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(Citation)

International Community Law Review, 20(2):252-277

(Issue Date)

2018

(Resource Type)

journal article

(Version)

Accepted Manuscript

(URL)

<https://hdl.handle.net/20.500.14094/90004915>



Benefits of A Legally Non-Binding Agreement: The case of the 2013 US-Russian Agreement on the Elimination of Syrian Chemical Weapons

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Keywords:

Non-binding agreement; Syria; chemical weapons; enforcement; military intervention

Abstract

The deal struck between the United States and Russia in September 2013, the 'Framework for Elimination of Syrian Chemical Weapons,' amounts to a legally non-binding agreement, and not a treaty. The objective of this agreement – namely, that of averting the pending crisis in Syria at that time – highlights what a non-binding agreement, as opposed to a treaty, can do. Somewhat curiously, various actors kept referring to the 2013 agreement even when binding instruments covering the same questions were in place. Thus, this note also explores the distinct benefits of the 2013 agreement even in the presence of the binding instruments. In some cases, the preference for the 2013 agreement can be explained as a search for leverage against Russia. In other cases, the rhetorical preference for the non-binding agreement could indicate a desire to discuss the question of enforcement without addressing institutional requirements of the Organisation for the Prohibition of Chemical Weapons or the United Nations Security Council.

1 Introduction

A deal was struck between the United States and Russia in September 2013 regarding the elimination of chemical weapons in Syria. Less than a month before this agreement, chemical weapons were used in the Syrian conflict,¹ which provoked international outrage. Military intervention against Syria by the United States as a reaction to this incident seemed imminent, without authorisation of such use of force by the United

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¹ The use of chemical weapons in Ghouta, Syria, on 21 August 2013 was later confirmed by the UN fact-finding mission. United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, *Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013*, S/2013/553 (13 September 2013).

Nations' Security Council.² By 9 September 2013, the media was asking the US Secretary of State whether there was 'anything at this point that his [President Assad's] government could do or offer that would stop an attack?'³ A culmination of the five-day negotiation, the agreement, announced on 14 September 2013 by the two countries, successfully averted this **crisis** – namely, an imminent US military intervention – in Syria. The agreement was given the title 'Framework for Elimination of Syrian Chemical Weapons.'⁴ The first part of this note examines the benefits of this non-binding agreement in comparison to a treaty. After a confirmation that this agreement was indeed a non-binding agreement (2.1.1) and the brief description of its content (2.1.2), the note proceeds to the examination of the relative benefits of this non-binding agreement that an agreement in the form of a legally binding treaty may not have offered. While this examination pertains to the 2013 US-Russia agreement, discussions of certain benefits, including the speed, and the absence of the *non tertiis* rule, are meant to be of some general purport (2.2.1). The immediate benefits offered by the *form* of the agreement do not, of course, solve all the issues of substance. A point on which the parties remain divided is the question of enforcement (2.2.2) – a thorny question that will be more closely examined in the second part of this note.

The second part of this note is also an examination of the benefits of this non-binding agreement in comparison to binding instruments, albeit from a different perspective. It is an assessment of its benefits in light of the binding instruments that subsequently

² John R. Crook, "United States Threatens Military Strikes Against Syria, Then Joins in Diplomatic Efforts to Control Syrian Chemical Weapons", 107 *American Journal of International Law* (2013) pp. 901-902; Mika Hayashi, "Reacting to the Use of Chemical Weapons: Options for Third States", 1(1) *Journal on the Use of Force and International Law* (2014) pp. 90-91.

³ The question was asked by a CBS reporter, see *Remarks with United Kingdom Foreign Secretary Hague* (9 September 2013), <https://2009-2017.state.gov/secretary/remarks/2013/09/213956.htm> (accessed 29 November 2017).

⁴ The text is reproduced in 2.1.2.

started to apply to the same questions covered by the 2013 agreement, and thus is a case-specific assessment. There are three instruments that have to be taken into account in this assessment. First, based on the 2013 agreement, the Executive Council of the Organisation for the Prohibition of Chemical Weapons (OPCW) adopted a decision;⁵ the UN Security Council adopted a resolution on the same day, which included the OPCW decision as an annex;⁶ and the Chemical Weapons Convention (CWC)⁷ also came into force for Syria a few weeks later. Predictably, once the above – all binding – instruments were in force that cover the questions addressed by the non-binding 2013 agreement, the latter had little or no distinct benefit to offer (3.1). However, references to the 2013 agreement by various actors subsist well beyond the adoption of the above-mentioned formal acts by international organisations, or the entry into force for Syria of the CWC. Such references are observed as late as in 2017, and they indicate that there may be a distinct benefit in referring to this agreement, and not to the binding instruments (3.2).

2 The 2013 Agreement: “Framework for Elimination of Syrian Chemical Weapons”

2.1 Content and Nature of the 2013 Agreement

⁵ OPCW Executive Council Decision, Destruction of Syrian Chemical Weapons, EC-M-33/DEC.1 (27 September 2013) [hereinafter the ‘OPCW Decision’]. How the decision was given binding force definitively is described in part 3.1 of this note.

⁶ S/RES/2118 (2013) [hereinafter the ‘Resolution 2118’].

⁷ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction [hereinafter the CWC], 1974 UNTS 45.

A few highlights of the 2013 agreement, in light of the focus of the examination in Section 3, will be presented below (2.1.1). The analysis of the nature of the agreement confirms that this agreement was not a treaty and was a legally non-binding agreement (2.1.2).

2.1.1 Content of the 2013 Agreement

The 2013 agreement had all the practical elements necessary to proceed to the elimination of Syrian chemical weapons. The main text of the agreement is reproduced below.⁸

Taking into account the decision of the Syrian Arab Republic to accede to the Chemical Weapons Convention and the commitment of the Syrian authorities to provisionally apply the Convention prior to its entry into force, the United States and the Russian Federation express their joint determination to ensure the destruction of the Syrian chemical weapons program (CW) in the soonest and safest manner.

For this purpose, the United States and the Russian Federation have committed to prepare and submit in the next few days to the Executive Council of the OPCW a draft decision setting down special procedures for expeditious destruction of the Syrian chemical weapons program and stringent verification thereof. The principles on which this decision should be based, in the view of both sides, are set forth in Annex A. The United States and the Russian Federation believe that these extraordinary procedures are necessitated by the prior use of these weapons in Syria and the volatility of the Syrian civil war.

The United States and the Russian Federation commit to work together towards prompt adoption of a UN Security Council resolution that reinforces the decision of the OPCW Executive Council. This resolution will also contain steps to ensure its verification and effective implementation and will request that the UN Secretary-General, in consultation with the OPCW, submit recommendations to the UN Security Council on an expedited basis regarding the UN's role in eliminating the Syrian chemical weapons program.

The United States and the Russian Federation concur that this UN Security Council resolution should provide for review on a regular basis the implementation in Syria of the decision of the Executive Council of the OPCW, and in the event of non-compliance,

⁸ Crook, *supra* note 2, pp. 902-905. As the text was later communicated to the Executive Council of the Organisation for the Prohibition of the Chemical Weapons (OPCW) and the United Nations, it can also be found as an official document of either the OPCW (EC-M-33/NAT.1 (17 Sept. 2013)) or the United Nations (A/68/398-S/2013/565 (24 September 2013)).

including unauthorized transfer, or any use of chemical weapons by anyone in Syria, the UN Security Council should impose measures under Chapter VII of the UN Charter.

The proposed joint US-Russian OPCW draft decision supports the application of Article VIII of the Chemical Weapons Convention, which provides for the referral of any cases of non-compliance to the United Nations General Assembly and the United Nations Security Council.

In furtherance of the objective to eliminate the Syrian chemical weapons program, the United States and the Russian Federation have reached a shared assessment of the amount and type of chemical weapons involved, and are committed to the immediate international control over chemical weapons and their components in Syria. The United States and the Russian Federation expect Syria to submit, within a week, a comprehensive listing, including names, types, and quantities of its chemical weapons agents, types of munitions, and location and form of storage, production, and research and development facilities.

We further determined that the most effective control of these weapons may be achieved by removal of the largest amounts of weapons feasible, under OPCW supervision, and their destruction outside of Syria, if possible. We set ambitious goals for the removal and destruction of all categories of CW related materials and equipment with the objective of completing such removal and destruction in the first half of 2014. In addition to chemical weapons, stocks of chemical weapons agents, their precursors, specialized CW equipment, and CW munitions themselves, the elimination process must include the facilities for the development and production of these weapons. The views of both sides in this regard are set forth in Annex B.

The United States and the Russian Federation have further decided that to achieve accountability for their chemical weapons, the Syrians must provide the OPCW, the UN, and other supporting personnel with the immediate and unfettered right to inspect any and all sites in Syria. The extraordinary procedures to be proposed by the United States and the Russian Federation for adoption by the OPCW Executive Council and reinforced by a UN Security Council resolution, as described above, should include a mechanism to ensure this right.

Under this framework, personnel under both the OPCW and UN mandate should be dispatched as rapidly as possible to support control, removal, and destruction of Syria's chemical weapons capabilities.

The United States and the Russian Federation believe that the work of the OPCW and the UN will benefit from participation of the experts of the P5 countries.

The United States and the Russian Federation strongly reiterate their position on Syria as reflected in the Final Communique of the G-8 Summit in Northern Ireland in June 2013, especially as regards chemical weapons.

The two sides intend to work closely together, and with the OPCW, the UN, all Syrian parties, and with other interested member states with relevant capabilities to arrange for the security of the monitoring and destruction mission, recognizing the primary responsibility of the Syrian Government in this regard.

The United States and the Russian Federation note that there are details in furtherance of the execution of this framework that need to be addressed on an expedited basis in

the coming days and commit to complete these details, as soon as practicable, understanding that time is of the essence given the crisis in Syria.

Thus, at the outset, the agreement affirms the joint determination of the United States and Russia ‘to ensure the destruction of the Syrian chemical weapons program (CW) in the soonest and safest manner (1st para.).’ A decision of the Executive Council of the OPCW (2nd para.) and a resolution of the UN Security Council (3rd para.) would be used in the implementation of this agreement. A set of further guidelines for adopting the decision in the OPCW was also included (Annex A).⁹

Before revealing a concrete vision for the elimination of chemical weapons, the agreement then addressed the case of non-compliance on the part of Syria: Such non-compliance would be dealt with by the UN Security Council (4th para.) and by the OPCW (5th para.).

⁹ Annex A, entitled *Principles for Decision Document by OPCW Executive Council*, shows the following ten points.

- ‘1. The decision should be based on para 8. Art. IV and para. 10 of Art V of the CWC.
2. The decision should address the extraordinary character of the situation with the Syrian chemical weapons.
3. The decision should take into account the deposit by Syria of the instrument of accession to the CWC.
4. The decision should provide for the easy accessibility for States Parties of the information submitted by Syria.
5. The decision should specify which initial information Syria shall submit to the OPCW Technical Secretariat in accordance with a tightly fixed schedule and also specifies an early date for submission of the formal CWC declaration.
6. The decision should oblige Syria to cooperate fully on all aspects of its implementation.
7. The decision should address a schedule for the rapid destruction of Syrian chemical weapons capabilities. This schedule should take into account the following target dates:
 - A. Completion of initial OPCW on-site inspections of declared sites by November.
 - B. Destruction of production and mixing/filling equipment by November.
 - C. Complete elimination of all chemical weapons material and equipment in the first half of 2014.
 The shortest possible final deadline, as well as intermediate deadlines, for the destruction of Syrian chemical weapons capabilities should be included into the schedule.
8. The decision should provide stringent special verification measures, beginning within a few days, including a mechanism to ensure the immediate and unfettered right to inspect any and all sites.
9. The decision should address the issue of duties of the OPCW Technical Secretariat in this situation and its need for supplementary resources to implement the decision, particularly technical and personnel resources, and call upon states with relevant capacities to contribute to this end.
10. The decision should refer to the provisions of the CWC obliging the Executive Council, in cases of non-compliance with the Convention, to bring the issues directly to the attention of the UN General Assembly and the UN Security Council.’

Regarding the concrete steps for the elimination of chemical weapons, ‘a comprehensive listing, including names, types, and quantities of its chemical weapons agents, types of munitions, and location and form of storage, production, and research and development facilities (6th para.)’ needed to be submitted by Syria. The destruction of these chemical weapons would then be conducted ‘under the OPCW supervision (7th para.)’, and the deadline proposed for the complete destruction was set at ‘the first half of 2014 (7th para.)’. Annex B contains a few more details for the implementation process, such as the priority of categories in the destruction and a few more intermediate deadlines before the proposed deadline for the complete destruction.¹⁰

Because of the importance of the inspectors and other personnel involved in the process, ‘the unfettered right to inspect any and all sites (8th para.)’ was also stressed in the agreement. The last few paragraphs of the agreement refer to the importance of

¹⁰ The text of Annex B, with the title *Joint Framework on Destruction of Syrian CW*, is as follows, ‘The Russian Federation and the United States of America agree on the need to achieve rapid elimination of Syria's chemical weapons, thus reducing the threat posed to the people of Syria. They are each prepared to devote high-level attention and resources to support the monitoring and destruction mission of the OPCW, both directly and in cooperation with the United Nations and other States concerned. They agree to set an ambitious goal of eliminating the threat in a rapid and effective manner. Both parties agree that a clear picture of the state of Syrian chemical weapons could help advance a cooperative development of destruction options, including possible removal of chemical weapons outside of the Syrian territory. We agree on the importance of rapid destruction of the following categories:

1. Production equipment
2. Mixing and filling equipment
3. Filled and unfilled weapons and delivery systems
4. Chemical agents (unweaponized) and precursor chemicals. For these materials, they will pursue a hybrid approach, i.e., a combination of removal from Syria and destruction within Syria, depending upon site-specific conditions. They will also consider the possibility of consolidation and destruction in the coastal area of Syria.
5. Material and equipment related to the research and development of chemical weapons

The two parties agree to utilize the ‘universal matrix’, developed in the course of consultations by our two National Security Councils, as the basis for an actionable plan. They agree that the elimination of chemical weapons in Syria should be considered an urgent matter to be implemented within the shortest possible time period. The parties agree to set the following target dates:

- A. Completion of initial OPCW on-site inspections by November.
- B. Destruction of production and mixing/filling equipment by November.
- C. Complete elimination of all chemical weapons material and equipment in the first half of 2014.

The Russian Federation and the United States will work together closely, including with the OPCW, the UN and Syrian parties to arrange for the security of the monitoring and destruction mission, noting the primary responsibility of the Syrian government in this regard.’

cooperation with all relevant partners, such as the experts of the Permanent Members of the UN Security Council (10th para.) and other member states with different capabilities regarding the elimination of chemical weapons (12th para.). Lastly, the parties to the agreement once again acknowledged that the details for the implementation must be promptly decided, and that ‘time is of the essence given the crisis in Syria (13th para.).’

2.1.2 Nature of the 2013 Agreement

The 2013 agreement is not a treaty, the definition of which, as well as all related matters, are regulated by the Vienna Convention on the Law of Treaties (VCLT)¹¹ and customary norms which the VCLT for the most part reflects.

International courts and tribunals are quite consistent in employing a number of indicators to make an assessment as to whether an instrument or act is legally binding and/or constitutes a treaty for the purposes of international law. As a starting point, there are a few, typical elements in an agreement which could ‘lead to a conclusion that a statement does not constitute a binding agreement under international law.’¹² This observation was made by an arbitral tribunal in the *Newfoundland/Nova Scotia* arbitration (first phase), where the tribunal was attempting to establish the nature of the two joint statements that refer to the border between Newfoundland and Nova Scotia. The elements that would indicate the non-binding nature of an agreement according to this tribunal included ‘[t]he absence of a signed document ...; the use of language which is vague or which does not appear to embody any immediate commitment; a shared understanding between the parties to negotiations that their in principle

¹¹ Vienna Convention on the Law of Treaties, 1155 UNTS 331 [hereinafter the ‘VCLT’].

¹² *Newfoundland/Nova Scotia (first phase)*, *International Law Report*, vol. 128, p. 451, para. 3.18.

agreement is to be embodied in some later formal document or is to be subject to some subsequent process of implementation in order to become binding.’¹³

In the case of the 2013 agreement between the United States and Russia, all three elements mentioned in the foregoing were present. First, the 2013 agreement did not bear any signature. Second, it had no resemblance to a typical treaty in form or in the use of language. Apart from the commitments for the implementation steps that will be discussed below, most of the paragraphs state what the parties ‘*expect*’, ‘*decide[d]*’, ‘*determine[d]*’, ‘*believe*’ and ‘*intend*’, and do not communicate any substantive commitments. Conversely, the presence of certain informal terms in the 2013 agreement were strong indications of it not being a treaty: for instance, an abbreviation such as the ‘P5 countries’ (10th para.) would most likely have been eliminated and replaced by a more formal term, had the agreement been a treaty. Third, the agreement was based on the shared understanding that there would be a subsequent process of implementation. In fact, the first concrete commitment of the parties in the agreement concerns this subsequent process, ‘to prepare and submit in the next few days to the Executive Council of the OPCW a draft decision (2nd para.).’ As is the case with the second concrete commitment, which is ‘to work together towards prompt adoption of a UN Security Council resolution that reinforces the decision of the OPCW Executive Council (3rd para.).’

International Court of Justice (ICJ) jurisprudence also reveals similar and overlapping indicators. When asked to decide on the binding nature of a document, the Court ‘must have regard above all to its actual terms and to the particular circumstances in which it

¹³ *Ibid.*

was drawn up.’¹⁴ These two indicators adopted by the ICJ were also **approved** and employed in the arbitral award on jurisdiction and admissibility in the South China Sea arbitration.¹⁵

One of the ICJ cases that employed the ‘*actual terms*’ in a document as an indicator to decide its binding nature was the *Maritime Delimitation* case between Qatar and Bahrain.¹⁶ The Court had to determine the nature of the document called ‘*Minutes*,’ of a meeting between the two foreign ministers. The very first observation of the ICJ for these Minutes in this case was that the Minutes ‘state[d] what had been ‘agreed’ between the Parties,’¹⁷ thus emphasising the verb ‘*agree*.’ Certain weight was also given to the verb ‘*agree*’ in deciding the nature of a document in the more recent arbitral award regarding the South China Sea, mentioned above.¹⁸

In light of the foregoing, the 2013 agreement examined in the present note strikes one as a document that avoids the verb ‘*agree*.’ The term was never used in the main text of the agreement, either in its active or passive forms. The parties to this particular agreement did not explicitly ‘*agree*’ to or on anything stated in the text.

With regard to the circumstances in which the 2013 agreement was drawn up, there was, as mentioned briefly earlier (namely, in Section 1), a pending crisis in Syria: military intervention on the part of the United States against Syria was imminent, because of the

¹⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* [Maritime Delimitation case], *I.C.J. Reports* 1994, p. 121 (para. 23). The passage cites *Aegean Sea Continental Shelf (Greece v Turkey)*, *Jurisdiction*, *I.C.J. Reports* 1978, p. 39 (para. 96).

¹⁵ *South China Sea Arbitration, Philippines v China, Award on Jurisdiction and Admissibility* (2015) [South China Sea case], PCA Case No 2013-19, p. 82 (para. 213).

¹⁶ *Maritime Delimitation* case, *supra* note 14.

¹⁷ *Ibid.*, at para. 24.

¹⁸ *South China Sea* case, *supra* note 15 at p. 83 (para. 215).

use of chemical weapons in the Syrian conflict in August 2013.¹⁹ The two negotiators of the eventual agreement, the US Secretary of State and the Russian Foreign Minister, were negotiating a way to avert this crisis. Against this background, the intention of these negotiators was to provide a framework regarding the elimination of chemical weapons in Syria, so that military intervention may be averted. In negotiating this agreement, they appear not to have intended for it to have any legal effect. They were attempting to produce practical and immediate effects of averting further crisis.²⁰ The entire record of the press conference by the US Secretary of State and the Russian Foreign Minister after the agreement was reached²¹ indicates nothing to the contrary.

In short, the parties to the 2013 agreement appear to never have had any doubt, or disagreement, about the nature of this text. It is not a treaty; rather it is a legally non-binding agreement.

2.2 Immediate benefits and persisting issues

The 2013 agreement exhibits a few distinct benefits to a non-binding agreement that a treaty does not offer (2.2.1). These benefits offered by the *form* of the agreement cannot, of course, resolve disagreements of *substance* between the parties. A point on which the parties appeared to ‘agree to disagree’ in the 2013 agreement was the very thorny question of enforcement (2.2.2).

2.2.1 Benefits of a non-binding agreement as observed in the 2013 agreement

¹⁹ On the legal issues of such military interventions as unilateral enforcement in the absence of the Security Council authorisations, cf., Hayashi, *supra* note 2, p. 80.

²⁰ See how the US Secretary of State described the purpose of the negotiation, *infra* note 22.

²¹ *Remarks with Russian Foreign Minister Sergey Lavrov after their Meeting* (14 September 2013) [hereinafter the Press Conference on the 2013 Agreement], <https://geneva.usmission.gov/2013/09/14/transcript-secretary-of-state-kerry-and-russian-foreign-minister-lavrov-press-remarks-after-their-meeting/> (accessed 27 July 2017).

In comparison to a treaty, the first undeniable benefit of the 2013 agreement is the speed with which it was concluded. In the negotiation that led to the 2013 agreement, the speed was possibly the most important factor. As the last paragraph of the agreement emphasised, ‘time is [was] of the essence given the crisis in Syria’ at that time. Negotiating some bilateral treaty, with the formal procedure of signature and ratification by the two parties to follow, would have served very little purpose in this urgent context. The rapidity with which this agreement was conceived and developed is recalled by the US Secretary of State in the following manner,

‘And in the meantime, at a press conference in London – you may have been there – I was asked the question, ‘Is there anything that Assad could do in order to avoid being bombed?’ And I said, ‘Yes. He could agree to get rid of his weapons.’ And within an hour, an hour and a half, I got a phone call from Sergey Lavrov of Russia suggesting that was a really good idea, why don’t we work on whether or not we could do that? And President Obama and President Putin had actually talked about it a few weeks earlier in St. Petersburg, and I’d already talked to Lavrov [...] And so all of a sudden, Lavrov and I were thrown together by our presidents in an effort to try to achieve that.’²²

The press conference in London mentioned in this remark took place on 9 September 2013.²³ The negotiation between the US Secretary of State and the Russian Foreign Minister resulted in a typed text in English, which the United States and Russia agreed upon, with no Russian text to accompany it. All the details of the elimination of Syrian chemical weapons were left out deliberately, to be worked out ‘on the expedited basis in

²² *Remarks at a Press Availability* (5 January 2017), <https://2009-2017.state.gov/secretary/remarks/2017/01/266599.htm> (accessed 29 November 2017).

²³ *Remarks with United Kingdom Foreign Secretary Hague* (9 September 2013), *supra* note 3.

the coming days (13th para.)'. The last edits were reportedly made on the *iPad* of the US Secretary in his hotel room in Geneva where he was negotiating.²⁴ When the agreement was rendered public on 14 September 2013 at the same place where it was made, it bore no signature. It would not require any ratification. As soon as it was made, the agreement had the force that it was intended to have.

Second, this agreement does something that a treaty technically could not do. The 2013 agreement established what a third party to the agreement, namely, Syria, must do. It was an agreement between the United States and Russia, according to which 'the Syrians must provide the OPCW, the UN, and other supporting personnel with the immediate and unfettered right to inspect any and all sites in Syria (8th para.)'. The same language could not have been used had this been a treaty, without obtaining written consent to this obligation from Syria. The *non tertiis* rule for treaties, according to the VCLT and customary rules, means that a treaty may create an obligation for a third State only when that 'third State expressly accepts that obligation in writing.'²⁵

In other places, too, '[t]he United States and the Russian Federation expect Syria to submit, within a week (6th para.),' a comprehensive declaration of its chemical weapons. While the language of the agreement, if one takes the phrase at its face value, does not make it legally mandatory for Syria to submit this declaration, the practical message could not be mistaken: Syria politically must do so. This was an agreement that would not have survived the test of the *non tertiis* rule, given the absence of consent in writing on the part of Syria.

²⁴ Karen DeYoung, "How the United States, Russia Arrived at Deal on Syria's Chemical Weapons", *Washington Post* (16 September 2013), https://www.washingtonpost.com/world/national-security/how-the-united-states-russia-arrived-at-deal-on-syrias-chemical-weapons/2013/09/15/c851cd1e-1e5b-11e3-8459-657e0c72fec8_story.html (accessed 28 June 2017).

²⁵ VCLT, Art. 35.

Lastly, outside the comparison between a treaty and a non-binding agreement, the substantive achievement of the 2013 agreement was, of course, the avoidance of military intervention against Syria. Once the 2013 agreement was in place, there was no longer need, or justification, for unilateral military intervention in Syria. Military intervention, once imminent, was thus averted, and in the UN Security Council meeting to adopt a follow-up resolution,²⁶ a number of UN Member States commended the agreement for this effect.²⁷

2.2.2 Persisting issues between the parties despite the 2013 agreement

Beyond the benefits to a non-binding agreement identified in 2.2.1, there are, of course, certain things that neither a treaty nor a non-binding agreement may achieve. In particular, if the negotiating parties substantially disagree, that disagreement is something the *form* of the instrument cannot dispel. In such instances, those parties can ‘*agree to disagree*,’ and arrange a text that both deem acceptable. To ‘*agree to disagree*’ is something that can happen in negotiations that lead to both, legally binding and non-binding instruments.

As briefly mentioned earlier, an important disagreement area between Russia and the United States that the 2013 agreement did not resolve is the question of enforcement. Fundamental to the crisis that prompted the negotiation between the two parties was the presence, and the use, of chemical weapons in Syria. The UN Security Council was unable to proceed to any form of collective enforcement due to Russian objections (NB., Russia is one of the five permanent members of the UN Security Council, and an active *veto* on its part would make Security Council authorisation unattainable), and the United

²⁶ Resolution 2118, *supra* note 6. The resolution will be discussed in more detail in Section 3.1.

²⁷ S/PV.7038 (27 September 2017).

States' unilateral enforcement against Syria seemed imminent. The purpose of the agreement was precisely to avert this deadlock. **In this sense, not addressing the question of enforcement in this agreement was simply not possible.** Accordingly, as briefly explained in Section 2.1.2, the 2013 agreement did attempt to deal with the question of enforcement. It included a passage stating that 'in the event of non-compliance, including unauthorized transfer, or any use of chemical weapons by anyone in Syria, the UN Security Council should impose measures under Chapter VII of the UN Charter (4th para.).'

However, this part of the agreement was nothing but an *acknowledgement* that the two parties *agreed to disagree*. On the one hand, Russia remained less than enthusiastic about enforcement. The understanding of the passage in the agreement quoted above by the Russian foreign minister is that '[O]f course, it [this phrase in the agreement] does not mean that every violation that will be reported to the Security Council will be taken by word'²⁸ and acted upon immediately or automatically. Quite the contrary, 'we will investigate every case, And when we are sure, 100 percent, then we in the Russian Federation will be ready to adopt new resolution of the Security Council to embed the measures to punish the perpetrators of this violation.'²⁹

For his part, the U.S. Secretary of State in the same press conference explained that,

'...there are requirements in the framework, which you will see, that automatically take noncompliance and/or some question of deviation from the framework will go to the Security Council for debate as to what measure might be implemented. But there is an agreement between Russia and the United States

²⁸ Press Conference on the 2013 Agreement, *supra* note 21.

²⁹ *Ibid.*

that noncompliance is going to be held accountable within the Security Council under Chapter 7. What remedy is chosen is subject to the debate within the council, which is always true, but there's a commitment to impose measures.'³⁰

The interruption of this explanation by the Russian foreign minister at this point, saying 'Should, should,'³¹ highlights the difference in understanding by the two parties. The two parties to the agreement did not have a shared understanding about enforcement in case of non-compliance by Syria, and, of course, both parties knew it.

Following the announcement of the agreement, the United States once again stressed 'that there are consequences should the Assad regime not comply with the framework agreed today,'³² and that 'if diplomacy fails, the United States remains prepared to act.'³³ In other words, the unilateral enforcement by the United States in the absence of the Security Council's authorisation remained a legitimate option in the eyes of the United States, even though according to its agreement, in such a case, 'the UN Security Council should impose measures under Chapter VII of the UN Charter (4th para.).' At the same time, despite this clear allusion in the agreement to the possibility of measures under Chapter VII by the Security Council, any move perceived to be encouraging the

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Statement by the President on U.S.-Russian Agreement on Framework for Elimination of Syrian Chemical Weapons* (14 September 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/09/14/statement-president-us-russian-agreement-framework-elimination-syrian-ch> (accessed 27 July 2017).

³³ *Ibid.*

Security Council to adopt a Chapter VII resolution was immediately criticised by Russia as a wrong way to interpret or use the agreement.³⁴

To sum up, the two parties were clearly not in agreement about the eventual enforcement in case of non-compliance by Syria, even though this was something they could both overlook, and agree to disagree, in the 2013 agreement in view of the ensuring situation and imminent escalation of the crisis.

3 Are There Distinct Benefits of the 2013 Agreement in the Presence of the Binding Instruments?

As it was explained, the US-Russian 2013 agreement planned for the OPCW and the UN Security Council to be involved in the implementation of the elimination of chemical weapons in Syria. These institutions in fact did follow that plan, and within a few weeks, there was a decision of the Executive Council of the OPCW and a binding Security Council resolution. Thus, the next question is whether the 2013 agreement continues to offer any benefit beyond the initial achievements when the multilateral institutions took over and thus injected binding force into the arrangements for the elimination process of Syrian chemical weapons. To make this assessment, the follow-up steps in the two multilateral institutions will be briefly examined.³⁵ Predictably, as soon as the OPCW and the Security Council was involved in the elimination of

³⁴ Russland: Westen instrumentalisiert Syrien-Übereinkunft, *Reuters* (23 September 2013), <http://de.reuters.com/article/syrien-idDEBEE98L00320130922> (accessed 2 August 2017).

³⁵ For a more detailed discussion, see Masahiko Asada, “The OPCW’s Arrangements for Missed Destruction Deadlines Under the Chemical Weapons Convention: An Informal Noncompliance Procedure”, 108 *American Journal of International Law* (2014), p. 451.

chemical weapons in Syria, the 2013 agreement had little to offer. All issues of implementation, including non-compliance or violations by Syria, could be better dealt with within these institutions, by referring to the relevant binding instruments (3.1). However, even in the presence of these binding instruments, various actors in a number of scenes continue to refer to the 2013 agreement rather than to these binding instruments. Such, subsequent to the adoption of binding instruments, references are observed as late as in 2017, and they indicate that there may still be distinct benefit to referring to this agreement, and not to the binding instruments alone (3.2).

3.1 ‘No, there aren’t’

Regarding the elimination of chemical weapons in Syria, there is very little distinct benefit, if any, that the 2013 agreement continues to offer at present. This is because, first of all, the an key objective of the 2013 agreement was quickly integrated into a multilateral framework, the OPCW. In fact, this had been planned all along. One of the first commitments expressed in the 2013 agreement was that a joint US-Russian draft decision would be submitted to the Executive Council of the OPCW ‘in the next few days’ (2nd para.). Accordingly, the agreement was submitted to the Executive Council on 17 September 2013.³⁶ Welcoming the draft agreement, the Executive Council proceeded to adopt a decision on 27 September 2017³⁷ that detailed the special procedure of the elimination of chemical weapons for Syria.³⁸ In this way, the ambitious deadline in the non-binding 2013 agreement, to ‘complete the elimination of all

³⁶ EC-M-33/NAT.1 (17 September 2013).

³⁷ OPCW Decision, *supra* note 5.

³⁸ For details of this special procedure, see Ralph Trapp, “Elimination of the Chemical Weapons Stockpile of Syria”, 19 *Journal of Conflict and Security Law* (2014), pp. 10-18.

chemical weapons material and equipment in the first half of 2014’,³⁹ became an official deadline endorsed by the Executive Council of the OPCW.

The legal strength, or the binding effect, of this particular decision of the Executive Council over Syria may be subject to some doubt. For one thing, it was a decision by an organ of an international organisation, namely, the OPCW, of which Syria became a member only in October 2017 formally.⁴⁰ However, the OPCW decision was incorporated in the Security Council resolution that was adopted on the same day.⁴¹ In this resolution, while the Security Council let go of the standard expression for a binding decision – namely, ‘acting under Chapter VII of the Charter’ –⁴² the Chapter VII language was unequivocally present: the Security Council determined that ‘the use of chemical weapons in the Syrian Arab Republic constitutes a threat to international peace and security.’⁴³ The resolution then ‘[U]nderscor[es] that Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Council’s decisions,’⁴⁴ underlining the binding power of these decisions. One of these decisions by the Security Council in the resolution was ‘that the Syrian Arab Republic shall comply with all aspects of the decision of the OPCW Executive Council of 27 September 2013 (Annex I).’⁴⁵ In short, the OPCW decision, ‘not necessarily

³⁹ OPCW Decision, *supra* note 5, para. 1(c).

⁴⁰ The membership of the OPCW is automatically given to States that join the CWC: “All States Parties to this Convention shall be members of the Organization (Art. 8(2)a)”, and the formal entry into force of the CWC for Syria was 14 October 2013.

⁴¹ Resolution 2118, *supra* note 6, Annex I.

⁴² The discussion of the effect of this omission is found in Marie Jacobsson, “Syria and the Issue of Chemical Weapons - A Snapshot of a Legal Time-Frame: The United Nations Security Council Resolution 2118 (2013) and the OPCW Executive Council Decision”, in J. Ebbesson et al. (eds.), *International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi* (2014) pp. 142-146.

⁴³ This is a phrase adopted in one of the preambulatory paragraphs. In the first *operative* paragraph of the resolution, the Security Council also “[D]etermines that the use of chemical weapons anywhere constitutes a threat to international peace and security.” Resolution 2118, *supra* note 6.

⁴⁴ Resolution 2118, *supra* note 6, para. 1.

⁴⁵ Resolution 2118, *supra* note 6, para. 6.

binding *in itself*, was given an undoubtedly binding force on Syria by the Security Council resolution.⁴⁶

Therefore, shortly after the 2013 agreement had been reached between the United States and Russia, Syria was placed under obligations – binding no less – regarding its chemical weapons, formulated in the OPCW decision, and endorsed by the Security Council resolution 2118. Once the 2013 agreement was integrated into these formal frameworks, and given binding force by the Security Council resolution, there was little need to refer to the 2013 agreement *per se*. In fact, successive Executive Council decisions regarding Syria after the first decision on 27 September 2013⁴⁷ all refer to that first decision, and not to the 2013 agreement, when they describe the steps to be taken or express concerns regarding the elimination process.⁴⁸ Thus, issues of the elimination of Syrian chemical weapons are no longer discussed in the light of the 2013 agreement. If there are outstanding issues, they are now *legal* issues. They can therefore be addressed as violations of, or non-compliance to, obligations by reference to the subsequent formal legally binding instruments, and not as issues of non-compliance to a non-binding agreement.

The assessment that the 2013 agreement ceased to offer any distinct benefit in the presence of the binding instruments also is confirmed in the way the institutions involved react to the issues after binding instruments were put in place. For example,

⁴⁶ Asada, *supra* note 35, p. 449. See also Guillaume Le Floch, « L'OIAC et le démantèlement de l'arsenal chimique syrien », 141 *Journal du droit international* (2014), pp. 1151-1152.

⁴⁷ The relevant EC decisions related to the chemical weapons in Syria between 2013 and 2016 are EC-M-34/DEC.1 (15 November 2013), EC-M-42/DEC.3 (17 June 2014), EC-M-42/DEC.1 (17 June 2014), EC-M-46/DEC.1 (19 November 2014), EC-M-48/DEC.1 (04 February 2015) and EC-83/DEC.5 (11 November 2016).

⁴⁸ A noted exception appears to be a June 2014 decision (EC-M-42/DEC.1 (17 June 2014)) that consisted of a request to the OPCW Secretary-General. It recalled the 2013 agreement, probably because the subject of the request was the deadline first set by the 2013 agreement: chemical weapons destruction must be completed in the first half of 2014.

regarding the incident of the use of chemical weapons in Syria between April and August 2014,⁴⁹ a Security Council resolution recalled ‘*its* decision that the Syrian Arab Republic shall not use, develop, produce, otherwise acquire, stockpile or retain chemical weapons [...]’⁵⁰ and not the 2013 agreement about the elimination of these weapons in Syria.⁵¹ When the allegations of further chemical attacks after the adoption of this resolution emerged, the Security Council once again used the identical phrase to recall its earlier decision.⁵² In the meetings related to the adoption of these resolutions, no State referred to Syrian non-compliance with the 2013 agreement, or to the agreement itself.⁵³

Admittedly, these examples may not be the best in illustrating how the relevant binding instruments were preferred to the non-binding agreement. Since the principal concern that prompted these resolutions was the *use* of chemical weapons in Syria, and not the problems of the *elimination* process, one could argue that omitting the 2013 agreement is a matter of *substance* rather than *form*.

However, the same cannot be said for the following example. As the overseer of the elimination process of Syrian chemical weapons, the OPCW pays more attention to the elimination issues behind the use of chemical weapons than the Security Council. Thus, when there were reports of the OPCW-UN Joint Investigative Mechanism on the

⁴⁹ The Fact-Finding Mission concluded “with a high degree of confidence that chlorine has been used as a weapon” in this period. *Third Report of the OPCW Fact-Finding Mission in Syria*, S/1230/2014 (18 December 2014), para. 3.

⁵⁰ S/RES/2209 (2015), para. 3 [emphasis added].

⁵¹ *Ibid.*, para. 2. The use of the chemical weapons, a question that the agreement does not directly deal with, was condemned as a violation of Resolution 2118 and the CWC.

⁵² S/RES/2235 (2015), para. 2.

⁵³ S/PV.7401 (3 March 2015); S/PV.7501 (7 August 2015).

instances of the use of chemical weapons,⁵⁴ the OPCW was concerned that it ‘cannot fully verify that the Syrian Arab Republic has submitted a declaration that can be considered accurate and complete.’⁵⁵ The question pertains to the discrepancies in the Syrian declaration, a declaration ‘*expected*’ by the 2013 agreement in this first place, and was possibly the most important step in the elimination process as envisaged in that agreement. In addressing this issue, the preferred instruments that the OPCW stipulates are the three formal instruments that started to regulate the Syrian chemical weapons with binding force shortly after the conclusion of the 2013 agreement: namely, the CWC, the OPCW decision of September 2013, and UN Security Council Resolution 2118.⁵⁶ Nothing is said of the 2013 agreement.

Thus, it seems fair to conclude that regarding the elimination of Syrian chemical weapons, the 2013 agreement ceased to offer any distinct benefits as soon as the binding instruments started to cover the same questions as the agreement.

3.2 ‘Yes, there are’

Further to the conclusion in Section 3.1, references to the 2013 agreement by various actors subsist well beyond the adoption of the institutional decisions mentioned above or the entry into force of the CWC for Syria. Such references are observed as late as in

⁵⁴ *Third Report of the OPCW-United Nations Joint Investigative Mechanism*, S/2016/738 (24 August 2016); *Fourth Report of the OPCW-United Nations Joint Investigative Mechanism*, S/2016/888 (21 October 2016).

⁵⁵ EC-83/DEC.5 (11 November 2016), para. 6.

⁵⁶ The Executive Council “demands that the Syrian Arab Republic comply fully with its obligations under the Convention, Council decision EC-M-33/DEC.1, and United Nations Security Council resolution 2118 (2013).” *Ibid.*

2017, as chemical attacks in Syria continued.⁵⁷ This rhetorical preference for the 2013 agreement indicates that there may be some distinct benefit to referring to this agreement, and not to the binding instruments (3.2). In some cases, the reason for such rhetorical preference is that this agreement may offer some leverage against Russia (3.2.1). In others, the reason is arguably the fact that the 2013 agreement is not under any institutional constraint regarding the question of enforcement (3.2.2).

3.2.1 Subsequent references in April 2017: Highlighting Russia's Role

A survey of references to the 2013 agreement in the period after the relevant binding instruments came into force reveals that in some cases, this non-binding agreement is not used to condemn Syria and its actions. As discussed earlier, the Security Council resolutions and the OPCW decisions offer a stronger basis to condemn what Syria does with its chemical weapons. The survey suggests that the value of referring to the 2013 agreement is to establish a basis on which Russia's performance – not Syria's – could be measured and criticised.

There is a surge of references to the 2013 agreement in this sense in April 2017, when another instance of a chemical attack took place in Syria.⁵⁸ The chemical attack in April 2017 would have been unlikely had Syria kept to its commitments for the elimination of

⁵⁷ A good summary and analysis of this situation is found in Amy E. Smithson, "Assad's Phony Farewell to Arms: Syria's Chemical Weapons Programs", *Foreign Affairs* (26 October 2016), <https://www.foreignaffairs.com/articles/syria/2016-10-26/assads-phony-farewell-arms> (accessed 3 August 2017). See also S/RES/2235 (2015).

⁵⁸ The use of these chemical weapons was later confirmed by the OPCW Fact-Finding Mission. *Report of the OPCW Fact-Finding Mission in Syria regarding an alleged incident in Khan Shaykhun, Syrian Arab Republic, April 2017*, S/1510/2017 (29 June 2017).

chemical weapons. That Syria had not done so⁵⁹, and that its government still had chemical weapons, seemed most likely, given the chemical attack. This was Russia's fault in light of the 2013 agreement, according to the United States.

'[t]he U.S. and the Russian Government entered into agreements whereby Russia would locate these weapons, they would secure the weapons, they would destroy the weapons, and that they would act as the guarantor that these weapons would no longer be present in Syria. Clearly, Russia has failed in its responsibility to deliver on that commitment from 2013.'⁶⁰

In another interview, the US Secretary of State repeated his view, and even used the term '*obligation*' in describing the Russian commitment: 'Russia has failed in its responsibility to deliver on this 2013 commitment. It is unclear whether Russia failed to take this obligation seriously or Russia has been incompetent[...].'⁶¹ The US Permanent Representative at the United Nations confirmed this assessment of Russian performance: 'Russia is supposed to be a guarantor of the removal of chemical weapons from Syria. [...] Russia is supposed to have removed all the chemical weapons from Syria.'⁶²

These condemnations of Russia by the United States would only make sense if there had indeed been a specific role or responsibility for Russia in the chemical weapons

⁵⁹ The Joint Investigative Mechanism between the UN and the OPCW confirmed that the chemical weapons were used by governmental forces on this occasion. *Seventh report of the Organisation for the Prohibition of Chemical Weapons - United Nations Joint Investigative Mechanism*, S/2017/904 (26 October 2017), para. 46.

⁶⁰ *Remarks with National Security Advisor H.R. McMaster* (6 April 2017), available at <https://www.state.gov/secretary/remarks/2017/04/269543.htm> (accessed 28 July 2017). See also his remark a few days later, available as "Full Transcript: Rex Tillerson on 'Face the Nation'", *CBS News* (9 April 2017), <http://www.cbsnews.com/news/full-transcript-rex-tillerson-on-face-the-nation-april-9/> (accessed 2 August 2017).

⁶¹ *Remarks at a Press Availability* (11 April 2017), during his visit to Italy to attend the G-7 Foreign Ministers' Meeting, <https://www.state.gov/secretary/remarks/2017/04/269693.htm> (accessed 2 August 2017).

⁶² S/PV.7919 (7 April 2017).

elimination programme in Syria. Such a role or responsibility for Russia can only arise from the 2013 non-binding agreement, and not in the formal, multilateral instruments discussed earlier. The United States must be aware of this distinct benefit to referring to the 2013 agreement when it chose to refer to the agreement over the binding instruments, to criticise Russian performance regarding the chemical weapons in Syria.

A very similar use of the 2013 agreement is also made by States other than the United States. Examples can be found in UN Security Council meetings. A draft resolution condemning the use of chemical weapons and imposing sanctions was introduced to the Security Council meeting on 12 April 2017.⁶³ By that time, it had become abundantly clear that Russia intended to veto this draft resolution. In its efforts to forestall the veto on the part of Russia, the United Kingdom recalled the 2013 US-Russia agreement and reminded Russia of its commitments.⁶⁴ After the voting, the United Kingdom once again referred to the 2013 agreement, this time to criticise the Russian veto: ‘Today’s veto is even more regrettable given that Russia was the architect of the 2013 agreement to dismantle Syria’s chemical-weapon programme.’⁶⁵

In these instances, the 2013 agreement is referred to as a basis to blame Russia. For this particular purpose, the binding instruments regarding the elimination of Syrian chemical weapons, including the CWC, a treaty, are not particularly useful. The CWC does not oblige any particular State Party, such as Russia, to oversee the elimination of chemical weapons by another State Party bilaterally. No State Party is under an obligation to

⁶³ S/2017/315 (12 April 2017).

⁶⁴ S/PV.7921 (12 April 2017).

⁶⁵ S/PV.7922 (12 April 2017).

locate, secure, and destroy chemical weapons in another State Party either.⁶⁶ Thus, within the CWC, binding as it is, there is no specific role or responsibility – other than whatever *erga omnes partes* obligations may be present – that Russia in particular must discharge. Consequently, the CWC cannot be used *per se* to criticise what Russia does or does not do regarding Syria and its chemical weapons. The same observation can be made for the binding instruments specifically adopted to deal with the elimination of Syrian chemical weapons: neither the OPCW decision in September 2013 nor the Security Council resolutions including the Resolution 2118 envisages any special or specific role for Russia. Thus, the OPCW decision and the relevant UN Security Council resolutions cannot be used for criticising Russia, either.

Against this background, should any State wish to condemn Russia for the continued use of chemical weapons in Syria presently, the only instrument to which Russia explicitly agreed to and that could serve some basis, is in fact the 2013 agreement. This is a distinct benefit that the 2013 agreement continues to offer compared to the binding instruments in place.

3.2.2 Subsequent references in June 2017: Question of enforcement

There is another set of subsequent references to the 2013 agreement that deserve separate examination. They are distinct in purpose to those references to the agreement discussed in 3.2.1. These references appear to be based on a link, loose as it is, between the 2013 agreement and the question of enforcement. As described earlier, military intervention against Syria due to use of chemical weapons in its territory was averted precisely because this agreement had been reached. By 9 September 2013, the question

⁶⁶ The unique exception in the CWC is the situation that involves abandoned chemical weapons under Art. 2(6). Developments regarding the single situation that falls under that provision are examined in Asada, *supra* note 35, pp. 468-471.

to be asked was whether there was ‘anything at this point that his [President Assad’s] government could do or offer that would stop an attack?’⁶⁷ The US Secretary of State replied by saying.

‘Sure. He [President Assad] could turn over every single bit of his chemical weapons to the international community in the next week. Turn it over, all of it, without delay, and allow a full and total accounting for that. But he isn’t about to do it, and it can’t be done, obviously.’⁶⁸

However, Syria agreed to proceed to the elimination of chemical weapons, by accepting the 2013 agreement, and military intervention as a reaction to earlier use of chemical weapons was not pursued.

Perhaps because of this close link between the question of enforcement and the origins of the 2013 agreement, references to the 2013 agreement are made in settings where the question of enforcement is debated. For example, there is a number of references to the 2013 agreement detected in June 2017. The United States made it known, on 26 June 2017, that it ‘has identified potential preparations for another chemical weapons attack by’ Syria.⁶⁹ The statement in question ended with a warning that ‘[I]f ... Mr. Assad conducts another mass murder attack using chemical weapons, he and his military will pay a heavy price.’⁷⁰ Many observers took this warning to mean that the United States

⁶⁷ *Remarks with United Kingdom Foreign Secretary Hague* (9 September 2013), *supra* note 3.

⁶⁸ *Remarks with United Kingdom Foreign Secretary Hague* (9 September 2013), *supra* note 3.

⁶⁹ *Statement from the Press Secretary* (26 June 2017), <https://www.whitehouse.gov/the-press-office/2017/06/26/statement-press-secretary> (accessed 23 August 2017),

⁷⁰ *Ibid.*

intended to carry out another unilateral military intervention, similar to the one in April 2017.⁷¹

A day after this warning by the United States, the French minister for European and foreign affairs, in his interview with *Le Monde* on 27 June 2017, referred to the 2013 agreement, and the fact that it was not respected by Syria. This happened in an answer to the question about possible unilateral enforcement by France in the event of a new chemical attack. The French minister affirmed that the view of the French president on this question was indeed clear,⁷² and added: ‘Moreover, this is a demonstration that the 2013 agreement regarding the dismantlement of the Syrian chemical arsenal, concluded under the auspices of Russia notably, is once again deliberately violated.’⁷³

At about the same time, the OPCW fact-finding mission confirmed that the chemical attack had indeed taken place in April 2017.⁷⁴ On this occasion, quoting the statement by the minister mentioned earlier, a press officer of the French ministry of foreign affairs succeeded in receiving a question regarding the enforcement of the 2013 agreement: ‘Concretely, what steps do you plan to take in order to ensure the respect of the 2013 agreement by Syria regarding the dismantlement of its [chemical] arsenal?’⁷⁵

The answer closely echoed what the country’s president and the minister of foreign

⁷¹ The incident in April 2017 is described in Mika Hayashi, “The U.S. Airstrike After the Use of Chemical Weapons in Syria: National Interest, Humanitarian Intervention, or Enforcement Against War Crimes?”, 21(8) *ASIL Insights* (13 July 2017), <https://www.asil.org/insights/volume/21/issue/8/us-airstrike-after-use-chemical-weapons-syria-national-interest> (accessed 2 August 2017).

⁷² See *infra* note 77.

⁷³ ‘Il s’agit en outre de la démonstration que l’accord de 2013 sur le démantèlement de l’arsenal chimique syrien, passé sous l’égide de la Russie notamment, est une fois de plus violé délibérément.’ Entretien de M. Jean-Yves Le Drian, ministre de l’Europe et des affaires étrangères, avec le quotidien «Le Monde» (le 30 juin, 2017), <http://basedoc.diplomatie.gouv.fr/vues/Kiosque/FranceDiplomatie/kiosque.php?fichier=bafr2017-06-29.html#Chapitre4> (accessed 1 August 2017).

⁷⁴ OPCW Fact-Finding Mission Report, *supra* note 58.

⁷⁵ Point de presse du sous-directeur de la presse, ‘Rapport de la mission d’établissement des faits de l’OIAC sur l’attaque de Khan Cheikhoun’ (le 30 juin 2017), <http://www.diplomatie.gouv.fr/fr/dossiers-pays/syrie/evenements/actualites-2017/article/syrie-armes-chimiques-rapport-de-la-mission-d-etablissement-des-faits-de-l-oiac> (accessed 1 August 2017).

affairs had already said: France ‘treats the use and manufacturing of chemical weapons in Syria as a red line, and will not hesitate to retaliate in case of documented [proven] chemical attacks.’⁷⁶ Because of the term ‘*retaliate*’, or ‘*proceed to reprisals*’ according to the original French, one may get the impression that the case discussed was that of an eventual attack against France. However, the context, which the phrase immediately before this expression so clearly describes, displaces this possibility absolutely. The case discussed was the case of the use of chemical weapons in Syria, and the question asked effectively was whether France would proceed to enforcement action in such a case. The meaning of the words ‘*red line*’ cannot be mistaken, either. They are used by the French president a few days before regarding the enforcement action against Syria. The president in fact used these words, the ‘*red line*’, to affirm that France would proceed to a unilateral airstrike – or an airstrike in cooperation with the United States – against Syria if chemical weapons were used in Syria again.⁷⁷ In retrospect, ‘*red line*’ was also the exact phrase used by the United States in 2013 when it was considering the possibility of unilateral military intervention against the chemical attack in Syria.⁷⁸

Clearly, the main purpose of referring to the 2013 agreement in these cases was not to discredit or criticise Russia. The purpose of these remarks is different from the remarks examined in Section 3.2.1. The straightforward meaning of the remarks in question is

⁷⁶ *Ibid.* ‘... la France fait de l’emploi et de la fabrication d’armes chimiques en Syrie une ligne rouge et n’hésitera pas à procéder à des représailles en cas d’attaque chimique documentée.’

⁷⁷ « Syrie: Macron et Trump prêts à «une réponse commune en cas d’attaque chimique» », *Le Figaro* (le 27 juin 2017), <http://www.lefigaro.fr/international/2017/06/27/01003-20170627ARTFIG00060-washington-menace-damas-accuse-de-preparer-une-autre-attaque-chimique.php> (accessed 3 August 2017).

⁷⁸ *Remarks by President Obama and Prime Minister Reinfeldt of Sweden in Joint Press Conference* (4 September 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/09/04/remarks-president-obama-and-prime-minister-reinfeldt-sweden-joint-press-> (accessed 21 August 2017). The term was also echoed in the academic articles that analyse enforcement actions in the Syria case, see, e.g., Carsten Stahn, “Syria and the Semantics of Intervention, Aggression and Punishment: On ‘Red Lines’ and ‘Blurred Lines’”, 11 *Journal of International Criminal Justice* (2013), pp. 955–977.

that Syria did not do what it promised to do, and the 2013 agreement was an element to take into consideration in the discussion of enforcement action against Syria.

Of course, the nonfulfillment on the part of a State of a non-binding agreement *per se* does not offer on its own strength any legal justification for unilateral military enforcement by another State. On the contrary, according to the UN Charter, '[A]ll Members shall refrain in their international relations from the threat or use of force [...] (Art. 2(4)).' Whether the particular international relations in question are regulated by binding instruments or non-binding instruments is not material in the application of this rule.

If so, the references to the 2013 agreement, and, more specifically, to Syrian non-performance of that agreement, do not have much benefit in justifying the idea of unilateral enforcement. Nevertheless, the rhetorical choice of the 2013 agreement over the Security Council Resolutions and the OPCW decisions in this context arguably makes some sense. The institutional decisions are bound by institutional requirements. Non-compliance with the OPCW decisions must be dealt with in accordance with the procedures of the OPCW, such as Article 8 of the CWC. Violations of Security Council decisions must be dealt with by the Security Council, and collective enforcement is lawful only where a collective decision authorises this. The legal constraints on enforcement actions are explicit and far more detailed within these institutions, than in the stand-alone non-binding 2013 agreement. Invoking the decisions of these institutions would be detrimental to the purpose, if one were trying to justify unilateral enforcement.

4 Concluding remarks

The 2013 agreement examined in this note was a non-binding agreement between the United States and Russia that was reached to avert an escalation of the crisis in Syria in September 2013. There may be many benefits to concluding a non-binding agreement over a treaty, a few of which were amply demonstrated in the case of the 2013 US-Russia Agreement. For one thing, the speed with which an agreement could be reached was key to **successfully averting** a further escalation of the crisis in Syria at that time – namely, unilateral military intervention on the part of the US – and it was a benefit a treaty as a form of agreement could not possibly offer. Moreover, while the 2013 agreement was reached by the United States and Russia, the agreement concerns, as its title clearly indicates, the elimination of *Syrian* chemical weapons. It was in part an agreement about what a third State, not party to the agreement, namely, Syria, should or must do. The application of the *non tertiis* rule and corresponding legal implications would have ensued had the agreement been a treaty purporting to confer legal obligations on a non-party. In sum, the 2013 agreement showed distinct benefits to using a non-binding agreement as opposed to a treaty.

The other assessment that the present study carried out was that of benefits of this non-binding agreement, in this particular case, in light of the subsequent application of binding instruments to the same questions as the agreement. The process of the elimination of chemical weapons in Syria roughly sketched in this non-binding agreement was soon injected with binding force and formality by the effects of the OPCW decision, the UN Security Council resolution 2118, and of the entry into force of

the CWC for Syria. Given this rapid development, if there were any lasting benefit in the 2013 agreement after these formal binding instruments were in force, it would have to be one that these instruments, despite their binding force, were unable to offer. The second assessment in this note is concerned with this.

Predictably, in terms of what Syria must do regarding its chemical weapons, the non-binding agreement held no distinct benefit once the matter was taken over by binding instruments. In some instances, the examination of the subsequent references to the 2013 agreement even when these binding instruments were in force, revealed, first, that it is used to highlight Russia's, and not Syria's, non-performance in the elimination of chemical weapons. The binding instruments, such as the Security Council resolution 2118 or the CWC, do not provide any particular role or obligation for Russia, and cannot be used as leverage against Russia. Second, the subsequent references to the 2013 agreement in other instances indicated a rhetorical preference for the 2013 agreement in discussing the enforcement question. While non-performance on the part of Syria under this non-binding agreement cannot on its own strength amount to justification for unilateral enforcement, the agreement is arguably perceived to be subject to fewer legal constraints than the binding instruments – adopted within the relevant multilateral institutions – that operate within institutional and procedural constraints.