

# THE NECESSITY FOR A PERMANENT DISINCENTIVE: EXAMINING THE USE OF CHEMICAL WEAPONS WITH A FOCUS ON SYRIA'S CIVIL WAR

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## I. INTRODUCTION

Chemical weapons are, by nature, horrific and fundamentally indiscriminate, and society has historically viewed their use as a viola-

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guage under Article 8 of the Rome Statute<sup>8</sup> is not interpreted to implicitly ban chemical weapons, Article 8 should be revised to explicitly refer to chemical weapon use as a war crime.

Last year, North Korean ruler Kim Jong Un's half-brother, Kim Jong Nam, was poisoned with the nerve agent VX<sup>9</sup> at the Kuala Lumpur International Airport and died from suffocation.<sup>10</sup> More recently, in March, a Russian former double agent, Sergei Skripal, and his daughter were poisoned with a nerve agent known as Novichok<sup>11</sup> while they were in England.<sup>12</sup> The Syrian civil war presents the most recent case involving chemical warfare, during which all parties to the war engaged in countless war crimes and crimes against humanity.<sup>13</sup>



does not explicitly list chemical weapon use as a war crime; rather, it ambiguously refers to the use of toxic weapons.<sup>21</sup>

There are other alternatives to a Security Council referral to the ICC, such as prosecution in Syrian domestic courts or an international criminal tribunal.<sup>22</sup> Another option is an internationalized criminal tribunal,<sup>23</sup> similar to the International Military Tribunal for Germany that was created for the Nuremburg trials in 1945. Although the Security Council used these alternatives in the past, their effects were only temporary; past tribunals merely addressed the specific problem for which they were created.<sup>24</sup> In light of the inconceivable duration of the hostilities in Syria, coupled with the international community's obvious intent to prohibit chemical weapon use,<sup>25</sup> prosecutions by the ICC is the most promising cause of action, since it would

## II. CHEMICAL WEAPON CLASSIFICATION AND THE HISTORY OF REGULATION

A chemical weapon is traditionally defined as a “toxic chemical contained in a delivery system, such as a bomb or shell.”<sup>26</sup> The CWC has defined chemical weapons more broadly than the traditional designation; the “term chemical weapon is applied to any toxic chemical or its precursor that can cause death, injury, temporary incapacitation or sensory irritation through its chemical action.”<sup>27</sup> The physical effects of chemical weapons obviate the world’s insistence on prohibiting their use. Depending on the chemical, those effects include: “blindness, blistering, burning, lung damage, skin discoloration, involuntary urination and defecation, vomiting, twitching, convulsions, paralysis, and unconsciousness.”<sup>28</sup>

Multiple international treaties demonstrate a worldwide consensus that the prohibition of chemical weapons is imperative to international peace and stability. Chemical weapons are an indiscriminate weapon in violation of the 1925 Geneva Protocol,<sup>29</sup> a protocol to the Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War,<sup>30</sup> which followed the Hague Conventions of 1899 and 1907.<sup>31</sup> These treaties set the foundation for the laws of war and war crimes over one hundred years ago, and subsequent treaties have built upon that foundation to fill gaps in the law that the international community realized with the advancement of society.

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26. *See* *supra* note 1, at 100.

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ers were particularly interested because of the power and political leverage they could attain with such weapons. International concern stemmed from the notion that a state fearing attack would most likely launch a preemptive strike or, if already under attack, a state, with its regional alliances, would be legally authorized to launch a proportional counter attack, based on Article 52 of the UN (“UN”) Charter.<sup>47</sup> The history of chemical weapon use clearly shows that implementing more stringent measures is indispensable to ensuring the peace and stability of the entire international community. Although it appears that many people, including some party states, ignored the 1925 Geneva Protocol and that the Protocol had a few shortcomings, it is now widely accepted as customary international law.<sup>48</sup>

The CWC is the “first multilateral arms control and nonproliferation treaty” containing a time period for the destruction of a whole category of weapons of mass destruction and integrating a comprehensive verification system<sup>49</sup>—a far more expansive treaty than the 1925 Geneva Protocol. The CWC entered into force in 1997 and “prohibits the development, production, stockpiling, and use of chemical weapons.”<sup>50</sup> According to Article 1 of the CWC:

1. Each State Party to th[e] Convention undertakes never under any circumstances:
  - (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
  - (b) To use chemical weapons;
  - (c) To engage in any military preparations to use chemical weapons;

47. U.N. Charter art. 52, Oct. 24, 1945, 1 U.N.T.S. XVI; Martin, *supra* note 2, at 37 (citing Jordan J. Paust, *supra* note 2, at 34 U. PA. J. INT’L L. 431, 435-36 (2012)).

48. U.N. General Assembly Resolution 2162B called for all states to strictly adhere to the 1925 Geneva protocol. U.N. General Assembly Resolution 2603 asserted that the prohibition on the use of chemical weapons in international armed conflicts were widely accepted rules of international law. G.A. Res. 2162B (XXI), at 11 (Dec. 5, 1966); G.A. Res. 2603 (XXIV), at 16 (Dec. 16, 1969); *supra* Rep. of the U.N. Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, ¶ 1, A/67/997-S/2013/553 (Sept. 16, 2013).

49. *supra* note 2, U.S. CHEMICAL WEAPONS CONVENTION WEB SITE, [http://www.cwc.gov/cwc\\_about.html](http://www.cwc.gov/cwc_about.html) (last visited Feb. 10, 2018).

50. *supra* note 2.

- (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under th[e] Convention.<sup>51</sup>

The OPCW is responsible for overseeing the CWC's implementation, including the worldwide destruction of chemical weapons.<sup>52</sup> At present, the OPCW has 192 member states.<sup>53</sup> The OPCW and the UN formed a legally binding relationship in 2001 and "agree[d] to cooperate closely within their respective mandates and to consult on matters of mutual interest and concern."<sup>54</sup> The OPCW is authorized to investigate party states, but in order to investigate non-party states, the OPCW must cooperate with the UN Secretary General.<sup>55</sup> If it receives information from a state party alleging violations, the OPCW will inspect and monitor activities and facilities of a state party to ensure compliance.<sup>56</sup>

The distinct and terrifying facet of chemical weapons supports the urgency of more stringent regulation and enforcement. The capacity of this "pervasive and invisible agent to inflict particularly gruesome injury with little or no warning, and often with no means of escape, is viewed by many military personnel as 'dirty' warfare, infused with an intrinsic evil not accorded to other weapons systems."<sup>57</sup>

Toxic chemicals more commonly used in warfare are generally separated into four categories: nerve, blister, blood, and choking agents.<sup>58</sup> Nerve agents, such as tabun, sarin, and soman, thwart the enzymes that are vital to the proper functioning of the nervous system

51. Chemical Weapons Convention, *r* note 1, art. I(1)(a)-(d).

52. *s* note 15.

53. *i*.

54. G.A. Res. 55/283, art. II, ¶ 1, (Sept. 24, 2001); *r* Org. for the Prohibition of Chemical Weapons [OPCW], Decision on the Relationship Agreement Between the United Nations and the OPCW, ¶ 1, C-VI/DEC.5 (May 17, 2001).

55. G.A. Res. 55/283, *r* note 54, ¶ 2(c).

56. *i*, art. IV, ¶ 2-3; *s* *r r r e f r e j - o r*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/chemical-weapons-convention/annexes/verification-annex/part-xi/#c12112> (last visited Feb. 23, 2018).

57. David D. Haines & S. C. Fox, *s f - o s e j - o r* *r r r g s - o - o*, 26 FORENSIC SCI. REV. 97, 98 (2014) (citing JEREMY PAXMAN & ROBERT HARRIS, A HIGHER FOR

by interfering with neurotransmission.<sup>59</sup> This leads to the impairment of muscle function and a high likelihood of death.<sup>60</sup> Nerve agents are highly toxic and enter the body by inhalation, skin absorption, or consumption.<sup>61</sup> Symptoms of this agent tend to manifest exceptionally quickly and commonly include suffocation, nausea, vision impairment, difficulty breathing, vomiting, and seizures.<sup>62</sup>

Blistering agents cause severe blisters, burns, blindness, permanent respiratory damage, and cancer.<sup>63</sup> This type of agent acts initially as an irritant, but later becomes a cell poison.<sup>64</sup> Common examples of blistering agents are: sulfur mustard, nitrogen mustard, lewisite, and phosgene oxime.<sup>65</sup> Blood agents, such as hydrogen cyanide, cyanogen chloride, and arsine, are poisons that pass into the bloodstream and hinder regular cell functions, causing suffocation.<sup>66</sup> Choking agents are typically in the form of gas and rapidly disperse in the atmos-

59. Eneh & Ogbuefi-Chima, *r* note 2, at 13 (“Nerve chemical weapons agents are neurotoxins (like sarin, tabun, soman or VX), which block an enzyme that is necessary for the central nervous system to function, leading to a disruption of muscle function followed by a seizure and, eventually, death.”); Haines & Fox, *r* note 57, at 102 (“[N]erve agent . . . refers to small molecules that complex with and inhibit the enzymes that are necessary for nerve transmission, resulting in failure of neuromuscular control over critical physiologic functions.”); *f* *s* *r*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/about-chemical-weapons/types-of-chemical-agent/nerve-agents> (last visited Mar. 16, 2017).

60. Eneh & Ogbuefi-Chima, *r* note 2, at 13; Haines & Fox, *r* note 57, at 102 (citing Frederick R. Sidell, *f* *s* *r*, TEXTBOOK OF MILITARY MEDICINE: MEDICAL ASPECTS OF CHEMICAL AND BIOLOGICAL WARFARE 129, 131-39 (Frederick R. Sidell et al. eds, 1997); *f* *s* *r*, *r* note 59.

61. Eneh & Ogbuefi-Chima, *r* note 2, at 13; *f* *s* *r*, *r* note 59; *r* Haines & Fox, *r* note 57, at 102 (citing Sidell, *r* note 60).

62. *f* *s* *r*, *r* note 59; *r* Eneh & Ogbuefi-Chima, *r* note 2, at 13; Haines & Fox, *r* note 57, at 102.

63. Eneh & Ogbuefi-Chima, *r* note 2, at 12; Haines & Fox, *r* note 57, at 102-04; *f* *s* *r*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/about-chemical-weapons/types-of-chemical-agent/blister-agents> (last visited Mar. 16, 2017).

64. Eneh & Ogbuefi-Chima, *r* note 2, at 12; *f* *s* *r*, *r* note 63; *r* Haines & Fox, *r* note 57, at 102-04.

65. Eneh & Ogbuefi-Chima, *r* note 2, at 12 (citing RANDOLPH NORRIS SHREVE & JOSEPH BRINK, CHEMICAL PROCESS INDUSTRIES (2006)); Haines & Fox, *r* note 57, at 102-04; *f* *s* *r*, *r* note 63.

phere.<sup>67</sup> These agents “[target] the nose, lungs and throat, and [produce] an immediate smothering effect followed by oedema (excess fluid) of the lung possibly resulting in death by asphyxiation.”<sup>68</sup>

The effects of chemical weapons, however, stretch further than physical impairment and mutilation. Exposure to some agents can also result in psychological damage.<sup>69</sup> These physically and psychologically horrific consequences of chemical warfare highlight the difference between weapons of this type and more traditional weapons of war. The foregoing discussion on chemical weapon regulation throughout history indicates that these effects have traditionally been utterly terri-

human rights [were] committed by the Syrian military, security forces and pro-government militias.”<sup>74</sup> The war, thus far, has resulted in about 470,000 deaths and has caused approximately half the population to be displaced, including over 4 million people that fled the country and 6.36 million people displaced within the country.<sup>75</sup> Since 2011, 11.5% of Syrians have died or suffered injuries and 13.8 million people cannot earn a living.<sup>76</sup> Caught in the midst of the chaos, more than 4.5 million civilians have fled Syria as refugees and had to endure the resistance of some countries refusing to accept refugees.<sup>77</sup> Civilians are deprived of access to adequate drinking water and food, mainly due to the active blocking of humanitarian aid by the parties involved in the war.<sup>78</sup>

In 2012, President Obama referred to Syria’s use of chemical weapons as crossing a legal “red line,” which would warrant a response from the US military.<sup>79</sup> The Independent Inquiry again reported reasonable grounds to believe that “Government forces . . . had committed crimes against humanity of murder and of torture, war crimes and gross violations of international human rights law and international humanitarian law.”<sup>80</sup> About a year later, the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic (“U.N. Mission”) pursued investigations into seven of sixteen allegations of chemical weapon use

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sion.aspx (last visited Feb. 16, 2018) (“[T]he Human Rights Council through resolution S-17/1 adopted at its 17th special session with a mandate to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic.”).

74. *Human Rights Council, Report of the Independent International Commission of Inquiry on the Situation in the Syrian Arab Republic*, ¶ 10 (2011), <https://www.unhcr.org/refugees/54954944.html>.

received by the Secretary General.<sup>81</sup> The U.N. Mission concluded that the parties in the Syrian war used chemical weapons on five different occasions.<sup>82</sup> The Syrian government crossed the legal “red line.”

The CIA and the US government immediately threatened a limited military strike against Assad, but Russia stepped in to broker a deal and proposed that the Syrian government join the CWC.<sup>83</sup> The Syrian government ultimately agreed, and the US and Russia created the Framework to establish the timeline for elimination and destruction of Syria’s materials and on-site inspections.<sup>84</sup> The Framework called upon the Security Council to adopt a resolution to reinforce the decision of the OPCW.<sup>85</sup> Subsequently, the Security Council adopted Resolution 2118 and “determined that the use of chemical weapons anywhere constituted a threat to international peace and security, and called for the full implementation of the [OPCW] . . . .”<sup>86</sup> Furthermore:

The [Security] Council specifically “prohibited Syria from using, developing, producing, otherwise acquiring, stockpiling, or retaining chemical weapons, or transferring them to other States or non-State actors,” and emphasized that “no party in Syria should use, develop, produce, acquire, stockpile, retain, or transfer such weapons.”<sup>87</sup>

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81. U.N. Secretary-General, *Report of the Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic*, U.N. Doc. A/68/663-S/2013/735, annex (Dec. 13, 2013).

82. *Id.* ¶¶ 109, 111, 113, 115, 117.

83. *Id.* ¶ 109, *2012-2013*, ARMS CONTROL ASS’N, <https://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity> (last updated Apr. 13, 2018).

84. Framework, *supra* note 14, at 2, 3, 5.

85. *Id.* at 2 (“The United States and the Russian Federation commit to work together towards prompt adoption of a 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 Secretary-General, in consultation with OPCW, submit recommendations to the Security Council on an expedited basis regarding the role of the United Nations in eliminating the Syrian chemical weapons programme. The United States and the Russian Federation concur that the Security Council resolution should provide for review, on a regular basis, of the implementation in Syria of the decision of the Executive Council of OPCW, and in the event of non-compliance, including unauthorized transfer, or any use of chemical weapons by anyone in Syria, the Security Council should impose measures under Chapter VII of the Charter of the United Nations.”).

86. Press Release, Security Council, Security Council Requires Scheduled Destruction of Syria’s Chemical Weapons, Unanimously Adopting Resolution 2118 (2013), U.N. Press Release SC/11135 (Sept. 27, 2013) [hereinafter Meetings Coverage], <https://www.un.org/press/en/2013/sc11135.doc.htm>.

87. Martin, *supra* note 2, at 55 (quoting Meetings Coverage, *supra* note 86).

Notwithstanding the strong international response, the Independent Inquiry once again found evidence that the parties in Syria used chemical weapons on multiple occasions.<sup>88</sup>

theless, the Joint Mechanism alleged that forces conducted chlorine attacks on multiple occasions even after the destruction<sup>93</sup> (chlorine was not part of the Framework because it is an industrial chemical,



prosecutions of the individuals committing the crimes and with no justice for the Syrian civilians who were killed, injured, or driven out of their country.

Frustrated with the lack of justice, France initiated the International Partnership against Impunity for the Use of Chemical Weapons with the support of about thirty countries and international organizations.<sup>100</sup> It has already started identifying perpetrators of chemical warfare and publishing their names online, using public shame as a method for deterrence and ensuring the perpetrators will be held accountable when the time comes.<sup>101</sup>

Many states have turned to imposing sanctions on Syria,<sup>102</sup> but doing so does not necessarily have a deterrent effect. For those in-

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2017); *International Partnership against Impunity for the Use of Chemical Weapons* (Feb. 7, 2018), <https://www.opcw.org/news/article/opcw-fact-finding-mission-in-syria-continues-investigations-into-allegations-of-chemical-weapons-use/> (indicating an investigation and reporting by the OPCW, but no further action by any states).

100. *International Partnership against Impunity for the Use of Chemical Weapons*, No IMPUNITY CHEMICAL



condemns such actions. Rather than continuing the passive approach taken thus far, a more stable and effective solution is critical to ensure the current safety of the international community and the safety for the future.

The Rome Statute is the foundational and governing document for the ICC, which is located in The Hague, Netherlands.<sup>111</sup> The Rome Statute was adopted at a UN diplomatic conference in 1998 and the treaty was entered into force in 2002.<sup>112</sup> 124 countries have acceded to or ratified the Rome Statute, but Syria is not a state party.<sup>113</sup> Syria signed the Rome Statute on November 29, 2000, but has not ratified it.<sup>114</sup> The ICC is designed as a court of last resort;<sup>115</sup> under the principle of complementarity, it must defer to national proceedings whether or not they lead to prosecution, unless there is no functioning judicial system, or if the national proceedings are intended to shield a suspect from prosecution.<sup>116</sup>

The Rome Statute requires territorial or personal jurisdiction, subject-matter jurisdiction, and temporal jurisdiction before the ICC

an application of the Prosecutor to open an investigation on her own initiative.<sup>120</sup> The crimes defined in the Rome Statute do not have a statute of limitations, but the court's jurisdiction is not absolutely retroactive; the crimes must have occurred after the Rome Statute went into effect.<sup>121</sup> Nevertheless, if a state became a party subsequent to the court's establishment, jurisdiction can only retroactively extend to the date of ratification.<sup>122</sup>

While not a UN organization, the ICC has a cooperation agreement with the UN.<sup>123</sup> When a matter is not within the court's jurisdiction, the Security Council can refer the situation to the ICC, granting it jurisdiction.<sup>124</sup> The ICC Prosecutor then has the discretion to decide whether to pursue an investigation.<sup>125</sup> The Security Council has used this power to refer situations in non-Party States to the ICC on only two prior occasions: the first time for Darfur, Sudan in 2005 and then for Libya in 2011.<sup>126</sup>

There are two overarching obstacles regarding the UN Security Council and the ICC: the lack of resources and enforcement mechanisms, and partisan interests of the five permanent members.

The devastating gravity of the effects of chemical warfare and the widespread dissatisfaction with such weapons in the international community warrants stringent consequences. "[R]estoring the norm requires that all those who use toxic chemicals be held accountable."<sup>127</sup> Automatic referral will finally eliminate loopholes for avoiding punishment, thereby creating a deterrent effect. It will Com

where a civil war continues with the same stamina for years, while the rest of the world watches.

It may seem outrageous that so many instances of chemical weapon use in Syria have gone completely unpunished even though there is an entire arms control treaty dedicated to the prohibition of precisely those types of weapons.<sup>128</sup> However, the CWC sets out a rather meager approach to dealing with violations of the treaty and the Syrian war has made that apparent numerous times. The CWC assigns to the Conference the responsibility to take the necessary measures to “ensure compliance with th[e] Convention and to redress and remedy any situation which contravenes the provisions . . . .”<sup>129</sup> It also provides that the “Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the UN General Assembly and the UN Security Council.”<sup>130</sup> Over the course of the Syrian war, this system has proved fruitless and there is no reason to believe that it will be any different in the future.

Since the events of the war most likely amount to cases of “particular gravity,” the issue has been, or would be, brought to the attention of the Security Council or General Assembly. This results in the same scenario as each time the Security Council has presented a resolution to refer the use of chemical weapons in Syria to the ICC, because once again any course of action would have to be approved by the five permanent members. Thus, just as each proposal to refer the situation to the ICC has been rejected by Russia and China based on partisan interests, the same would occur with any issue the Conference brings to the attention of the UN.

All possible avenues to pursue justice and accountability for such a grave offense are continuously hindered, creating a vicious cycle of impunity. Two preliminary obstacles must be addressed before the ICC Prosecutor may accept a Security Council referral and open an investigation into Syria. First, can the language in Article 8(2)(e)(xiv)<sup>131</sup> of the Rome Statute be applied to the situation in Syria? Second, can the language of the Rome Statute be interpreted to include a prohibition on the use of chemical weapons? Both questions would have to be answered in the affirmative for the Prosecutor

128. *Chemical Weapons Convention*, *supra* note 1.

129. *Id.* art. XII(1).

130. *Id.* art. XII(4).

131. *Rome Statute*, *supra* note 5, art. 8(2)(b)(xvii)-(xviii) (“Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices . . .”).

to determine that such actions in Syria potentially amount to war crimes and therefore warrant investigation.

### 1. Characterizing the Syrian War

Article 8(2) of the Rome Statute originally only prohibited the use of “poison or poisoned weapons” and “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” in the context of international armed conflicts.<sup>132</sup> The situation in Syria is not a conflict where a state is fighting against another state, and as such, is not of international character. Rather, it can be characterized as a non-international armed conflict (“NIAC”),<sup>133</sup> which warrants application of the law of armed conflict.<sup>134</sup> Prior to the adoption of the Second Additional Protocol to the Geneva Conventions (“Additional Protocol II”),<sup>135</sup> NIACs were “under-regulated and under-ex-

132. Rome Statute of the International Criminal Court, art. 8(2)(b)(xvii)-(xviii). The Statute defines “war crimes” as “(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention” and “(b) [o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts . . . .” Rome Statute, art. 8(2)(a)-(b).

133. The Statute defines a non-international armed conflict as one “that take[s] place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” Rome Statute, art. 8(2)(f). It is necessary to first inquire whether the situation amounts to an armed conflict. The International Criminal Tribunal for the former Yugoslavia held in *Prosecutor v. Tadić*, “that an armed conflict exists whenever there is [1] a resort to armed force between States, or [2] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

134. Also referred to as international humanitarian law, or IHL. Tom Ruys, *Non-International Armed Conflicts: A New Paradigm?*, 50 *STAN. J. INT’L L.* 247, 248-49 (2014).

135. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609. The purpose of Additional Protocol II was to improve and supplement Common Article 3 to the 1949 Geneva Conventions without altering its existing conditions of application. Protocol II, art. 1. It applies to all armed conflicts that are not already mentioned in the “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),” which occur on a State Party’s territory, where the State Party’s “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Protocol II, art. 1.



amined,”<sup>136</sup> and were mainly governed by Article 3, common to all four Geneva Conventions of 1949 (“Common Article 3”).

the territory of non-parties.”<sup>143</sup> If the Security Council can expand ICC jurisdiction to bind non-parties to the Statute, then it also follows that the court should have the power to bind non-parties to the Amendment.

## 2. Does the Rome Statute Prohibit the Use of Chemical Weapons?

Assuming referral can be based on the Kampala Amendment, it becomes necessary to ascertain whether the ambiguous language of Article 8(2)(e)(xiii) and (xiv) can be construed to encompass the use of chemical weapons.<sup>144</sup> To safeguard the best interests of the international community, the Article 8 provisions should be read as prohibiting the use of chemical weapons. In the event that the provisions are interpreted more narrowly, the text of the Rome Statute under Article 8 ought to be revised to explicitly forbid chemical weapons.

One justification in favor of construing Article 8 to include chemical weapons is that the language “asphyxiating, poisonous or other gases” mirrors the language of the 1925 Geneva Protocol, which specifically prohibits the use of chemical weapons.<sup>145</sup> The Czech Republic made a declaration upon its ratification of the Kampala Amendment:

The Czech Republic interprets the Amendment to Article 8 of the Rome Statute of the International Criminal Court (Kampala, 10 June 2010) as having the following meaning:

- (i) The prohibition to employ gases, and all analogous liquids, materials or devices, set out in article 8, paragraph 2 (e) (xiv), is interpreted in line with the obligations arising from the Convention on the Prohibition of the Development, Production, stock-piling and Use of Chemical Weapons and on Their Destruction of 1993.<sup>146</sup>

A state party’s pronouncement of this interpretation lends support to this view. Opponents argue that the omission of a specific reference to chemical weapons is significant; i.e., a proposal to explicitly prohibit chemical and biological weapons that was removed from the

143. *Id.*

144. This controversial topic has been constantly debated. Amal Alamuddin & Philippa Webb, *Asphyxiating, Poisonous or Other Gases, and All Analogous Liquids, Materials or Devices*, 8 J. INT’L CRIM. JUST. 1219, 1227 (2010) (comparing the different views of commentators).

145. Rome Statute, *supra* note 5, art. 8(2)(b)(xvii)-(xviii) (prohibiting the use of “poisoned weapons” and “asphyxiating, poisonous or other gases, and all analogous liquids, materials or device . . .”), Geneva Protocol, *supra* note 1 (prohibiting “the use of bacteriological methods of warfare . . . between [the parties of the agreement] . . .”).

146. Kampala Amendment, *supra* note 7, Declarations.



final draft is evidence of the parties' intentions.<sup>147</sup> A treaty, however, cannot be interpreted solely based on drafting history.<sup>148</sup>

Under the Vienna Convention of the Law of Treaties, the text and terms of a treaty must be interpreted first,<sup>149</sup> whereas drafting history is considered as a supplemental means of interpretation.<sup>150</sup> Words such as "poison," "asphyxiation," "gases," and "liquids" are used in the Rome Statute, the CWC, and the 1925 Geneva Protocol.<sup>151</sup> Blood agents under the CWC are poisons (or poisoned weapons), dispersed as gases, that cause the body to suffocate. Suffocation is equivalent to asphyxiation.<sup>152</sup> Choking agents are also gases and result in death by asphyxiation.<sup>153</sup> Blistering agents are in the form of a gas or liquid and "can act as poison if they pass into the blood stream, and can cause death by asphyxiation if they reach the respiratory system."<sup>154</sup>

Both terms have the same meaning in both contexts. In addition, the drafting history of the treaty shows that the main reason for removing chemical and biological weapons from the final draft was essentially because some wanted to include nuclear weapons but others argued against it, which led to an agreement to omit nuclear, chemical, and biological weapons altogether.<sup>155</sup> The parties did not exclude the explicit language because of a disfavor of chemical weapons prohibition.

147. Alamuddin & Webb, *r* note 144, at 1227-28.

148. Vienna Convention on the Law of Treaties, art. 31-32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *r* Akande, *r* note 141.

149. Vienna Convention, *r* note 148, art. 31 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

150. *r* art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.").

151. *r* Rome Statute, *r* note 5, art. 8(2)(b)(xvii)-(xviii); Chemical Weapons Convention, *r* note 1, art. XIII; Geneva Protocol, *r* note 1.

152. *r*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/asphyxia> (last visited Feb. 24, 2018).

153. *f* Eneh & Ogbuefi-Chima, *r* note 2, at 12-13; Haines & Fox, *r* note 57, at 102.

154. Eneh & Ogbuefi-Chima, *r* note 2, at 12; *r* Haines & Fox, *r* note 57, at 101-02.

155. Some states at the Rome Conference "insisted that it was unfair or misleading to ex-

Article 8(2)(e) also includes “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.”<sup>156</sup> This provision is evidence of an intention to conform to customary international law and so provides an additional justification because “[s]tate practice establishes . . . [the prohibition of the use of chemical weapons] as a norm of customary international law applicable in both international and non-international armed conflicts.”<sup>157</sup>

The language of the Rome Statute mirrors the 1925 Geneva Protocol, the Czech Republic declared that it interprets the Rome Statute in accordance with the CWC, and the ordinary meaning of the terms are equivalent to the terms in the CWC.<sup>158</sup> The use of chemical weapons is also prohibited under customary international law.<sup>159</sup> Thus, the provisions of the Rome Statute should be understood to imply the prohibition of the use of chemical weapons. This construction of Article 8(2)(e)(xiii) and (xiv), and the fact that referral based on the Kampala Amendment is analogous to referral based on the Rome Statute, together demonstrate the likelihood of ICC jurisdiction and ultimately support automatic referral to the ICC for any use of chemical weapons as a war crime.

### 3. How Automatic Referral Addresses the Current Obstacles of the ICC

There appears to be enough regulation through the CWC and the Security Council, but politics will surely stand in the way of any meaningful intervention. The Security Council “can’t bring (peace-building) resolutions to a vote because they’re blocked by one of the five permanent members (China, France, Russia, the UK and the US) who themselves are committing these violations . . . .”<sup>160</sup> When the ICC has jurisdiction to prosecute the Syrian government and rebel forces for engaging in chemical warfare, the prohibition of chemical weapons will finally be enforced and the ICC will gain credibility and support in the international community.

156. Rome Statute, *r* note 5, art. 8(2)(e).

157. HENCKAERTS & BECK, *r* note 108, at 3.

158. Rome Statute, *r* note 5, art. 8(2)(b)(xvii)-(xviii); Geneva Protocol, *r* note 1; Kampala Amendment, *r* note 7, Declarations; Chemical Weapons Con999.9 (e T\*(will fimhra)Tj/T1\_0 1 Tf( note 7, Decla Adion8ar

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ate those goals. With such a structure already in place, it is not necessary to create a new one. The parties to the Syrian conflict have breached a clear line, so the members of the Security Council and the international community should not hesitate to ensure that the situation is referred to the ICC. Since the ICC is a nongovernmental organization, it lacks a police force or enforcement body of its own, and thus relies on the cooperation and assistance of the international community.<sup>167</sup>

Another possible obstacle standing in the way of automatic referral is Russia and China's potential use of their veto powers and whether it is possible for all five permanent Security Council members to agree on the resolution creating automatic grounds for referral. Member states should not be concerned about exposing themselves to the possibility of prosecution for involvement in the conflict because the ICC's jurisdiction would only be for prosecuting chemical weapon use. Neither China nor Russia have been accused of participation in chemical warfare—at least not yet.

Another limitation is the high probability that Russia will not want to break its long-standing alliance with Assad. To address this concern, the Security Council resolution may instead create automatic grounds for referral for any *de facto* use of chemical weapons. However, in the event that the resolution will only be adopted with that qualification, another system will have to be put into place to ensure that the parties to the Syrian conflict do not walk away free men. They must be

tence as a court have been against African countries.<sup>170</sup> In the event that the Security Council adopts a resolution unhindered by the usual vetoes, creating automatic referral to the ICC for the Syrian conflict will reassure the international community that the ICC is fulfilling its purpose, rather than merely targeting specific countries.

Automatic referral and the underlying purpose of the ICC complement each other. On the one hand, we have a problem of prior solutions being merely temporary and therefore a recurring problem, and on the other hand, we have a court that is not living up to its potential and is instead being accused of targeting African countries. With automatic referral, the ICC can ensure that the ban on chemical warfare is enforced regularly, and if the ICC is given the responsibility

providing a “blanket prohibition” for Syria’s use of chemical weapons.<sup>174</sup> “If Syria used chemical weapons to unlawfully kill civilians or to perpetrate genocide, those actions would be a violation of Syria’s treaty obligations, but not any more so than if Syria used conventional weapons to perpetrate the same actions.”<sup>175</sup> Hence, the CWC—and possibly the 1925 Geneva Protocol—remains the basis for justifying automatic referral.

The notion that Syria’s actions, whether by chemical weapons or conventional weapons, would be treated the same provides additional support for the argument that there should be automatic referral. We have already witnessed the consequences of no punishment: A civil war has continued to escalate for seven years, the once beautiful and boasting cities of Syria have been ravaged and torn to the ground, and innocent civilians have had to endure gravely unimaginable horror.<sup>176</sup> Absent a system for automatic referral, which would target the problem head-on, all the parties to the war, and even parties to armed conflicts in the future, will continue to take advantage of the current system. It appears that, at every step of the way, there is a miniscule technicality that allows the parties to escape punishment and liability, which is exactly where the problem arises.

The system of automatic referral does not vest the five permanent members of the Security Council with unlimited discretion to accept or veto on a case-by-case basis every proposed referral to the ICC. Rather, it safeguards and prioritizes the peace and stability of the international community by frustrating selfish and biased attempts to hinder those objectives. International consensus on the horror of chemical weapons and the historical trend of prohibition is, as explained above, without a doubt customary international law.<sup>177</sup>

Domestic courts in Syria are technically under an obligation to investigate and prosecute the responsible individuals and parties that might have committed crimes on their territory,<sup>178</sup> but that is not a possibility since the war is still enduring and the courts are not in operation.<sup>179</sup>

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174. / .

175. / .

176. Rodgers et al., *r* ¶ note 13.

177. *r* discussion *r* ¶ Part II.

178. Jones, *r* ¶ note 20, at 804-05.

179. *r* at 805 (citing Rep. of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/22/59, annex XIV (Feb. 5, 2013)).

Domestic courts in other countries may be able to prosecute individuals on the basis of universal jurisdiction.<sup>180</sup> Germany and Sweden have started to pursue this avenue of accountability, but have encountered various challenges.<sup>181</sup> Since the conflict is still ongoing, authorities are unable to gather evidence from Syria.<sup>182</sup> In addition, universal jurisdiction is typically exercised against individuals that are physically present in the prosecuting country, but the individuals of interest here are not in Germany or Sweden.<sup>183</sup>

Another option is an international criminal tribunal, which is created under the Chapter VII powers of the Security Council.<sup>184</sup> Russia will not agree to a special international criminal tribunal set up specifically for Syria because doing so would expose Assad's regime to the risk of prosecution, and Russia is allied with Syria.<sup>185</sup> Nevertheless, Russia showed interest in chemical weapon regulation by establishing the Framework with the US and suggesting that Syria join the CWC to have its chemical weapons destroyed.<sup>186</sup> An tribunal has been created by the Security Council on two different occasions, once for Yugoslavia and another time for Rwanda.<sup>187</sup> However, those tribunals were created to deal with atrocious crimes in specific regions for specific conflicts.<sup>188</sup>

A more permanent approach to Syria's conflict is crucial because of the gravity of the issue, which will continue to present itself again and again in other conflicts if no permanent measures are taken. In

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addition to the reasons laid out above, a prime advantage of referring these cases to the ICC is avoiding the lengthy and expensive process of establishing a new tribunal, since a permanent mechanism is already in place.<sup>189</sup>

An internationalized criminal tribunal,<sup>190</sup> also referred to as a hybrid court, could provide another possible forum for justice. This type of tribunal combines domestic and international elements in relation to the officers and pertinent law.<sup>191</sup> The involvement of domestic officers often yields a feel of regional dominion over the tribunal's work and increases the perceived legitimacy of the region.<sup>192</sup> Participation of international officers could additionally contribute dexterity and "increase the perceived independence and impartiality of the criminal justice process."<sup>193</sup> However, this would be an extremely risky alternative because the domestic officials would certainly be biased and would stand in the way of a fair system.<sup>194</sup> On the contrary, the ICC would provide an independent and impartial forum to ensure equitable adjudication for all parties.

Another alternative that is advocated for very often on this topic is to question whether the international community is justified to intervene in Syria. "Parties to the Geneva Conventions and their Additional Protocols are explicitly obligated not only to respect their treaty obligations, but also to ensure respect for them."<sup>195</sup> This is not an explicit provision. Rather, the "Responsibility to Protect" is a result of universal accord.<sup>196</sup> The idea is that States "have a 'Responsibility to Protect' . . . their civilian populations and that other States must act

189. Jones, *r* note 20, at 811 ("In the event that sufficient will is gathered for the pursuit of international criminal justice, it would be more likely, and more prudent, for the Security Council to refer the situation to the ICC under Article 13(b) of the Rome Statute than to establish a new institution for the same purpose.")

190. *r* S.C. Res. 827 (May 25, 1993); S.C. Res. 955 (Nov. 8, 1994).

191. *r* Jones, *r* note 20, at 811-12; *r*, INT'L JUST. RESOURCE CTR., <http://www.ijrcenter.org/international-criminal-law/internationalized-criminal-tribunals/> (last visited Feb. 17, 2018). *r* Statute of the Special Court for Sierra Leone, Jan. 16, 2002, 97 A.J.I.L. 295, 2178 U.N.T.S. 137.

192. *r* Jones, *r* note 20, at 812 (first citing Lindsey Raub, *r* *r*, 41 N.Y.U. J. INT'L L. & POL.



affirmatively when a State is unwilling or unable to meet their responsibility.”<sup>197</sup> In regards to the use of force:

[Responsibility to Protect] may include the use of force, but may also involve measures short of that, including targeted sanctions, international condemnation, diplomatic efforts, referral to the ICC, etc. Resort to force by one State on the territory of another, even for the purpose of protecting a civilian population against war crimes, crimes against humanity and genocide, may be unlawful absent Security Council authorization, unless also justifiable as self-defense.<sup>198</sup>

A military intervention is not likely to be more successful than an automatic referral to the ICC. A military intervention in Syria would stir up more anger and resistance and would probably lead to an increase of hostilities. The duration of the war in Syria shows that the parties are deeply invested and would oppose involvement from an outside military force for meddling in their internal affairs. However, the strength of the intervention could make a difference. A military that is extremely prepared to join a drawn-out war will have a greater effect than a military that is unprepared for such circumstances.

## V. CONCLUSION

Chemical weapons are “quintessentially weapons of terror.”<sup>199</sup> The international community has an obligation to end the war crimes and crimes against humanity in Syria, but legally cannot do so without the UN and the International Criminal Court. The UN Security Council should adopt a resolution that creates automatic grounds for referral to the International Criminal Court for any use of chemical weapons and the ICC’s jurisdiction should be grounded on the Kampala Amendment.<sup>200</sup> If the current language of the Rome Statute does not implicitly include chemical weapons, the Statute should be revised to explicitly refer to chemical weapon use as a war crime. I argue for a more permanent approach to Syria’s conflict because of the gravity of the issue, which is likely to present itself again and again in future conflicts if no permanent measures are taken. A seven-year civil war and hundreds of thousands of deaths is more than a reason to

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tional community, everyone has a duty to protect the innocent individuals in Syria, those who fled Syria, and those who had their lives taken away.

