

## A Legal ‘Red Line’?: Syria and the Use of Chemical Weapons in Civil Conflict

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### ABSTRACT

This Essay analyzes the prohibition on the use of chemical weapons in civil conflicts and applies its findings to the Syrian civil war. We find that international humanitarian law and international criminal law provide a clear ban on the use of chemical weapons in international armed conflict. This prohibition is less clear in noninternational armed conflict, suggesting the need for legal reforms to firmly ban the use of chemical weapons in all armed conflicts. Furthermore, we find the use of chemical weapons in Syria does not, by itself, cross a legal red line justifying military intervention. Instead, the use of chemical weapons is one factor in determining the existence of a humanitarian crisis requiring strong international action.

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## INTRODUCTION

In June 2012, U.S. President Barack Obama warned the Syrian government that deploying chemical weapons in Syria's ongoing civil war would be crossing a "red line" that would be met with "enormous consequences."<sup>1</sup> One year after President Obama's tough remarks, evidence surfaced that Syrian President Bashar al-Assad was using chemical weapons against his own people.<sup>2</sup> In response, the Obama administration changed its policy from providing only humanitarian aid to rebel forces to also providing direct "military support" to rebels.<sup>3</sup> The administration was recently weighing a direct military strike against the Assad regime, which has been put on hold while it pursues diplomatic means to disarm Syria's chemical arsenal.<sup>4</sup> While the use of chemical weapons seems to have been a political red line for the administration and its allies, international law does not currently establish the same bright-line rule against the use of chemical weapons in all conflicts.

This Essay examines the prohibition on the use of chemical weapons under relevant treaties and customary international law and applies this law to the ongoing Syrian civil war. We argue that while international humanitarian and criminal law provide a clear ban on the use of chemical weapons in international armed conflict, that ban is less clear in noninternational armed conflict. In addition, we find that mass atrocity crimes committed by the Assad regime could legally justify the military intervention that the United States and allies have suggested with their "red line" policy. The use of chemical weapons, however, would not

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1. Margaret Talev & Nayla Razzouk, *Obama Says Chemical Weapons Use by Syria 'Red Line' for U.S.*, BLOOMBERG (Aug. 21, 2012, 10:16 AM), <http://www.bloomberg.com/news/2012-08-20/obama-says-any-chemical-weapon-use-in-syria-red-line-for-u-s-.html> (internal quotation marks omitted).
  2. Peter Foster & Jon Swaine, *Syria: US Confirms Assad Used Chemical Weapons*, TELEGRAPH, June 14, 2013, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10119750/Syria-US-confirms-Assad-used-chemical-weapons.html>; Rick Gladstone & C.J. Chivers, *Forensic Details in U.N. Report Point to Assad's Use of Gas*, N.Y. TIMES, Sept. 16, 2013, <http://www.nytimes.com/2013/09/17/world/europe/syria-united-nations.html>; see 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, [http://www.un.org/disarmament/content/slideshow/Secretary\\_General\\_Report\\_of\\_CW\\_Investigation.pdf](http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf).
  3. *Id.*
  4. Thom Shanker et al., *Obama Weighs 'Limited' Strikes Against Syrian Forces*, N.Y. TIMES, Aug. 27, 2013, <http://www.nytimes.com/2013/08/28/world/middleeast/obama-syria-strike.html>; *Syria Crisis: Obama Puts Military Strike on Hold*, BBC (Sept. 11, 2013, 10:58 AM), <http://www.bbc.co.uk/news/world-us-canada-24043751> [hereinafter *Syria Crisis*].

uniquely justify intervention, or strong international action,<sup>5</sup> under current international law. Finally, focus on chemical weapons as the sole determinative factor for international action allows states like Syria to continue committing mass atrocity crimes using conventional weapons with impunity.

### I. THE SYRIAN CIVIL WAR AND CHEMICAL WEAPONS

The Syrian civil war started in 2011, during a period of political upheaval and revolution in the Middle East known as the Arab Spring. Peaceful protests against the Assad regime began in early 2011.<sup>6</sup> The Syrian government responded with overwhelming force, including the targeting of civilians.<sup>7</sup> The opposition escalated into an armed resistance, and by May 2012, the International Committee of the Red Cross (ICRC) declared that Syria was engaged in a noninternational armed conflict.<sup>8</sup> The Syrian government is now fighting the Free Syrian Army<sup>9</sup> and an opposition movement led by the National Coalition of Syrian Revolutionary and Opposition Forces.<sup>10</sup>

The Syrian civil war has ravaged the country. Both sides of the conflict have committed international crimes, but government forces have reportedly committed more widespread abuses. In August 2012, the Independent International Commission of Inquiry on the Syrian Arab Republic, a body established by the UN Human Rights Council, reported:

The commission found reasonable grounds to believe that Government forces . . . had committed the crimes against humanity of murder and of torture, war crimes and gross violations of international

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5. A strong international response may include foreign military intervention, ICC referral, international sanctions, or the establishment of a no-fly zone.
  6. Joe Sterling, *Daraa: The Spark That Lit the Syrian Flame*, CNN (Mar. 1, 2012, 9:32 AM), <http://www.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/index.html>.
  7. *Opposition: 127 Dead as Syrian Forces Target Civilians*, CNN (Apr. 7, 2012, 6:52 PM), [http://articles.cnn.com/2012-04-07/middleeast/world\\_meast\\_syria-unrest\\_1\\_homs-and-hama-syrian-observatory-network-of-opposition-activists?\\_s=PM:MIDDLEEAST](http://articles.cnn.com/2012-04-07/middleeast/world_meast_syria-unrest_1_homs-and-hama-syrian-observatory-network-of-opposition-activists?_s=PM:MIDDLEEAST).
  8. *Syria*, GENEVA ACAD. INT'L HUMANITARIAN L. & HUM. RTS., [http://www.geneva-academy.ch/RULAC/applicable\\_international\\_law.php?id\\_state=211](http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=211) (last updated July 13, 2012).
  9. "The FSA has remained a brand name only . . . . Meanwhile, there are also independent military alliances, which vary from more moderate to more extreme groups . . . . The differences between the self-identified FSA and the independent groups have not, however, significantly hindered their cooperation as they have continued to cooperate operationally to achieve their common objectives." U.N. Gen. Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 25, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013); see also *Guide to the Syrian Opposition*, BBC, <http://www.bbc.co.uk/news/world-middle-east-15798218> (last updated Sept. 16, 2013).
  10. Zachary Laub & Jonathan Masters, *Syria's Crisis and the Global Response*, COUNCIL ON FOREIGN REL. (Sept. 11, 2013), <http://www.cfr.org/syria/syrias-crisis-global-response/p28402>.

human rights law and international humanitarian law, including unlawful killing, torture, arbitrary arrest and detention, sexual violence, indiscriminate attack, pillaging and destruction of property. . . . The violations and abuses committed by anti-Government armed groups did not reach the gravity, frequency and scale of those committed by Government forces . . . .<sup>11</sup>

In the course of four months (January 15–May 15, 2013), the same commission reported “17 incidents potentially meeting the definition of massacre”<sup>12</sup> in addition to instances of “[o]ther unlawful killing” such as murder and summary executions.<sup>13</sup>

Syrian government forces continue arbitrary arrests and detentions, depriving individuals of their liberty and carrying out forced disappearances.<sup>14</sup> According to the Commission, in 2013 torture is so “endemic in detention centres and prisons”<sup>15</sup> throughout Syria, that it amounts to a war crime. The documented treatment is “evidence [of] a state policy of torture, constituting a crime against humanity.”<sup>16</sup> Torture has also been reported in rebel-operated facilities in Aleppo. Opposition forces have subjected “persons perceived to be supportive of the Government . . . to beatings and other ill-treatment.”<sup>17</sup>

Despite the strong and continuing evidence of war crimes and crimes against humanity, the United States and its allies have focused on Syria’s use of chemical weapons. The threat of chemical weapons initiated a series of warnings from the United States, United Kingdom,<sup>18</sup> and France<sup>19</sup> in 2012. Leaders from

11. U.N. Gen. Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, at *Summary*, U.N. Doc. A/HRC/21/50 (Aug. 16, 2012).

12. U.N. Gen. Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 38, U.N. Doc. A/HRC/23/58 (June 4, 2013). The Commission defines “massacre” as “[a]n intentional mass killing of civilians not directly participating in hostilities, or hors de combat fighters, by organized armed forces or groups in a single incident, in violation of international human rights or humanitarian law.” U.N. Gen. Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶ 42, U.N. Doc. A/HRC/22/59 (Feb. 5, 2013).

13. U.N. Gen. Assembly, Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶¶ 51–54, U.N. Doc. A/HRC/23/58 (June 4, 2013).

14. *Id.* ¶¶ 64–66.

15. *Id.* ¶ 82.

16. *Id.* ¶ 87.

17. *Id.* ¶ 89.

18. Nicholas Watt, *Cameron Echoes Obama’s Warning to Syria Over Chemical Weapons*, GUARDIAN (Aug. 22, 2012, 8:18 PM), <http://www.guardian.co.uk/politics/2012/aug/23/cameron-obama-syria-chemical-weapons>.

19. *France Calls on UN to Give Syrians All the Support They Request Against Assad*, UN NEWS CENTRE (Sept. 25, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43007&Cr=general+debate&Cr1=#.UeQwaBYUvR0>.

all three countries stated that the threat or use of chemical weapons would trigger a forceful response, possibly including military intervention.

In 2013, concrete evidence of chemical weapons use began to surface.<sup>20</sup> By August, the Syrian government faced allegations of using chemical weapon in six separate attacks.<sup>21</sup> A U.S. intelligence report cited by Secretary of State John Kerry showed evidence that the Assad regime had killed 1429 citizens in a chemical weapons attack, including 426 children.<sup>22</sup> Although this accounts for only a small fraction of the total casualties of the conflict,<sup>23</sup> the use of chemical weapons has prompted strong international response including serious consideration of military intervention without Security Council authorization.<sup>24</sup> The international community has shown concern over the attacks, claiming the use of chemical weapons violates international norms.<sup>25</sup> Rebel forces also face allegations of launching a chemical attack;<sup>26</sup> however, limited access prevents independent confirmation.

In June 2013, the CIA announced plans to provide arms to “small groups of vetted Syrian rebels,” and France and Saudi Arabia were in talks to provide limited military support to rebels.<sup>27</sup> In September, key members of the Obama ad-

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20. The U.N. Report issued on September 16, 2013 confirmed the use of chemical weapons “between the parties [in the Syrian civil conflict] . . . also against civilians, including children, on a relatively large scale.” *Letter of Transmittal*, in 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, *supra* note 2.
  21. *Syria Chemical Weapons Allegations*, BBC, <http://www.bbc.co.uk/news/world-middle-east-22557347> (last updated Aug. 21, 2013).
  22. Paul Richter, *John Kerry Says Syria Chemical Attack Killed at Least 1,429 People*, L.A. TIMES, Aug. 30, 2013, <http://www.latimes.com/world/worldnow/la-fg-wn-kerry-us-syria-chemical-attack-20130830,0,2222419.story>.
  23. Alan Cowell, *War Deaths in Syria Said to Top 100,000*, N.Y. TIMES, June 26, 2013, <http://www.nytimes.com/2013/06/27/world/middleeast/syria.html> (noting that, according to the Syrian Observatory, “36,661 civilians, including 8,000 women and children; 13,539 rebel fighters; and 2,015 defectors from government forces”).
  24. Harriet Alexander et al., *Syria: August 28 as It Happened*, TELEGRAPH, Aug. 29, 2013, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10273014/SyriaAugust-28-as-it-happened.html> (summarizing concern voiced by U.S. President Barack Obama, a statement by the Archbishop Desmond Tuto, and the text of the British government’s motion to be presented to the Parliament for the August 29, 2013 vote).
  25. *See Obama’s Global ‘Norm’ on Chemical Weapons in Syria*, CHRISTIAN SCI. MONITOR (Sept. 11, 2013), <http://www.csmonitor.com/Commentary/the-monitors-view/2013/0911/Obama-s-global-norm-on-chemical-weapons-in-Syria>.
  26. *See Russian Inquiry to UN: Rebels, Not Army, Behind Syria Aleppo Sarin Attack*, RT (July 9, 2013, 4:22 PM), <http://rt.com/news/syria-chemical-attack-rebels-848>.
  27. Adam Entous et al., *U.S. Begins Shipping Arms for Syrian Rebels*, WALL ST. J., June 26, 2013, <http://online.wsj.com/article/SB10001424127887323419604578569830070537040.html>.

ministration, including Secretary of State John Kerry and Secretary of Defense Chuck Hagel, laid out the justification for a limited military strike against Syria before the U.S. Senate Foreign Relations Committee.<sup>28</sup> In response to threats of a direct U.S. military strike against the Assad regime, Russia proposed that the Syrian government join the Chemical Weapons Convention, which requires international monitoring of the country's chemical arsenal and a commitment from Syria to destroy the weapons.<sup>29</sup> The Syrian government subsequently agreed to accede to the CWC.<sup>30</sup> On September 14, 2013, the United States and Russia announced a "Joint Framework on Destruction of Syrian CW" that proposes a timeline for the elimination of equipment and material, as well as on-site inspections.<sup>31</sup> On September 27, the Security Council unanimously adopted Resolution 2118 "determin[ing] that the use of chemical weapons anywhere constituted a threat to international peace and security, and called for the full implementation of the . . . decision of the Organisation for the Prohibition of Chemical Weapons (OPCW), which contains special procedures for the expeditious and verifiable destruction of Syria's chemical weapons."<sup>32</sup> Currently, the plans for a strike against Syria are still on the table, but they have been put on hold while chemical weapons negotiations are being pursued.<sup>33</sup>

Syria's use of chemical weapons could possibly violate a legal red line under either treaty or customary law. This red line refers to an absolute legal prohibition against the use of chemical weapons or an action that justifies international intervention.

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28. Spencer Ackerman & Dan Roberts, *Syria: Kerry and Hagel Press for Strikes in Effort to Convince Senate Sceptics*, GUARDIAN (Sept. 3, 2013, 4:36 PM), <http://www.theguardian.com/world/2013/sep/03/syria-kerry-hagel-strikes-senate>.
  29. Dan Roberts & Julian Borger, *Syria Crisis: Obama Welcomes Russia's Chemical Weapons Proposal*, GUARDIAN (Sept. 9, 2013), <http://www.theguardian.com/world/2013/sep/09/us-russian-proposal-syria-chemical-weapons>.
  30. *Syria Will Sign Chemical Weapons Convention, Declare Arsenal, Foreign Ministry Says*, HUFFINGTON POST (Sept. 10, 2013, 2:28 PM), [http://www.huffingtonpost.com/2013/09/10/syria-chemical-weapons-convention\\_n\\_3901417.html](http://www.huffingtonpost.com/2013/09/10/syria-chemical-weapons-convention_n_3901417.html).
  31. *Framework for Elimination of Syrian Chemical Weapons*, U.S. DEPARTMENT ST. (Sept. 14, 2013), <http://www.state.gov/t/pa/prs/ps/2013/09/214247.htm>.
  32. Press Release, Security Council, Security Council Requires Scheduled Destruction of Syria's Chemical Weapons, Unanimously Adopting Resolution 2118, U.N. Press Release SC/11135 (Sept. 27, 2013), available at <http://www.un.org/News/Press/docs/2013/sc11135.doc.htm>; see S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2118\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2118(2013)).
  33. *Syria Crisis*, *supra* note 4.

## II. THE LEGALITY OF CHEMICAL WEAPONS UNDER INTERNATIONAL TREATY LAW

The legality of chemical weapons is addressed in a number of international treaties including the Geneva Gas Protocol of 1925, the Geneva Conventions of 1949, the Chemical Weapons Convention, and the Rome Statute. Analyses of these treaties, however, show that most treaty law applies to the use of chemical weapons in international armed conflict and not in noninternational armed conflict. Furthermore, there is currently no individual criminal liability for the use of chemical weapons in noninternational armed conflict under the Rome Statute to the International Criminal Court (ICC).

The Geneva Gas Protocol of 1925 prohibits the “use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, material or devices.”<sup>34</sup> Syria is party to the Geneva Gas Protocol<sup>35</sup> and is legally bound to its provisions. The parties to the treaty, however, only agreed “to be bound [to the provisions] between themselves.”<sup>36</sup> Because only states are party to the Protocol, it creates no legal obligation for Syria to refrain from chemical attacks against rebel forces in a civil war. The interstate nature of the treaty is consistent with the treaty’s origins as a response to the brutal interstate chemical warfare that occurred during World War I.<sup>37</sup> Furthermore, the treaty does not address the production or stockpiling of chemical weapons. Therefore, as a party to the Protocol, Syria is not prohibited from producing chemical weapons or using chemical weapons against a nonsignatory of the treaty.

Syria is also party to the Geneva Conventions of 1949, which regulate the law of warfare and are generally considered customary international law. The

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34. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Geneva Gas Protocol].

35. See *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol)*, U.S. DEPARTMENT ST., <http://www.state.gov/t/isn/4784.htm> (last updated Sept. 25, 2002) (listing Syria as acceding to the Protocol on December 17, 1968).

36. Geneva Gas Protocol, *supra* note 34; SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 394 (2012).

37. See *Chemical Weapons*, U.N. OFF. FOR DISARMAMENT AFF., <http://www.un.org/disarmament/WMD/Chemical> (last visited Sept. 24, 2013). Under the Geneva Gas Protocol, many states made reservations that the treaty was binding only against other states that had ratified the treaty, and/or that the treaty would not be binding if an enemy state violated the prohibitions, demonstrating it was not intended to be an outright ban on chemical weapons. Since then, some states have withdrawn their reservations, but a significant number of reservations remain. See *Geneva Protocol Reservations*, STOCKHOLM INT’L PEACE RES. INST., [http://archives.sipri.org/contents/expcon/cbwarfare/cbw\\_research\\_doc/cbw\\_historical/cbw-hist-geneva-res.html](http://archives.sipri.org/contents/expcon/cbwarfare/cbw_research_doc/cbw_historical/cbw-hist-geneva-res.html) (last visited Sept. 24, 2013).

Geneva Conventions and their Protocols distinguish protections between international and noninternational armed conflicts. Common Article 3 of the Geneva Conventions (CA3) is a section common to all four Geneva Conventions and applies to noninternational armed conflicts.<sup>38</sup> The use of chemical weapons is not addressed in CA3. In fact, chemical weapons were intentionally excluded from CA3 protections,<sup>39</sup> which were meant to provide only a basic level of protection, in light of states' sovereignty concerns.<sup>40</sup> The Additional Protocol II applies rules to internal armed conflict beyond those found in the four Geneva Conventions,<sup>41</sup> however, Syria is not party to the Protocol. Even if Syria were a party, Additional Protocol II does not address the use of chemical weapons. Therefore, the Geneva Conventions and Protocol II do not specifically restrict Syria's use of chemical weapons in noninternational armed conflict.

The international community noticed this gap in international humanitarian law and created a separate convention to ban the use and production of chemical weapons, commonly known as the Chemical Weapons Convention (CWC). The CWC entered into force in 1997.<sup>42</sup> Under the Convention, state parties agree never:

- (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;

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38. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

39. SIVAKUMARAN, *supra* note 36 ("The prohibition on the use of gas was suggested for inclusion in common Article 3, but the suggestion was not taken up.")

40. See GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 48 (Jean S. Pictet ed., 1952).

41. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609.

42. U.S. DEPT OF STATE, BUREAU OF PUB. AFFAIRS, THE CHEMICAL WEAPONS CONVENTION: ELIMINATING A WHOLE CATEGORY OF WEAPONS OF MASS DESTRUCTION (2011), <http://www.state.gov/documents/organization/177084.pdf>.

(d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.<sup>43</sup>

The Convention currently has 189 parties,<sup>44</sup> meaning almost all the states in the world have joined. The only states that have not yet signed or acceded<sup>45</sup> to the Convention are Angola, Egypt, North Korea, South Sudan, and Syria.<sup>46</sup> Burma and Israel have signed but not ratified the Convention.<sup>47</sup> The CWC would be applicable in noninternational armed conflicts; however, since Syria had not signed or ratified the treaty,<sup>48</sup> the international body that monitors compliance with the Convention, the Organisation for the Prohibition of Chemical Weapons, could not take significant action until the recent agreement brokered by Russia.

The Rome Statute established the International Criminal Court in 2002 to prosecute individuals for war crimes, genocide, and crimes against humanity.<sup>49</sup> The Statute specifically prohibits the use of chemical weapons in international armed conflict. Under the Statute, the deployment of chemical weapons could therefore be inherently illegal as a war crime if used during international armed conflict or as a means to carry out genocide, crimes against humanity, or war crimes.

Syria is not party to the Rome Statute; therefore, the ICC would not have jurisdiction over the crimes committed in Syria unless the UN Security Council referred the situation to the Court.<sup>50</sup> But even if the Security Council refers the use of chemical weapons in the Syrian civil war to the Court (which it has not done), the Court could not prosecute individuals for using chemical weapons in a civil conflict. Under Article 8(b) of the Rome Statute, the use of chemical weapons including “asphyxiating, poisonous or other gases, and all analogous liquids,

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43. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I, Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317.

44. *OPCW Member States*, ORG. FOR PROHIBITION OF CHEMICAL WEAPONS, <http://www.opcw.org/about-opcw/member-states/> (last visited July 17, 2013).

45. In September 2013, Syria pledged to sign the Chemical Weapons Convention (CWC), *see infra* Part I.

46. *Non-member States*, ORG. FOR PROHIBITION OF CHEMICAL WEAPONS, <http://www.opcw.org/about-opcw/non-member-states> (last visited Sept. 24, 2013).

47. *Id.*

48. Syria deposited its notification of accession to the CWC on September 14, 2013, which will enter into force Oct. 14, 2013. *See* Secretary Gen., United Nations, Accession of the Syrian Arab Republic to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Sept. 14, 2013), *available at* <http://treaties.un.org/doc/Publication/CN/2013/CN.592.2013-Eng.pdf>.

49. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

50. *See id.* art. 13(b).

materials or devices”<sup>51</sup> is prohibited only in the context of an “international armed conflict.”<sup>52</sup> The Rome Statute’s criminalization of war crimes mirrors the international/noninternational armed conflict distinction in international humanitarian law and the Geneva Conventions. Chemical weapons might be used as a means to carry out genocide, crimes against humanity, or other war crimes, but only such actions, and not the use of chemical weapons to carry out those actions, would be criminalized under the Rome Statute.

In the June 2010 Review Conference of the Rome Statute, Belgium proposed an amendment to criminalize the use of chemical weapons in all conflicts, whether international or noninternational.<sup>53</sup> Thus far, the amendment binds only the eight parties that have ratified the amendment.<sup>54</sup> Syria has not ratified the Rome Statute or the amendment criminalizing the use of chemical weapons in civil war. As a result Syria is not subject to ICC jurisdiction without Security Council referral.

Finally, Syria is party to other international treaties including the Genocide Convention<sup>55</sup> and the International Covenant on Civil and Political Rights (ICCPR),<sup>56</sup> which protects the right to life<sup>57</sup> and would seem to prohibit the use of chemical weapons.<sup>58</sup> These treaties do not expressly prohibit methods of genocide or unlawful killing, though. Therefore, these treaties cannot be viewed as a blanket prohibition on the use of chemical weapons by Syria. 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 anymore so than if Syria used conventional weapons to perpetrate the same actions.

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51. *Id.* art. 8(b)(xviii).

52. *Id.* art. 8(b).

53. See INT’L COMM. OF THE RED CROSS, THE WEAPONS AMENDMENT (ARTICLE 8.2 LETTER E) OF THE ICC STATUTE) 1 (2010), [http://www.iccnw.org/documents/ICRC\\_The\\_weapons\\_amendment.22april10.1755.pdf](http://www.iccnw.org/documents/ICRC_The_weapons_amendment.22april10.1755.pdf).

54. *Amendment to Article 8 of the Rome Statute of the International Criminal Court*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&cmdtsg\\_no=XVIII-10-a&chapter=18&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&cmdtsg_no=XVIII-10-a&chapter=18&lang=en) (last visited Sept. 24, 2013) (noting that the amendment has been ratified by Botswana, Estonia, Germany, Liechtenstein, Luxembourg, Mauritius, Norway, Samoa, San Marino, and Trinidad and Tobago).

55. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

56. International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171.

57. *Id.* art. 6.

58. Additionally, as *lex specialis*, international humanitarian law may trump international human rights law contained in the ICCPR during times of conflict. See *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8, 1996) [hereinafter *Nuclear Weapons Case*].

### III. THE LEGALITY OF CHEMICAL WEAPONS UNDER CUSTOMARY INTERNATIONAL LAW

While treaty law does not prohibit Syria from using chemical weapons in civil war, customary international law (CIL) may provide a clearer prohibition. The International Committee of the Red Cross, an authoritative source on international humanitarian law, states that the use of chemical weapons is prohibited “as a norm of customary international law applicable in both international and non-international armed conflicts.”<sup>59</sup> Further examination, however, reveals inconsistencies that challenge the notion of a customary rule against the use of chemical weapons in civil conflicts.

CIL is defined as “a general and consistent practice of states followed . . . from a sense of legal obligation.”<sup>60</sup> The formation of CIL requires two elements: state practice and *opinio juris*. The first element can be met if states conform to a certain uniform practice through their physical and verbal conduct. Physical acts refer to the state’s behavioral conduct such as “battlefield behaviour [or] the use of certain weapons.”<sup>61</sup> Verbal acts refer to the state’s verbal communications through such instruments as “national legislation, national case-law, . . . opinions of official legal advisers, comments by governments on draft treaties, . . . statements in international organisations and at international conferences and government positions taken with respect to resolutions of international organisations.”<sup>62</sup> Although the practice needs to be “extensive and representative,”<sup>63</sup> this criterion does not require unanimous consent or full participation in the practice. The second element of CIL, *opinio juris*, refers to the state’s belief that it observes the customary practice (the first element) out of a legal obligation rather than, for example, a policy preference.<sup>64</sup> This legal obligation is distinguishable from a treaty obligation in that it is not written or codified.

There is no strict customary practice regarding the use of chemical weapons in civil conflicts. Modern chemical warfare traces to World War I, and since then, chemical agents have been periodically employed in noninternational

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59. *Rule 74: Chemical Weapons*, INT’L COMMITTEE OF THE RED CROSS, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter24\\_rule74](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter24_rule74) (last visited Sept. 24, 2013).

60. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986).

61. *Assessment of Customary International Law*, INT’L COMMITTEE OF THE RED CROSS, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_in\\_asofcuin](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin) (last visited Sept. 24, 2013).

62. *Id.*

63. COMM. ON FORMATION OF CUSTOMARY (GEN.) INT’L LAW, INT’L LAW ASS’N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 20 (2000) [hereinafter STATEMENT OF PRINCIPLES TO FORMATION OF CIL].

64. *Id.* at 31.

armed conflicts. The Soviet Union reportedly used chemical weapons against a peasant revolt in Tambov (1921);<sup>65</sup> the Spanish used mustard agent during the Rif War in occupied Morocco (1920–26);<sup>66</sup> the Portuguese reportedly employed chemical agents in colonized Angola (1970);<sup>67</sup> and later, following independence, the Angolan government allegedly used chemical weapons during its civil war (1975–2002).<sup>68</sup> An additional incident occurred in 1988, when the Iraqi government launched a chemical attack against its Kurdish population.<sup>69</sup> Since 1993, when the CWC entered into force, four countries have allegedly used chemical weapons.<sup>70</sup> The periodic use of chemical weapons in domestic conflicts fails the criteria of state practice. Absent state practice, *opinio juris* cannot exist.<sup>71</sup>

One might argue the existence of a customary rule prohibiting the use of chemical weapons in civil conflicts because such weapons have generally not been used. This line of reasoning fails against the analysis of the International Court of Justice (ICJ) in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. In its opinion, the Court found that no clear customary rule prohibited the threat or use of nuclear weapons.<sup>72</sup> Like chemical weapons, nuclear weapons have been used infrequently in the modern era. The ICJ, however, found that nonuse does not automatically indicate a customary rule. States may adopt a practice of nonuse for different purposes and not from a sense of a legal obligation.<sup>73</sup> For example, states may avoid the use of chemical weapons based on their

65. LEV ALEKSANDROVICH FEDOROV, CTR. OF ECOLOGICAL POLICY OF RUSS., CHEMICAL WEAPONS IN RUSSIA: HISTORY, ECOLOGY, POLITICS (1994), available at [http://www.fas.org/nuke/guide/russia/cbw/jptac008\\_194001.htm](http://www.fas.org/nuke/guide/russia/cbw/jptac008_194001.htm); Nathan H. Johnson et al., *Historical Perspective of Chemical Warfare Agents*, in HANDBOOK OF TOXICOLOGY OF CHEMICAL WARFARE AGENTS 7, 10 (Ramesh C. Gupta ed., 2009).

66. Johnson et al., *supra* note 65, at 10; see also *Chemical Weapons*, REACHING CRITICAL WILL, <http://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4582-chemical-weapons> (last visited Oct. 7, 2013).

67. Babjee Pothuraju, *Chemical Weapons Profile of Angola*, INST. FOR DEF. STUD. & ANALYSES, [http://www.idsa.in/cbwmagazine/ChemicalWeaponsProfileofAngola\\_BabjeePothuraju#.Uear2xYUvR0](http://www.idsa.in/cbwmagazine/ChemicalWeaponsProfileofAngola_BabjeePothuraju#.Uear2xYUvR0) (last visited Sept. 24, 2013).

68. *Id.*

69. Javed Ali, *Chemical Weapons and the Iran-Iraq War: A Case Study in Noncompliance*, NONPROLIFERATION REV., Spring 2001, at 43, 52.

70. *Practice Relating to Rule 74. Chemical Weapons*, INT'L COMM. OF THE RED CROSS, [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule74](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule74) (last visited Oct. 7, 2013).

71. Before the formation of a rule, “it is logically impossible for [states] to have an *opinio juris* in the literal and traditional sense, that . . . the practice is *already* legally permissible or obligatory.” STATEMENT OF PRINCIPLES TO FORMATION OF CIL, *supra* note 63, at 33.

72. *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 71–72 (July 8, 1996).

73. *Id.* ¶¶ 66–67 (noting that some States adopt non-use practices, not from a sense of legal obligation, but because circumstances that would justify the use of nuclear weapons simply have not arisen).

policy interests or to adhere to treaty obligations, and not because of a customary rule.

One might also argue that treaty obligations indicate the existence of *opinio juris* against the use of chemical weapons. Treaties may reflect existing rules of customary international law,<sup>74</sup> but treaties are not uniform in limiting the use of chemical weapons and show no clear *opinio juris*. While the CWC limits chemical weapons in all scenarios, other major treaties such as the Geneva Conventions and the Rome Statute blatantly exclude chemical weapons prohibitions from applying to domestic conflicts. Furthermore, the amendment to the Rome Statute that would criminalize the use of chemical weapons in civil conflicts was ratified only by a handful of states. If CIL prohibited chemical weapons in domestic conflicts, then current treaty regimes would address the liability and regulate the specific use of chemical attacks. It would be logically inconsistent to believe that a customary rule against the use of chemical weapons in civil conflicts exists that could justify intervention, even though no individual could then be held criminally liable for their use at the ICC.<sup>75</sup>

#### IV. CHEMICAL WEAPONS IN CIVIL CONFLICT: A JUSTIFICATION FOR INTERNATIONAL INTERVENTION?

The United States and its allies have pointed to the use of chemical weapons in Syria as a justification for international action, possibly including military intervention. The government's use of chemical weapons in the civil conflict, however, should not be the sole justification for strong international action under the U.N. Charter or the emerging doctrine of Responsibility to Protect.

Under the Charter, military intervention is justified for self-defense<sup>76</sup> or to restore international peace and security, through authorization by the Security Council.<sup>77</sup> If the Syrian government is using chemical weapons, its target is rebel forces, rather than other states. Therefore, the right to self-defense would not be triggered. In addition, the Security Council has not yet authorized military intervention in Syria to restore peace and security. Irrespective of chemical weapons

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74. STATEMENT OF PRINCIPLES TO FORMATION OF CIL, *supra* note 63, at 43.

75. While the Rome Statute text does not criminalize the use of chemical weapons in civil war, Dapo Akande has argued that the Security Council could refer chemical weapons use in Syria based on the 2010 Kampala amendment. See Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?*, EJIL: TALK! (Aug. 23, 2013), <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria>.

76. U.N. Charter art. 51.

77. *Id.* art. 39–42.

use, some 100,000 people have already been killed in the conflict,<sup>78</sup> mainly with conventional weapons, and the conflict has created over 2 million refugees.<sup>79</sup> Therefore, any future Council action would be unlikely to depend principally on the use of chemical weapons as the cause of international instability.

Another possible justification for international military intervention is the emerging Responsibility to Protect doctrine that allows military intervention when the state fails to protect its population.<sup>80</sup> The doctrine is understood through the Three Pillars, which hold the state responsible for the protection of its population (First Pillar); promises international assistance to the state to carry out its responsibility (Second Pillar); and if the state is unable to protect its population, assigns the responsibility to the international community (Third Pillar).<sup>81</sup> Significantly, the Third Pillar promotes international presence in what may traditionally be considered a state's domestic affairs. The Third Pillar "could involve any of the whole range of UN tools, whether pacific measures under Chapter VI of the Charter, coercive ones under Chapter VII, and/or collaboration with regional and subregional arrangements under Chapter VIII."<sup>82</sup> Under the Third Pillar, Responsibility to Protect may also allow foreign intervention. According to the International Commission for Intervention and State Sovereignty, military intervention must comply with six criteria including "right authority, just cause, right intention, last resort, proportional means and reasonable prospects."<sup>83</sup>

Because of the large number of atrocities already committed in the conflict,<sup>84</sup> coupled with the state's failure to protect its population, Responsibility to Protect could support military intervention in Syria. The use of chemical weapons in Syria, however, would not significantly alter the case for military intervention under the doctrine. Therefore, chemical weapons use is not a "legal red line" for intervention but merely one factor to be considered. Even if the use of chemical weapons is illegal under CIL, the prohibition is not as strong as the prohibi-

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78. Cowell, *supra* note 23.

79. Lisa Schlein, *Number of Syrian Refugees Tops Two Million, UN says*, VOICE AM. (Sept. 3, 2013), <http://www.voanews.com/content/un-number-of-syrian-refugees-tops-2-million/1742092.html>.

80. See Alicia L. Bannon, Comment, *The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism*, 115 YALE L.J. 1157, 1161 (2006).

81. See U.N. Gen. Assembly, 2005 World Summit Outcome ¶ 138, A/RES/60/1 (Oct. 24, 2005); Press Release, U.N. Secretary Gen., Secretary-General Defends, Clarifies 'Responsibility to Protect' at Berlin Event on 'Responsible Sovereignty: International Cooperation for a Changed World,' SG/SM/11701 (July 15, 2008).

82. Press Release, U.N. Secretary Gen., *supra* note 81.

83. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 32 (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

84. See *supra* Part I.

tions on torture or crimes against humanity, which are violations of *jus cogens*.<sup>85</sup> These violations of *jus cogens* have already been perpetrated on a mass scale in Syria. According to a recent report of the Secretary-General on the Responsibility to Protect, “[r]ecent events, including in the Syrian Arab Republic, underline the vital importance of early action to prevent atrocity crimes and the terrible consequences when prevention fails.”<sup>86</sup>

Scholars have argued that intervention under Responsibility to Protect requires Security Council authorization,<sup>87</sup> and the 2005 World Summit Outcome Document places the Third Pillar in context of the Security Council’s Chapter VII authority. Intervention under Responsibility to Protect should be understood, however, in the broader context of humanitarian protections. The adoption of Responsibility to Protect arguably signals international response beyond the UN Charter.<sup>88</sup> The Security Council may already authorize intervention for the purposes of peace and security; thus, Responsibility to Protect must at least sometimes refer to situations other than those mentioned in Chapter VII, otherwise the doctrine would be rendered meaningless. Responsibility to Protect originates from situations that required legal means beyond the Charter. For example, the Security Council was unable to respond to the humanitarian crises in Kosovo and Rwanda, necessitating an additional legal means for the international community to address similar future situations.

In the case of Syria, the Security Council has failed to respond to the continuing humanitarian crisis. Russia and China have vetoed any proposal for strong international action, rendering the Security Council ineffective. If Responsibility to Protect is exclusively applied by the Security Council, any stale-

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85. Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 331 (describing *jus cogens*); see Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapons Attacks*, AM. SOC’Y INT’L L. (Aug. 30, 2013), <http://www.asil.org/insights130830.cfm> (“While the use of chemical weapons may be universally considered a violation of international law, the claim that it is a violation of a *jus cogens* norm would be sharply disputed.”).

86. U.N. Gen. Assembly, Responsibility to Protect: State Responsibility and Prevention ¶ 4, A/67/929–S/2013/299 (July 9, 2013).

87. See Anderson, *supra* note 85 (“The formal legal limitations of R2P and the apparent requirement of Security Council authorization have led some international lawyers to embrace . . . the formal legal conclusion that unilateral intervention indeed would be illegal.”); Oona A. Hathaway & Scott J. Shapiro, *On Syria, a U.N. Vote Isn’t Optional*, N.Y. TIMES, Sept. 3, 2013, <http://www.nytimes.com/2013/09/04/opinion/on-syria-a-un-vote-isnt-optional.html>.

88. Paul R. Williams, Trevor Bulbrick, and Jonathan Worboys “argue that R2P’s third pillar should provide for the limited use of force without Security Council authorization” and establishes criteria for when R2P should be used outside of the Security Council’s authority. Paul R. Williams et al., *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT’L L. 473, 476 (2012).

mate will result in an ineffective doctrine.<sup>89</sup> Those who favor Security Council authorization would argue that limiting Responsibility to Protect by requiring Security Council approval would prevent aggressive wars. This would also, however, forestall humanitarian intervention that could save lives and prevent mass atrocities.

Whether or not Security Council authorization is required for a Responsibility to Protect intervention, the use of chemical weapons should not be the deciding factor in the use of the doctrine. Sole focus on chemical weapons detracts from other serious international crimes and allows for the continuation of a humanitarian crisis in the case of a settlement over the use of the chemical weapons. With the Russian proposal to eliminate Syria's arsenal, the Obama administration has at least put the threat of intervention on pause. As stated by U.S. Senator John McCain, "by drawing a 'red line' on chemical weapons, the President actually gave the Assad regime a green light to use every other weapon in his arsenal with impunity."<sup>90</sup>

### CONCLUSION

The rhetorical red line referred to by international leaders is not a defined legal red line under treaty or customary international law. The case of Syria suggests the need for substantial legal reforms—at the very least, states should ratify the 2010 amendment to the Rome Statute criminalizing the use of chemical weapons in noninternational armed conflicts. Furthermore, the Syrian civil war shows that current noninternational armed conflict protections codified in the Geneva Conventions are inadequate. Syria's use of chemical weapons has been the focus of international attention and provoked a strong response. The focus on chemical weapons has taken attention off other international crimes that will likely continue even if Syria accedes to, and complies with, the CWC. The mass atrocities committed in the conflict justified action long before reports of chemical weapons use. These atrocities are the true red line.

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89. See Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention*, JUST SECURITY (Oct. 2, 2013, 9:00 AM), <http://justsecurity.org/2013/10/02/koh-syria-part2/> ("On reflection, a 'per se illegal' rule [for intervention without Security Council authorization] is plainly overbroad. If no self-defense considerations arose, such a rule would permanently disable any external collective action, for example, to protect the population of any U.N. permanent member state from genocide. By treating the veto alone as dispositive, *the per se position denies any nation, no matter how well-meaning, any lawful way to use even limited and multilateral force to prevent Assad from intentionally gassing a million Syrian children tomorrow.*").

90. Floor Remarks by Senator John McCain on Syria (May 9, 2013), available at [http://www.mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord\\_id=89ca7f22-923e-372b-be2c-3980f025032b](http://www.mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord_id=89ca7f22-923e-372b-be2c-3980f025032b).