stipulated in Article 34 of the UN Charter, has established a variety of commissions to handle critical situations related to the maintenance of international peace and security, including those arising from the (threat of) use of 'weapons of mass destruction' (WMD). By way of example, the Security Council set up monitoring systems to verify that Iraq was complying with disarmament obligations in the aftermath of the Gulf war,[40] and an investigative body to identify the perpetrators of chemical attacks that occurred during the Syrian conflict.[41] In relation to the chemical attacks in Syria, even the General Assembly took investigative action, taking a historic step by setting up a special mechanism entrusted to collect and analyse evidence of international crimes committed therein that could be preserved for future criminal investigations.[42] Lastly, bodies capable of investigating human rights and humanitarian law violations resulting from the use of CBRN weapons can be commanded to investigate a situation by the UN Human Rights Council (HRC), in the form of an ad hoc commission of inquiry.[43]

All in all, the blossoming of the UN investigative mechanisms has become critical to the promotion of accountability for CBRN incidents involving weapons, especially the most serious ones. By determining the occurrence of CBRN incidents and the facts surrounding any allegations of the use of CBRN weapons, and, at times, even carrying out legal assessments, UN investigative powers can be instrumental to ensuring, or to laying the groundwork for ensuring, the prosecution of those responsible. Though pertaining more to the 'recovery' phase of the CBRN emergency cycle, the UN investigative powers end up exercising also a crucial deterrent function to 'prevent' future similar CBRN events.

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instrument separate from the [BWC], with a different mandate and different membership' (<https://eeas.europa.eu/delegations/un-new-york/88134/node/88134_bs>).

38 UN Doc S/24065, S/24344 respectively detail the results of those two investigations.

39 See Section 4 in this contribution.

40 See the UNMOVIC, which replaced the UNSCOM (Section 3.2 in this contribution).

41 See Section 4 in this contribution.

42 Ibid.

43 Ibid.

3 An Overview of Collective Measures of Constraint

3.1 *Institutional Penalties under Arms Control and Disarmament Regimes*

Once non-compliance with ACDL agreements is suspected or found, graduated measures can be taken by competent institutional organs as an incentive to remedy incorrect behaviour, starting from the removal of treaty benefits to the adoption of penalties as the last stage of the compliance-control system. Accordingly, their goal is to 'reinforce' the prevention phase of the CBRN emergency management cycle. By contrast, when a CBRN event actually occurs, the exercise of sanctioning powers by the supervisory bodies may step more into the 'recovery' phase of the cycle.

For the purpose of this chapter, the constraint measures adopted by the OPCW, and those endorsed by the IAEA, are worth examining. With regard to the in-built sanctions handled by the OPCW, the approach followed appears, as already anticipated, to be more managerial than truly coercive. Specific tools aimed at leading the violator back to compliance are clearly provided in Article XII CWC, titled 'measures to redress a situation and to ensure compliance, including sanctions', which set forth a three-step procedure. Firstly, in cases where a State has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance,[44] and where the State concerned fails to fulfil the request within the specified time, the OPCW Conference may, upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under the CWC until it undertakes the necessary action to conform with its obligations under the Convention.[45] The measures can impinge on a wide set of membership benefits with the only limitation being the deprival of State membership. In doing this, the Conference doesn't necessarily need to ascertain a violation of the Convention and may depart from recommendations received by the Executive Council, although an attempt to solve the issue through consultation between the latter and the State concerned is required in order to take action under Article XII. A further initiative that the Conference may embark upon, in cases where serious damage to the object and purpose of the Convention results from activities prohibited therein, is to recommend 'collective measures' to States Parties, such as the withholding of any exports of chemicals from the concerned State.[46] Although the recommendations are *per*

44 See art VIII, para 36 CWC, and Section 2.1 in this contribution.

45 Art XII, para 2 CWC.

46 Art XII, para 3 CWC.

se not legally binding, a State Party that doesn't comply with them, by assisting and cooperating with the State concerned, can be found to be in breach of Article I, para 1(d) CWC. In cases of particular gravity, the Conference, as a last resort, shall bring the issue, including relevant information and conclusions, to the attention of the UN General Assembly and the Security Council.[47] Despite the detailed and sophisticated procedure offered by the CWC in the event of non-compliance, Article XII had never been implemented, until very recently. Indeed, on 20 April 2021, the OPCW Conference adopted a groundbreaking decision, whereby it suspended certain rights and privileges of the Syrian Arab Republic under the CWC, thus marking the first application of Article XII, para 2.[48] At times, allegations of the breach of the CWC have been discussed during Review Conferences, though without Article XII being formally triggered.[49]

A different kind of centralised penalty applies with regard to the NPT regime, with the IAEA playing the role of 'nuclear watchdog' of an 'early warning system' which does not, strictly speaking, involve an enforcement procedure.[50] Under the verification system established in Article XII.C of the IAEA Statute, in cases where non-compliance issues are reported by the inspectors, and in the event of failure of the concerned State to take fully corrective action within a reasonable time, the IAEA Board may directly curtail or suspend assistance being provided by the Agency or by a member and call for the return of materials and equipment made available to the recipient State. Moreover, in accordance with Article XIX, a member which has persistently violated the provisions of this Statute, or of any agreement entered into by it pursuant to the IAEA Statute, may be suspended from the exercise of the privileges and rights of membership by the General Conference, acting by a two-thirds majority of the members present and voting upon a recommendation by the Board of Governors.[51]

In light of the above overview, it emerges that the relationship between the supervisory organisations and the UN, especially the Security Council, is highly 'institutionalised', so that the former's sanctioning powers can never encroach upon the prerogatives of the latter. This is clear from Article XII, para 3

47 Art XII, para 4 CWC.

48 <https://www.opcw.org/media-centre/news/2021/04/conference-states-parties-adopts-decision-suspend-certain-rights-and>. As for the backdrop against which the OPCW adopted the decision, see Section 4 in this contribution.

49 On such allegations, see G den Dekker, 'Art. XII' in W Krutzsch, E Myjer, R Trapp (eds), *The Chemical Weapons Convention: A Commentary* (OUP 2014) 365, 376.

50 L Rockwood (n 23) 319.

51 Art XIX.B IAEA Statute.

CWC, affirming that measures taken by the OPCW should be 'in conformity with international law', which implies, on the one hand, that the Conference can only recommend peaceful measures and, on the other hand, that measures under the CWC should complement, not undermine, the prerogatives of the Security Council. Needless to say, the Security Council can take actions not only on the basis of 'referral' from the IAEA or the OPCW, but also autonomously under Chapter VII, as long as the risk posed by CBRN weapons constitutes a threat or breach of international peace and security, or an act of aggression, thus overcoming the lack of universality of treaty obligations.

3.2 *Sanctions Imposed by the Security Council*

As is known, the reawakening of the Security Council in the 90s resulted in a more frequent triggering of Chapter VII and in a progressive enlargement of what constitutes a threat to, or breach of, peace pursuant to Article 39 of the UN Charter. The notion came into play in a variety of different situations, including the proliferation of nuclear, chemical, and biological weapons,[52] and, most recently, the spread of biological pathogens causing communicable diseases.[53] With particular regard to WMD, the milestone is the widely discussed Resolution 1540 (2004), whereby the Security Council enacted counter-proliferation measures of a general and abstract character.[54]

On quite a few occasions, the Security Council was able to adopt sanctions pursuant to Article 41 of the UN Charter, mostly of an economic nature, targeting specific CBRN threats, thus preserving and re-establishing international peace and security.[55] The Security Council has, thus, become a major actor in counter-proliferation by intervening in several problematic situations, to begin with, the well-known comprehensive economic embargo imposed against Iraq for the possession of nuclear, chemical and biological weapons, following the invasion of Kuwait in 1990–1991.[56] In the aftermath of the

52 On proliferation of nuclear, chemical and biological weapons, see UNSC Res 825 (1993), 1540 (2004), 1695 (2006), 1718 (2006), 1887 (2009), 2087 (2013), 2094 (2013).

53 The Security Council dealt with the HIV emergency in UNSC Res 1308 (2000), with the Ebola outbreak in UNSCR Res 2177 (2014) and, recently, with the Covid-19 virus in UNSC Res 2535 (2020). The Security Council, while openly employing the language of Chapter VII amid the Ebola crisis, used a more nuanced approach with regard to the Covid-19 outbreak (on this issue, see M Arcari, 'Some thoughts after SC resolution 2532 (2020) on Covid-19' (2020) 70 QIL 59, 62–63).

54 See ch 7 by Poltronieri Rossetti.

55 From the perspective of the CBRN emergency management cycle, these sanctions can be considered as part of the prevention phase, if the CBRN event has not yet occurred, and in between the response and the recovery phase, if the event has occurred, depending on the sanctions' specific purpose.

56 See UNSC Res 661 and 670 (1990), Res 1284 (1999).

controversial use of global sanctions against Iraq, which raised several concerns due to the humanitarian consequences suffered by its population, the Security Council converted the economic embargo into a 'smart' sanctions regime targeting senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled by them or by persons acting on their behalf.[57] Selective embargoes and scaling-down of diplomatic relations have also been imposed on Libya for developing WMD during the 90s,[58] and on two other problematic situations related to the development of nuclear programmes by Iran and the DPRK. With respect to the Iranian nuclear programme, the Security Council adopted sanctions in 2006, partially pursuant to the NPT regime and partially outside that system,[59] and it established the 1737 Committee to monitor the implementation of the measures, which worked in cooperation with the IAEA. The Iranian sanctions regime was eventually lifted in 2016, when the Security Council approved the Joint Comprehensive Plan of Action (JPCOA) in 2015,[60] and when the IAEA reported that Iran had taken the necessary steps to allow verification and monitoring as a result of the implementation of the JPCOA. However, the effectiveness of the JPCOA was steadily undermined in 2018, when the US withdrew from it,[61] claiming that Iran infringed the deal, and reimposed unilateral sanctions against Tehran, and when the latter, in response, exceeded agreed-upon limits and moved away from its nuclear pledges, especially during a period of particular unrest between the two States exacerbated by the killing of Iranian Major General Qasem Soleimani. As for the situation in the DPRK, which withdrew from the NPT in 2003, albeit through dubious procedures,[62] its nuclear programme has been the object of a specific sanctions regime established by the

57 States are required to implement asset freezes and transfer measures in connection with individuals and entities included in the List established pursuant to UNSC Res 1483 (2003), managed by the 1518 Committee.

58 See UNSC Res 748 (1992) and 883 (1993). The sanctions regime was suspended in 1999 and formally lifted in 2003.

59 See UNSC Res 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010).

60 UNSC Res 2231 (2015) provided a 'snap-back' mechanism which leads to the re-imposition of sanctions in case of a violation of the JPCOA, according to a peculiar procedure defined as an 'inversed veto' (H Blix, 'UN Security Council vs. Weapons of Mass destruction' (2016) 85 ActScandJurisGent 147, 160). In April 2020, the US announced its intention to trigger that mechanism, but it encountered objections from other permanent members of the Security Council.

61 See M Arcari, E Milano, 'The Joint Comprehensive Plan of Action five years on: Legal questions and future prospects' (2020) 66 QIL Zoom-in 1, introducing the contributions written by M Sossai and T Cullis and S Noorbaloochi.

62 See, among many, T Coppen, 'Good faith and withdrawal from the Non-Proliferation Treaty' (2014) 2 QIL Zoom-in 21.

Security Council in 2006,[63] overseen by the 1718 Committee, which remains in force today. Recently, Resolutions 2270 (2016) and 232 (2016), following several nuclear tests by the DPRK, set up one of the most comprehensive sanctions regimes ever imposed by the UN, composed of both a selective embargo and targeted measures.[64] On the contrary, in the aftermath of the chemical attacks in Syria, the Security Council, whilst condemning such incidents, failed to adopt a resolution that would have imposed sanctions against parties using chemical weapons, due to the veto powers exercised by permanent members (namely Russia and China).[65]

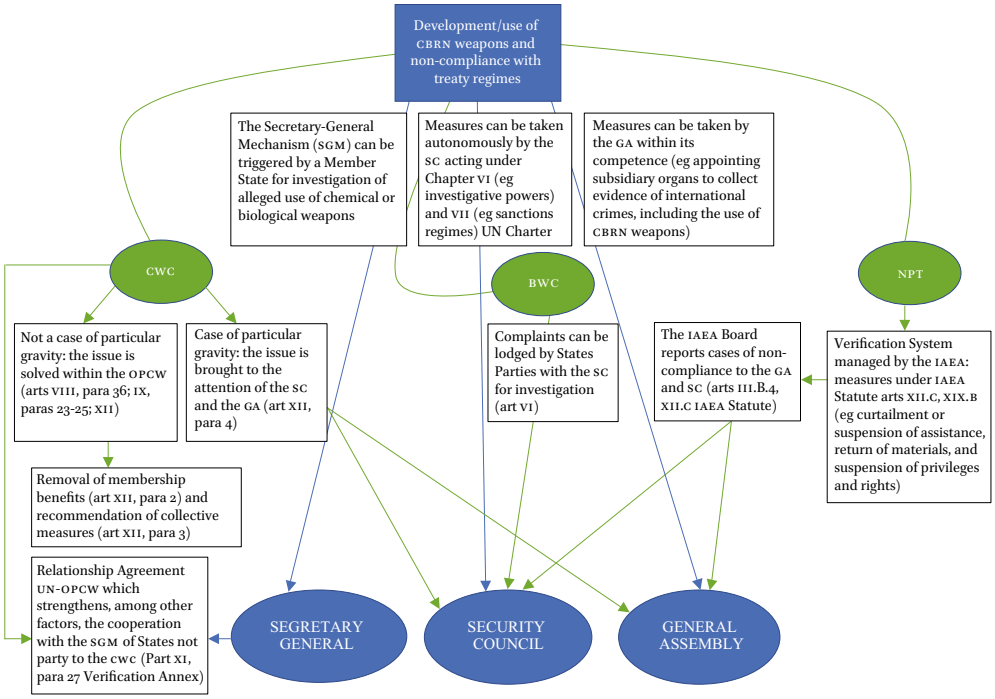

DIAGRAM 1 Non-compliance with international obligations applicable to CBRN weapons. An overview of the 'institutionalised' cooperation between the UN and treaty regimes

63 UNSC Res 1605 (2006), 1718 (2006), 1874 (2009).

64 L Borlini, 'The North Korean Gauntlet, International Law and the New Sanctions Imposed by the Security Council' (2016) ItYBIL 319. Apart from expanding the obligations resulting from the NPT, the resolutions promoted the BWC, to which the DPRK is a party, and the CWC, to which it is not.

65 <https://news.un.org/en/story/2017/02/552362-russia-china-block-security-council-action-use-chemical-weapons-syria>.

4 The Use of Chemical Weapons in Syria as a Catalyst for Multiple Investigations

As shown in the foregoing graphic, the 'institutionalised' relationship between the UN and the CWC regime is articulated on a number of different levels. The 2000 Relationship Agreement signed between the OPCW and the UN aims at further coordinating their respective tasks, through mutual information and reporting obligation schemes, making clear that there is no exclusivity in terms of the sphere of action between one organisation or the other, but that the range of powers entrusted to the OPCW can complement the mandate of the UN. The inter-governmental response to the use of chemical weapons in Syria during the deadly civil war illustrates how the cooperation between the UN and the OPCW has worked in practice, setting up a unique disarmament process, implemented under exceptional circumstances, notwithstanding that the stalemate of the Security Council led to the failure to adopt coercive measures.[66]

In March 2013, the Government of Syria officially made allegations of the use of chemical weapons in the Aleppo area and requested the Secretary-General to investigate under the SGM scheme.[67] With the assistance of the OPCW and the WHO, the Secretary-General dispatched a team mission to Syria in August 2013, which also investigated, as a priority, the second alleged use of chemical weapons, occurring later the same month, in the Ghouta area of Damascus. The mission presented a report on 13 September 2013, which confirmed that chemical weapons (namely sarin) had been used in a large-scale attack against the civilian population, including numerous children.[68] Shortly after, on 14 September 2013, Syria, under great international pressure, signed the CWC and provided notification of its intention to apply the Convention provisionally,[69] while the Russian Federation and the United States reached a historic agreement-framework for the elimination of chemical weapons in Syria. Immediately, the OPCW Executive Council adopted a

66 The assessment of the military reactions to the use of chemical weapons in Syria, and their possible legal justifications, clearly exceeds the scope of this contribution (on this topic see, among many, A de Guttry, 'The Western-led Military Operations in Syria in Response to the Use of Chemical Weapons: A Critical Assessment of the Claim for New Exceptions to the Prohibition on the Use of Force' (2018) Archiv des Voelkerrechts 472).

67 On the SGM, see Section 2.2.

68 UN Doc A/67/997 – S/2013/553.

69 On the question of the provisional application of the CWC, and the alleged 'instant accession' by Syria, see W Krutzsch, E Myjer, R Trapp, 'Annex to The Commentary, Issues Raised by the Accession of Syria to the Chemical Weapons Convention' in W Krutzsch, E Myjer, R Trapp (n 49) 689, 693–694.

decision,[70] fully endorsed and 'hardened' by Security Council Resolution 2118 (2013), which established special procedures for the expeditious destruction of Syria's chemical weapons programme and stringent verification thereof, with reference to the agreement-framework.[71] To oversee the timely elimination of the chemical weapons programme in the safest and most secure manner possible, a special mission, the OPCW-UN Joint Mission on the elimination of Syrian chemical weapons (JMIS), was established[72] and completed its task on 30 September 2014.[73]

Despite the dismantling activities, persistent allegations of chemical weapon attacks in Syria continued and, therefore, the OPCW set up a further investigative body in 2014, namely, the Fact-Finding Mission (FFM), mandated 'to establish facts surrounding allegations of the use of toxic chemicals, reportedly chlorine, for hostile purposes in the Syrian Arab Republic'.[74] Over the last six years, the FFM has looked into several incidents of use of chemical weapons in Syria, and it has confirmed with a 'high degree of confidence' that chlorine and mustard gas have been deployed as weapons.[75] The FFM's findings, in turn, constituted the basis for the work of the OPCW-UN Joint Investigative Mechanism (JIM), an independent body created by Security Council Resolution 2235 (2015), with a groundbreaking mandate to identify the perpetrators of chemical weapon attacks where the FFM determines or has determined that a specific incident in Syria involved or likely involved the use of chemicals as weapons.[76] In its reports presented to the Security Council, the JIM was able to attribute responsibility of four chemical incidents to the Syrian Government.[77] What stands out is that, unlike the FFM which is meant to establish only facts surrounding chemical incidents, the JIM's mandate, for the first time ever, was to determine the attribution of specific chemical incidents,

70 OPCW EC EC-M-33/Dec.1.

71 For the timelines for the elimination of the chemical weapons programme, see <https://opcw.unmissions.org/mandate-and-timelines>.

72 The mandate of the JMIS was based on recommendations developed in close consultations between the UN Secretary-General and the OPCW Director-General and pursuant to the 2000 UN-OPCW Relationship Agreement (see EC-M-33/DEC.1 and UNSC Res 2118 (2013)). On the legal basis from which the JMIS came to light, see R Trapp, 'Elimination of the Chemical weapons Stockpile of Syria' (2014) 19 JC&SL 7, 13–14.

73 A subsequent agreement was signed between the UN and the OPCW to foster closer cooperation between the two organisations (OPCW EC EC-M-34/DG.1 para 17).

74 <https://www.opcw.org/fact-finding-mission>.

75 Ibid.

76 UNSC Res 2235 (2015).

77 On the main findings of the JIM, see Y Naqvi, 'Crossing the red line: The use of chemical weapons in Syria and what should happen now' (2017) 99 IRRC 959, 971–974.

albeit without making any formal or binding judicial determination of criminal liability.[78] Therefore, it comes as no surprise that JIM's special mandate has been harshly criticised, leading to its expiration in November 2017, after the Russian Federation vetoed its renewal.

In the wake of the JIM's non-renewal, an alternative solution was found, in 2018, for identifying the perpetrators of the use of chemical weapons, the so-called Investigation and Identification Team (IIT). This time, the mechanism was created within the OPCW Technical Secretariat, under the authority of the Director-General.[79] After having begun its work in June 2019, the ITT submitted its first 82-page report, confirming that three chemical attacks which occurred in 2017 were launched 'pursuant to orders from the highest levels of the Syrian Arab Armed Forces'.[80] The second report, issued on 12 April 2021, with regard to the incident in Saraqib in 2018, drew a similar conclusion.[81] Given its unique task of identifying perpetrators, the IIT's mandate was also criticised, leading to complaints that the OPCW had exceed its powers. While it's undeniable that the OPCW, in the Syrian crisis context, moved away from purely technical verification and took on the functions of gathering and preserving evidence of chemical attacks, as well as attributing the attacks, in support of possible future judicial determination, the creation of the IIT could not be considered as an *ultra vires* act, since, as convincingly argued by scholars,[82] it pertains to the (implied) powers of the OPCW, set out in Articles VIII, IX, and XII CWC.

The UN efforts to conduct an inquiry into the brutal chemical incidents taking place in Syria have tremendously multiplied over the last decade. In fact, the UN HRC had already activated its own investigative powers with regard to the critical situation in Syria, back in August 2011, by establishing

78 For a thorough discussion on the JIM and its breakthrough mandate, see M Sossai, 'Identifying the Perpetrators of Chemical Attacks in Syria: The Organisation for the Prohibition of Chemical Weapons as Part of the Fight Against Impunity?' (2019) 17 JICJ 211, 214–215.

79 The IIT, established pursuant to OPCW Conference C-SS-4/DEC.3, has been entrusted with the mandate to 'identif[y] and repor[t] on all information potentially relevant to the origin of those chemical weapons in those instances in which the FFM determines or has determined that use or likely use occurred, and cases for which the OPCW-UN JIM has not identified the perpetrators of chemical weapons use in Syria' (<https://www.opcw.org/iit>).

80 OPCW TS S/1867/2020.

81 OPCW TS S/1943/2021.

82 Sossai (n 78) 220–221. For a critical reading of the OPCW Decision (n 79), and the powers delegated to the IIT concerning the determination of responsibility and attribution, see A Orakhelashvili, 'The Attribution Decision Adopted by the OPCW's Conference of States Parties and Its Legality' (2020) 17 IntlOrgLRev 664.

the Independent International Commission of Inquiry on the Syrian Arab Republic (HRC-COI).[83] Interestingly enough, the UN General Assembly, for its part, condemned the use of chemical weapons in Syria on several occasions and, in December 2016, took the groundbreaking decision to institute the 'International, Impartial and Independent Mechanism to ensure due Punishment to the Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011' (known in shorthand as IIIM).[84] The mechanism arguably falls within the boundaries of the General Assembly's competence, despite the fact that Russia and Syria have persisted in objecting to the step made as being *ultra vires*.[85] The IIIM is neither a prosecutor's office nor a court, but it collects, and analyses, information and evidence of international crimes committed in Syria, including those deriving from the use of chemical weapons, with the ultimate goal of assisting national, regional or international courts that have or will have jurisdiction over these crimes. The HRC-COI and the IIIM are complementary despite having distinct mandates: the former collects information, reports on broad patterns of violations and makes recommendations, notably to Member States; in contrast, the IIIM assists courts, based on the information collected by others – notably the HRC-COI – and it is not expected to publicly report on its substantive work.[86] Additionally, the OPCW made arrangements to connect the work of the IIT to the IIIM mandate, as the former is requested to preserve and provide information to the latter or to any relevant investigatory entities established under the auspices of the UN.[87]

This brief overview clearly indicates how multi-layered the cooperation among the UN and international institutions dealing specifically with CBRN agents can be. It also shows how pragmatic and innovative solutions can be found together, within and beyond the UN institutions, to circumvent, on the one hand, the inability or unwillingness of domestic authorities to prevent and investigate CBRN weapon incidents and, on the other hand, the Security Council's inertia, which may block the establishment of an ad hoc tribunal,

83 UN Doc A/HRC/RES/S-17/1 (reports are available at <https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx>).

84 UNGA Res 71/248 (21 December 2016) UN Doc A/RES/71/248.

85 Whilst is true that the General Assembly cannot itself create a body that prosecutes crimes, it is entitled, under arts 10 and 22 of the UN Charter, to establish subsidiary organs to collect and assess the available evidence of international crimes in order to inform its own discussion and recommendations on these matters. On the legitimacy of the General Assembly's action, see A Whiting, 'An Investigation Mechanism for Syria. The General Assembly Steps into the Breach' (2017) JICJ 231.

86 <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21241>.

87 See C-SS-4/DEC.3 (n 79) para 12.

the referral to the International Criminal Court, and the adoption of sanctions under Chapter VII. The establishment of investigative mechanisms, such as the IIIM for Syria, can be seen, ultimately, as 'a marker that reminds future political actors and diplomats that the crimes in Syria will not easily be forgotten or brushed aside',[88] hence creating an important bridge and setting the stage for a future criminal prosecution.[89] By establishing investigative mechanisms empowered to determine attribution of chemical weapons use, the OPCW has shown an inclination to deal not only with 'disarmament' issues but also with 'accountability'.

From this perspective, the international law framework applicable to CBRN weapons seems to have antibodies, if not to prevent, at least to pave the way to recover from CBRN events, through investigation and fact-finding activities, especially with regard to the most serious incidents that may constitute crimes under international law and gross human rights violations. Therefore, it remains to be seen whether and to what extent the valuable amount of data collected by the international investigative bodies will be used, as evidence, to hold perpetrators accountable before national and international courts. In this regard, the latest claims brought before national prosecutors (namely German) by Syrian victims of sarin gas attacks will certainly deserve attention in the future.[90] Alongside the remedies available for the victims,[91] some final thoughts should be devoted to inter-State litigation concerning CBRN events before international courts, namely, the International Court of Justice (ICJ).

5 New Routes to Enforce CBRN Obligations? Concluding Remarks on Inter-State Litigation

The analysis conducted above shows that most of the ACDL treaties endorse a 'carrot and stick' approach by envisaging, on the one hand, a number of benefits deriving from full compliance with the provisions established therein ('positive' incentives), and, on the other hand, a centralised system of supervision in order to ensure compliance with the provisions laid down in the agreements ('negative' incentives). If positive and negative incentives do

88 Whiting (n 85) 235.

89 On the relationship between fact-finding activities and criminal prosecution, see, among many, M Frulli, 'Fact-Finding or Paving the Road to Criminal Justice. Some reflections on United Nations Commissions of Inquiry' (2012) 10 JICJ 1323.

90 <https://www.justiceinitiative.org/litigation/german-criminal-investigation-into-chemical-weapons-attacks-in-syria>.

91 On this issue, see ch 34 by Capone.

not achieve their purpose, and non-compliance is suspected or found, treaty regimes provide also for progressive constraint measures that seek to restore full compliance and bring the violator back in line. Yet, these latter procedures fit into a rather 'soft-enforcing' dynamic. In fact, under the CWC and NPT regimes analysed above, the OPCW and the IAEA, lacking purely coercive powers, and envisaging only 'institutional penalties', offer a forum for debates among States Parties to help with clarifying doubts or solving disputes, through mediation and dialogue, in order to implement the agreements in a cooperative manner. From this perspective, supervisory organisations play much more of a 'managerial' role than a truly 'confrontational' one in their efforts to ensure compliance.[92]

In the event that an actual dispute arises between the parties, it is worth examining, finally, whether and to what extent dispute settlement clauses come into play. Many multilateral treaties dealing with CBRN events contain compromissory clauses that defer the settlement of disputes between the parties to the ICJ. This holds true especially with regard to CBRN industrial accidents,[93] as well as naturally occurring events, including communicable diseases.[94] Conversely, their insertion in disarmament and arms control agreements is less frequent and they have 'never played a major role in the context of implementation and compliance'.[95] Generally speaking, ACDL is more focused on the prevention of situations likely to give rise to disputes, through multiple levels of continuous dialogue, rather than on the resolution of disputes. Compliance control and dispute settlement mechanisms work in parallel, yet the *raison d'être* of the former is to avoid resorting to the latter in the first place.[96]

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92 G den Dekker, 'The Effectiveness of International Supervision in Arms Control Law' (2004) 9 JC&SL 315, 322.

93 Eg Convention on the Transboundary Effects of Industrial Accidents (1992) art 21; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) art 20.

94 For instance, with respect to potential litigation concerning health events, State compliance with WHO law (in particular with the 2005 International Health Regulations) could be challenged before the ICJ, relying on the compromissory clause contained in Article 75 of the WHO Constitution. With regard to the COVID-19 outbreak, see recently P Tzeng, 'Taking China to the International Court of Justice over COVID-19' (*EJIL:Talk!*, 2 April 2020) <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/>.

95 T Marauhn (n 2) 251.

96 As argued by scholars, '[t]he effectiveness of the whole [CWC] will to some extent depend on the ability of the system to avoid disputes' (T Kurzidem, 'Conflict management and the Chemical Weapons Convention' in M Bothe, A Rosas, N Ronzitti (eds), *The New Chemical*

As for treaty regimes explored in this chapter, neither the NPT,[97] nor the CWC or the BWC,[98] enshrine compromissory clauses that refer disputes to the ICJ, but, rather, they provide for diplomatic means to resolve differences. At most, institutional organs are often empowered, subject to authorisation from the General Assembly, to trigger the ICJ advisory function on any legal question arising within the scope of the activities of the respective institutions.[99] Yet, in recent years, nuclear weapons issues, in particular, have been brought to the attention of the ICJ on a number of occasions, both in litigation cases, based on different grounds of jurisdiction,[100] and in advisory opinions.[101] On the whole, the Court has taken a cautious attitude in dealing with such matters. However, some recent disputes may bring forward new questions relating – albeit only indirectly – to prohibited nuclear and chemical activities. With respect to nuclear activities, Iran recently sued the United States for violation of the 1955 Treaty of Amity,[102] as a result of the decision undertaken by the Trump administration to terminate its participation in JPCOA and to reimpose on Tehran sanctions lifted in connection with the JPCOA. The case is still pending and it remains to be seen whether the dispute falls within the material scope of the Treaty of Amity and its compromissory clause.[103] With respect to chemical activities, the Netherlands announced in September 2020 that it was seeking to hold Syria responsible for gross human rights violations, namely, for committing torture and using chemical weapons, by resorting to the compromissory clause contained in Article 30 of the Convention against Torture

Weapons Convention: Implementation and Prospects (Kluwer Law International 1998) 287).

97 Yet, art XVII.A IAEA Statute refers to the ICJ disputes not settled through negotiation. The Comprehensive Safeguards Agreements provide also for arbitration as a means to solve disputes between the parties, subject to a prior negotiation.

98 Art XIV CWC, art V BWC.

99 Art XIV CWC para 5 and art XVII.B Statute IAEA.

100 *Nuclear Tests* (*Australia v France*) (1974) ICJ Rep 253; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v India*) (2016) ICJ Rep 255. The ICJ in both cases did not address the merits of the claims.

101 *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep 226.

102 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Islamic Republic of Iran v United States of America*).

103 So far, the ICJ has affirmed that it has *prima facie* jurisdiction to grant provisional measures. Recently, it rejected the preliminary objections to jurisdiction and admissibility raised by the United States of America and found, consequently, that it has jurisdiction to entertain the application filed by the Islamic Republic of Iran. See ibid (Preliminary Objections).

and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[104] Interestingly, in March 2021, Canada declared its intention to take the same steps.[105] Although the scope of the dispute will be confined to a violation of the CAT, the ICJ, if it finds itself to have jurisdiction, would be indirectly asked to pronounce on the chemical attacks that occurred in Syria and it could make good use of the significant amount of factual evidence collected thus far by the several investigative bodies mentioned above.

Although litigation in this field is still rather scant, it is worth noting that applicant States, even if not 'specifically affected' by a given CBRN event, may, nevertheless, be willing to protect collective interests enshrined in treaties whose interpretation and application is at the centre of the dispute. Litigating 'communitarian' obligations on behalf of the international community in matters that deal, even indirectly, with CBRN weapons seems to have motivated both the applications filed by the Marshall Islands, with respect to the cessation of the nuclear arms race, and the forthcoming application announced by the Netherlands (and Canada) for the chemical attacks in Syria. If successful, this kind of litigation can, incidentally, contribute to implementing the recovery phase of the CBRN emergency management cycle, by requiring the non-compliant State to respect relevant obligations and to provide for reparation. Moreover, litigating CBRN events before international courts can induce the implementation of the obligation to give assurances and guarantees of non-repetition, with a view to preventing any similar events in the future, an obligation that, in the CBRN law field, is of paramount importance.

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