

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

*Michelle Almary**

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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-

* J.D., May 2018, Southwestern Law School. The author would like to thank the Journal's faculty advisors Silvia F. Faerman and Jonathon M. Miller for their assistance on earlier drafts; the Law Journal board and staff members for their ongoing encouragement and guidance; and her family for their invaluable support during this process.

tion of international law.¹ Exposure to chemical weapons causes unique emotional and psychological consequences and often yields greater harm than the mere physical effects of conventional weapons.² In spite of the various treaties and tribunals that reflect universal agreement on the importance of prohibition, the continued use of chemical weapons without consequence poses an immediate threat to the peace and stability of the international community.³ A permanent solution is crucial to ensure that the use of chemical weapons does not go unpunished.

A permanent solution is crucial to ensure that the use of chemical weapons by anyone, under any circumstance, does not go unpunished. The International Criminal Court (“ICC”),⁴ established and governed by the Rome Statute,⁵ was created to address the lack of a permanent forum for prosecuting atrocities of this magnitude. The court cannot exercise jurisdiction over a state that is not a party to the Rome Statute, but the United Nations Security Council (“Security Council”) may grant jurisdiction through a referral.⁶ The Security Council should adopt a resolution that creates automatic grounds for referral to the ICC for any use of chemical weapons, and the ICC’s jurisdiction should be based on the Kampala Amendment.⁷ If the current lan-

1. See U.N. SCOR, 72d Sess., 7893d mtg. at 2, 13, 15-16, U.N. Doc. S/PV.7893 (Feb. 28, 2017); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter *Chemical Weapons Convention*]; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 [hereinafter *Geneva Protocol*]; Jillian Blake & Aqsa Mahmud, *A Legal ‘Red Line’?: Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA L. REV. DISCOURSE 244, 246, 249, 251, 255 (2013); Kirsten Patrick et al., *Lest We Forget: Why the Use of Chemical Weapons Must Not Go Unchallenged*, 185 CAN. MED. ASS’N J. 1299, 1299 (2013).

2. See O.C. Eneh & F.I. Ogbuefi-Chima, *Chemical Weapons: Man-Made Destroyers of Life*, 5 J. APPLIED SCI. & DEV. 5, 6 (2014); David Martin, *The Chemical Weapons Convention: Hollow Idealism or Capable Mechanism? The Syrian Intervention as a Test Case*, 37 LOY. L.A. INT’L & COMP. L. REV. 31, 34 (2015) (citing Thomas L. McNaugher, *Ballistic Missiles and Chemical Weapons: The Legacy of the Iran-Iraq War*, 15 INT’L SECURITY 5, 22 (1990)).

3. See, e.g., Michele Kelemen, *Civilians Pay the Price As Syrian Conflict Grows More Violent*, NPR (Sept. 6, 2016, 4:30 PM), <http://www.npr.org/2016/09/06/492857910/civilians-pay-the-price-as-syrian-conflict-grows-more-violent>; Nick Robins-Early, *How Will Syria’s Assad Be Held Accountable For Crimes Against Humanity?*, HUFFPOST (Mar. 28, 2015, 11:38 AM), http://www.huffingtonpost.com/2015/03/28/syria-war-crimes_n_6950660.html.

4. See discussion *infra* Section IV.A.

5. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *Rome Statute*].

6. *Id.* art. 11, 13.

7. Amendment to Article 8 of the Rome Statute of the International Criminal Court, June 10, 2010, 2868 U.N.T.S. 195, Resolution RC/Res.5 [hereinafter *Kampala Amendment*]; see discussion *infra* Section IV.B.

guage under Article 8 of the Rome Statute⁸ 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 VX⁹ at the Kuala Lumpur International Airport and died from suffocation.¹⁰ More recently, in March, a Russian former double agent, Sergei Skripal, and his daughter were poisoned with a nerve agent known as Novichok¹¹ while they were in England.¹² 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.¹³ Although the United States-Russia Framework for Elimination of Syrian Chemical Weapons ("Framework")¹⁴ and the Organization for the Prohibition of Chemical Weapons ("OPCW")¹⁵ ordered the Syrian government to surrender all chemical weapons, Bashar Al

8. Rome Statute, *supra* note 5, art. 8 (defining "war crimes" within the jurisdiction of the court).

9. See generally *Facts About VX*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://emergency.cdc.gov/agent/vx/basics/facts.asp> (last visited Apr. 16, 2018).

10. See Joshua Berlinger, *Kim Jong Nam: The Plot to Murder North Korea's Exiled Son*, CNN, <https://www.cnn.com/2017/07/26/asia/kim-jong-nam-killing/index.html> (last updated Sept. 26, 2017, 6:10 AM). Two female suspects are currently on trial in Malaysia. See *Jong-nam Murder Trial Roundup: What We Know So Far*, MALAYMAIL (Feb. 9, 2018), <https://www.malaymail.com/s/1573835/jong-nam-murder-trial-roundup-what-we-know-so-far#bG14YFOv4sKd7LQy>.

11. Novichok is "reportedly five to eight times more toxic than VX nerve agent." *Russian Spy: What are Novichok Agents and What Do They Do?*, BBC NEWS (Mar. 19, 2018), <http://www.bbc.com/news/world-europe-43377698>.

12. *Id.*

13. See John B. Bellinger, *Make ISIS' Leaders Face Justice*, N.Y. TIMES (Apr. 2, 2015), <https://www.nytimes.com/2015/04/03/opinion/make-isis-leaders-face-justice.html>; Kelemen, *supra* note 3; Jared Malsin, *Assad's Regime is Still Using Chemical Weapons in Syria*, TIME (Sept. 14, 2016), <http://time.com/4492670/syria-chemical-weapon-aleppo-assad-regime>; Robins-Early, *supra* note 3 ("[W]ar crimes and crimes against humanity are being committed across the board by all parties."); Lucy Rodgers et al, *Syria: The Story of the Conflict*, BBC NEWS (March 11, 2016), <http://www.bbc.com/news/world-middle-east-26116868> ("A UN commission of inquiry has evidence that all parties to the conflict have committed war crimes - including murder, torture, rape and enforced disappearances."); *Syria and Isis Committing War Crimes*, GUARDIAN (Aug. 27, 2014), <https://www.theguardian.com/world/2014/aug/27/syria-isis-war-crimes-united-nations-un> (discussing the various war crimes and crimes against humanity committed by the Syrian government and Islamic State); *Syria Conflict: All Parties Committed War Crimes in Aleppo - UN*, BBC NEWS (Mar. 1, 2017), <http://www.bbc.com/news/world-middle-east-39126653>.

14. Letter from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General, Framework for elimination of Syrian chemical weapons (Sept. 19, 2013) [hereinafter Framework], <http://undocs.org/A/68/398>.

15. *About OPCW*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/about-opcw> (last visited Mar. 16, 2017); see Chemical Weapons Convention, *supra* note 1, art. VIII(1).

Asaad's¹⁶ military has allegedly deployed chemical weapons on numerous occasions.¹⁷ Opposition groups have also engaged in chemical warfare.¹⁸ The international community has failed to intervene, even though the war continues to escalate and violate all notions of basic human rights. The parties to the Syrian war have a "license to kill;" they are under the impression that they can act with impunity because of the lack of "consequences or accountability for their actions"¹⁹ The war in Syria is a prime example of the dire need for a permanent solution for prosecuting the use of chemical weapons.

A permanent solution such as automatic referral to the ICC will be successful because international criminal justice has a deterrent effect, substantiates or disproves allegations, and reduces the likelihood that groups will retaliate and seek retribution.²⁰ At present, politics between nations continue to be an obstacle to any significant intervention from the UN acting on its own. Thus, automatic referral can bypass that threat of politicization and simultaneously achieve justice, peace, and stability. One obstacle, however, is that the Rome Statute

16. See *Bashar al-Assad Fast Facts*, CNN, <http://www.cnn.com/2012/12/06/world/meast/bashar-al-assad—fast-facts/> (last updated Mar. 4, 2018), for a brief discussion about Syrian President Bashar al-Assad.

17. Org. for the Prohibition of Chemical Weapons [OPCW] Executive Council, *Destruction of Syrian Chemical Weapons*, EC-M-33/DEC.1 (Sept. 27, 2013); see Anne Barnard & Somini Sengupta, *Syria Is Using Chemical Weapons Again, Rescue Workers Say*, N.Y. TIMES (May 6, 2015), <http://www.nytimes.com/2015/05/07/world/middleeast/syria-chemical-weapons.html>; Martin Chulov & Kareem Shaheen, *International Concern Over Claims of Chemical Weapon Attack in Syria*, GUARDIAN (Dec. 13, 2016, 2:06 PM), <https://www.theguardian.com/world/2016/dec/13/international-concern-over-claims-of-chemical-weapon-attack-in-syria>; Russell Goldman, *Syria's Chemical Weapons Have Been Destroyed. So, Why Do Chlorine Gas Attacks Persist?*, N.Y. TIMES (Aug. 11, 2016), <https://www.nytimes.com/2016/08/12/world/middleeast/syria-chlorine-gas-attack.html>; Malsin, *supra* note 13; *Syria Blamed for Chemical Weapons Attack in 2015*, BBC NEWS (Oct. 22, 2016), <http://www.bbc.com/news/world-middle-east-37736184>; *Syria: Fresh Chemical Attack on Aleppo a War Crime*, AMNESTY INT'L (Aug. 11, 2016, 5:37 PM), <https://www.amnesty.org/en/latest/news/2016/08/syria-fresh-chemical-attack-on-aleppo-a-war-crime>.

18. Anthony Deutsch, *Exclusive: Chemical Weapons Used by Rebels in Syria - sources*, REUTERS (Nov. 5, 2015, 10:24 AM), <http://www.reuters.com/article/us-mideast-crisis-syria-chemicalweapons-idUSKCN0SU2PZ20151105>; Goldman, *supra* note 17; Eric Schmitt, *ISIS Used Chemical Arms at Least 52 Times in Syria and Iraq, Report Says*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/world/middleeast/isis-chemical-weapons-syria-iraq-mosul.html>; *Syria: New Deadly Chemical Attacks*, HUM. RIGHTS WATCH (Sept. 28, 2016, 1:00 AM), <https://www.hrw.org/news/2016/09/28/syria-new-deadly-chemical-attacks>.

19. Malaka Gharib, *Can Attacks On Aid Workers Be Stopped?*, NPR (Sept. 29, 2016, 11:49 AM) <http://www.npr.org/sections/goatsandsoda/2016/09/29/495829011/why-is-no-one-punished-for-attacks-on-aid-workers>.

20. See Annika Jones, *Seeking International Criminal Justice in Syria*, 89 INT'L L. STUD. 802, 803 (2013).

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

There are other alternatives to a Security Council referral to the ICC, such as prosecution in Syrian domestic courts or an *ad hoc* international criminal tribunal.²² Another option is an internationalized criminal tribunal,²³ 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.²⁴ In light of the inconceivable duration of the hostilities in Syria, coupled with the international community's obvious intent to prohibit chemical weapon use,²⁵ prosecutions by the ICC is the most promising cause of action, since it would create a system that ensures accountability in Syria and for future use of chemical weapons.

Following this introduction, in Part II, I present the background of chemical weapon regulation and the classification of the major categories of chemical weapons. After presenting the four major categories of chemical weapons and their effects, I discuss the 1925 Geneva Protocol and chemical weapon use post-Geneva. I then discuss the Chemical Weapons Convention and the Organization for the Prohibition of Chemical Weapons, which enforces the CWC. In Part III, I present the most notable and relevant events during the timeline of the Syrian civil war that focuses on the use of chemical weapons. In Part IV, I argue that, in order to address the atrocities in Syria and prevent future recurrences, the international community needs to implement a permanent disincentive, a responsibility that the Security Council should carry. I then present the mechanics of the ICC and, in arguing for automatic referral, I discuss the possible alternatives and why they are not sufficient.

21. See Rome Statute, *supra* note 5, art. 8(2)(b)(xvii)-(xviii) (listing the use of "poison or poisoned weapons" and "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" as a violation of the Rome Statute).

22. See ADVISORY SERV. ON INT'L HUMANITARIAN LAW, INT'L COMM. RED CROSS, INTERNATIONAL CRIMINAL JUSTICE: THE INSTITUTIONS (Oct. 2013), <https://www.icrc.org/en/download/file/1103/international-criminal-justice-institutions-icrc-eng.pdf>.

23. See *id.*

24. See *id.*

25. See discussion *infra* Part II.

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.”²⁶ 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.”²⁷ 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.”²⁸

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,²⁹ a protocol to the Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War,³⁰ which followed the Hague Conventions of 1899 and 1907.³¹ 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.

26. *Brief Description of Chemical Weapons*, OPCW, <https://www.opcw.org/about-chemical-weapons/what-is-a-chemical-weapon> (last visited Mar. 16, 2017); see ORG. FOR THE PROHIBITION OF CHEM. WEAPONS, FACT SHEET 4: WHAT IS A CHEMICAL WEAPON? 1 (Nov. 2017), https://www.opcw.org/fileadmin/OPCW/Fact_Sheets/English/Fact_Sheet_4_-_CW_types.pdf.

27. *Brief Description of Chemical Weapons*, *supra* note 26. The OPCW explains the Convention defines chemical weapons more generally as “Munitions or other delivery devices designed to deliver chemical weapons, whether filled or unfilled, are also considered weapons themselves.” *Id.*

28. Martin, *supra* note 2, at 35 (citing Margaret Sewell, *Freedom from Fear: Prosecuting the Iraqi Regime for the Use of Chemical Weapons*, 16 ST. THOMAS L. REV. 365, 371-72 (2004)).

29. Geneva Protocol, *supra* note 1, at 164-66.

30. *Supervision of the International Trade in Arms and Ammunition and in Implements of War*, League of Nations Conf. D. 58 (Feb. 6, 1932), <http://digital.library.northwestern.edu/league/le000102.pdf>.

31. International Convention with Respect to the Laws and Customs of War by Land (Hague II), July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 [hereinafter 1899 Hague Convention]; Convention Concerning the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter 1907 Hague Convention].

A. *Background on Chemical Weapon Regulation*

The large-scale use of chemical weapons in World War I in spite of the 1899 and 1907 Hague Conventions alarmed the international community. Although the Hague Conventions did not explicitly refer to chemical weapons, both prohibited “poison or poisoned arms” and, in the 1899 Convention, “arms, projectiles, or material of a nature to cause superfluous injury,” which was changed to “arms, projectiles, or material calculated to cause unnecessary suffering” in 1907.³²

Combatants in WWI used “at least twenty-eight types of gases and sixteen different mixtures of gases,”³³ including chlorine and phosgene, choking agents, and mustard gas, a blistering agent.³⁴ As a response, the 1925 Geneva Conference led to the creation of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (“1925 Geneva Protocol” or “Protocol”), which prohibits the use of chemical and biological weapons in international armed conflict.³⁵ The United States and Japan did not ratify the protocol before World War II³⁶ and many state parties reserved the right to use chemical weapons against non-party states or in response to any states that used chemical weapons against them.³⁷ A fundamental problem with the 1925 Geneva

32. 1899 Hague Convention, *supra* note 31, art. 23(a), (e); 1907 Hague Convention, *supra* note 31, art. 23(a), (e).

33. Martin, *supra* note 2, at 32 (citing BROOKS E. KLEBER & DALE BIRDSSELL, *THE CHEMICAL WARFARE SERVICE CHEMICALS IN COMBAT 3* (Stetson Conn ed., Ctr. Of Military History, 2003)).

34. Martin, *supra* note 2, at 32 (citing *Chemical Weapons*, U.N. OFF. FOR DISARMAMENT AFF. (UNODA), <https://www.un.org/disarmament/wmd/chemical/> (last visited Mar. 19, 2018) [hereinafter *UNODA Chemical Weapons*]); see also Sarah Everts, *When Chemicals Became Weapons of War*, 93 *CHEMICAL & ENGINEERING NEWS*, no. 8, Feb. 23, 2015, at 8, <http://chemicalweapons.cenmag.org/when-chemicals-became-weapons-of-war/>; Marek Pruszewicz, *How Deadly Was the Poison Gas of WWI?*, BBC NEWS (Jan. 30, 2015), <http://www.bbc.com/news/magazine-31042472>. “A well-known vesicant substance is mustard gas or dichlorodimethyl sulphide, (ClCH₂CH₂)₂S, made from ethene and disulphur dichloride (S₂Cl₂), which attacks the whole body and is carcinogenic (induces cancer). It may take up to 24 hours to start becoming apparent, and about 2-3 days to kill at low rate, from the time it is exposed.” Eneh & Ogbuefi-Chima, *supra* note 2, at 13.

35. Geneva Protocol, *supra* note 1; see Bureau of Int’l Sec. & Nonproliferation, *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, U.S. DEP’T ST., <https://www.state.gov/t/isn/4784.htm> (last updated Sept. 25, 2002).

36. Bureau of Int’l Sec. & Nonproliferation, *supra* note 35.

37. Geneva Protocol, *supra* note 1; Bureau of Int’l Sec. & Nonproliferation, *supra* note 35.

Protocol was that it did not address the research, development, or stockpiling of chemical weapons.³⁸

Many countries deployed or produced chemical weapons notwithstanding the provisions of the 1925 Geneva Protocol.³⁹ Japan used them against China in 1930 and Italy used mustard gas against Ethiopia in 1935.⁴⁰ The US, England, and Germany also prepared and stockpiled tons of chemical weapons during the war, but did not deploy them only because they feared retaliation.⁴¹ During the Cold War, England and the US developed chemical weapons together, and the Soviet Union also had development facilities.⁴² Once again, the international community faced a rude awakening, especially because modern developments during that time period fostered the potential for use of chemical weapons simultaneously with nuclear bombs.⁴³ By the late 1980s, Iran, Iraq, Israel, Syria, and Egypt had the means to combine chemical weapons and ballistic missiles.⁴⁴ Further, the government of Saddam Hussein in Iraq also used chemical weapons such as mustard gas, sarin, and nerve agents during the war against Iran in the 1980s and against its own Kurdish population in 1991.⁴⁵

Chemical weapons have unique characteristics that make them exceptionally effective when they are deployed in an urban setting,⁴⁶ thus the likelihood of their use during war was high. Moreover, lead-

38. Geneva Protocol, *supra* note 1; Martin, *supra* note 2, at 33 (quoting *UNODA Chemical Weapons*, *supra* note 34) (first citing *UNODA Chemical Weapons*, *supra* note 34; and then citing Geneva Protocol, *supra* note 1).

39. See *UNODA Chemical Weapons*, *supra* note 34.

40. See Martin, *supra* note 2, at 33 (first citing McNaugher, *supra* note 2, at 7; and then citing *UNODA Chemical Weapons*, *supra* note 34); Everts, *supra* note 34; Pruszewicz, *supra* note 34.

41. See *Arms Control and Proliferation Profile: The United Kingdom*, ARMS CONTROL ASS'N (Mar. 29, 2017), <https://www.armscontrol.org/factsheets/ukprofile> ("During World War I, the United Kingdom produced an arsenal of chlorine and mustard gases. In 1957 the UK abandoned its chemical weapons program and has since eradicated its stockpiles."); *Chemical Weapons*, FAS, <https://fas.org/nuke/guide/usa/cbw/cw.htm> (last updated June 15, 2000, 7:26 AM) ("During World War II, President Roosevelt announced a no-first-use policy but had promised instant retaliation for any Axis use of chemical agents At the end of the war stockpiles of newer agents, called "nerve gases," were discovered. These were found to be effective in much lower concentrations than those agents known up to that time. The end of World War II did not stop the development or stockpiling of chemical weapons."); Everts, *supra* note 34; Pruszewicz, *supra* note 34.

42. See Martin, *supra* note 2, at 35 (quoting *UNODA Chemical Weapons*, *supra* note 34) (citing Sewell, *supra* note 28, at 367).

43. See Martin, *supra* note 2, at 35.

44. Martin, *supra* note 2, at 37 (citing McNaugher, *supra* note 2, at 25).

45. Martin, *supra* note 2, at 34 (first citing McNaugher, *supra* note 2, at 8, 17; and then citing Sewell, *supra* note 28, at 372).

46. Martin, *supra* note 2, at 36 (citing McNaugher, *supra* note 2, at 21, 22, 30).

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.⁴⁷ 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.⁴⁸

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 system⁴⁹—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.”⁵⁰ 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, *Use of Military Force in Syria by Turkey, NATO, and the United States*, 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); *see* 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. *About the CWC*, U.S. CHEMICAL WEAPONS CONVENTION WEB SITE, http://www.cwc.gov/cwc_about.html (last visited Feb. 10, 2018).

50. *Id.*

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

The OPCW is responsible for overseeing the CWC's implementation, including the worldwide destruction of chemical weapons.⁵² At present, the OPCW has 192 member states.⁵³ 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."⁵⁴ 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.⁵⁵ 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.⁵⁶

B. Major Categories of Chemical Weapons

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."⁵⁷

Toxic chemicals more commonly used in warfare are generally separated into four categories: nerve, blister, blood, and choking agents.⁵⁸ 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, *supra* note 1, art. I(1)(a)-(d).

52. *About OPCW*, *supra* note 15.

53. *Id.*

54. G.A. Res. 55/283, art. II, ¶ 1, (Sept. 24, 2001); *see* 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, *supra* note 54, ¶ 2(c).

56. *Id.* art. IV, ¶ 2-3; *Part XI. Investigations in Cases of Alleged Use of Chemical Weapons*, 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, *Acute and Long-Term Impact of Chemical Weapons: Lessons from the Iran-Iraq War*, 26 FORENSIC SCI. REV. 97, 98 (2014) (citing JEREMY PAXMAN & ROBERT HARRIS, *A HIGHER FORM OF KILLING: THE SECRET HISTORY OF CHEMICAL AND BIOLOGICAL WARFARE* (2007)).

58. Eneh & Ogbuefi-Chima, *supra* note 2, at 12-13; Haines & Fox, *supra* note 57, at 101 (citing COLIN S. GRAY, *ANOTHER BLOODY CENTURY: FUTURE WARFARE* 269 (2007)).

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

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

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

61. Eneh & Ogbuefi-Chima, *supra* note 2, at 13; *Nerve Agents*, *supra* note 59; see Haines & Fox, *supra* note 57, at 102 (citing Sidell, *supra* note 60).

62. *Nerve Agents*, *supra* note 59; see Eneh & Ogbuefi-Chima, *supra* note 2, at 13; Haines & Fox, *supra* note 57, at 102.

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

64. See Eneh & Ogbuefi-Chima, *supra* note 2, at 12; *Blister Agents*, *supra* note 63; see also Haines & Fox, *supra* note 57, at 102-04.

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

66. Eneh & Ogbuefi-Chima, *supra* note 2, at 13 (“Early symptoms of cyanide poisoning include restlessness, headache, palpitations and breathing difficulties, followed by vomiting, convulsions, respiratory failure and unconsciousness. In a confined space, the volatile HCN quickly reaches lethal concentration levels, hardly leaving the time to display early symptoms, but victims simply fall dead. There is no antidote for cyanide poisoning.”); *Blood Agents*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/about-chemical-weapons/types-of-chemical-agent/blood-agents> (last visited Mar. 16, 2017); see Haines & Fox, *supra* note 57, at 101-02.

phere.⁶⁷ 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.”⁶⁸

The effects of chemical weapons, however, stretch further than physical impairment and mutilation. Exposure to some agents can also result in psychological damage.⁶⁹ 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 terrifying to the international community. Prohibition of the use of chemical weapons continues to be the ultimate theme.

III. THE SYRIAN CIVIL WAR

The Syrian civil war erupted in March 2011, when Syrian President Bashar Al-Assad reacted to peaceful opposition to his regime.⁷⁰ The government used disproportionate force, which led to the surge of armed opposition by rebel groups.⁷¹ Shortly after, other extremist groups, such as the Islamic State of Iraq and Syria (“ISIS”), formed to seize territory in Syria.⁷² In 2011, the UN Human Rights Council (“UNHRC”) mandated the Independent International Commission of Inquiry on the Syrian Arab Republic (“Independent Inquiry”) to investigate any allegations of violations of international human rights law,⁷³ which found that “widespread and systematic violations of

67. See Eneh & Ogbuefi-Chima, *supra* note 2, at 12. Common choking agents include “chlorine, Cl₂, . . . phosgene or carbonyl chloride, COCl₂, [and] nitrogen oxide, NO” *Id.*

68. Eneh & Ogbuefi-Chima, *supra* note 2, at 12-13.

69. See *Psychotomimetic Chemical Weapons*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/protection/types-of-chemical-agent/psychotomimetic-agents/> (last visited Mar 19, 2018). Psychotomimetic agents include “substances which, when administered in low doses (<10 mg) cause conditions similar to psychotic disorders or other symptoms emanating from the central nervous system (loss of feeling, paralysis, rigidity, etc.). The effects are transitory and cause inability to make decisions and incapacitation A serious effect of poisoning with BZ [3-quinuclidinyl benzilate], as also with other atropine-like substances, is an increased body temperature. Deterioration in the level of consciousness, hallucinations and coma occur subsequently. Incapacitating after-effects may remain 1-3 weeks after the poisoning.” *Id.*

70. Rodgers et al., *supra* note 13; *Syria’s Civil War Explained From The Beginning*, AL-JAZEERA (Apr. 14, 2018), <http://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html>.

71. *Syria’s Civil War Explained*, *supra* note 70.

72. Rodgers et al., *supra* note 13; *Syria’s Civil War Explained*, *supra* note 70.

73. Gulnara Isakova (Vice-President and Rapporteur), Rep. of the Human Rights Council on its Seventeenth Special Session, at 3-5, U.N. Doc. A/HRC/S-17/2 (Oct. 18, 2011); *Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. HUM. RTS. COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommis->

human rights [were] committed by the Syrian military, security forces and pro-government militias.”⁷⁴ 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.⁷⁵ Since 2011, 11.5% of Syrians have died or suffered injuries and 13.8 million people cannot earn a living.⁷⁶ 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.⁷⁷ 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.⁷⁸

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.⁷⁹ 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.”⁸⁰ 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

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 Opens Special Session on Human Rights in Syrian Arab Republic*, U.N. HUM. RTS. OFF. HIGH COMMISSIONER (Dec. 2, 2011), <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11679&LangID=E>.

75. Simon Lewis, *The Death Toll from Syria’s War is Actually 470,000*, TIME (Feb. 11, 2016), <http://time.com/4216896/death-toll-syria-war-470000/>.

76. *Id.*

77. DIANE BOLME ET AL., A COMPREHENSIVE RESPONSE TO THE SYRIAN REFUGEE CRISIS: HIGHLIGHTING THE UNITED STATES’ ROLE IN THE INTERNATIONAL EFFORT 16 (Nathan Bradshaw & Taylor Twadelle eds., 2016), https://jsis.washington.edu/wordpress/wp-content/uploads/2016/06/Task-Force-D-Report-2016-Friedman_.pdf.

78. “*Deprivation of food, water, shelter and medical care – a method of war in Syria, and a crime against humanity*”, U.N. HUM. RTS. OFF. HIGH COMMISSIONER (Feb. 6, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14224&LangID=E>.

79. Glenn Kessler, *President Obama and the ‘Red Line’ on Syria’s Chemical Weapons*, WASH. POST (Sept. 6, 2013), https://www.washingtonpost.com/news/fact-checker/wp/2013/09/06/president-obama-and-the-red-line-on-syrias-chemical-weapons/?utm_term=.0ef064c6dfe; see also Framework, *supra* note 14.

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

received by the Secretary General.⁸¹ The U.N. Mission concluded that the parties in the Syrian war used chemical weapons on five different occasions.⁸² 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.⁸³ 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.⁸⁴ The Framework called upon the Security Council to adopt a resolution to reinforce the decision of the OPCW.⁸⁵ 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]”⁸⁶ 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.”⁸⁷

81. U.N. Secretary-General, *Identical Letters Dated 13 December 2013 from the Secretary-General Addressed to the President of the General Assembly and the President of the Security Council*, U.N. Doc. A/68/663-S/2013/735, annex (Dec. 13, 2013).

82. *Id.* ¶¶ 109, 111, 113, 115, 117.

83. *Timeline of Syrian Chemical Weapons Activity, 2012-2018*, 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.⁸⁸

In 2015, the Security Council mandated the OPCW-U.N. Joint Investigative Mechanism (“Joint Mechanism”) “to identify to the greatest extent feasible those involved in the use of [toxic] chemicals as weapons in [Syria]”⁸⁹ The Joint Mechanism found substantial evidence that the Syrian Air Force was responsible for two chlorine attacks and were responsible for another instance where ISIS used sulfur-mustard gas.⁹⁰ The Joint Mechanism submitted its findings to the Security Council, which was then tasked to determine what measures to take based on the findings. At present, all of the Security Council’s actions were blocked and no individual has been held accountable for his or her crimes.⁹¹

Pursuant to the Framework, the OPCW removed all and destroyed most of Syria’s declared chemical weapons by 2015.⁹² None-

88. *Syria: Events of 2015*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2016/country-chapters/Syria> (last visited Feb. 22, 2018) (“Despite its accession to the Chemical Weapons Convention in 2014, the Syrian government used toxic chemicals in several barrel bomb attacks in Idlib governorate in March, April, and May. While Human Rights Watch was unable to conclusively determine the toxic chemicals used, the distinct smell of chlorine reported by rescue workers and doctors indicate that it was probably used.”).

89. Press Release, United Nations, Security Council Considers Fourth Report by Joint Investigative Mechanism, U.N. Press Release DC/3668 (Oct. 27, 2016), <https://www.un.org/press/en/2016/dc3668.doc.htm>; Press Release, United Nations, Joint Investigative Mechanism Presents Its Third Report to Security Council, U.N. Press Release DC/3651 (Aug. 30, 2016), <https://www.un.org/press/en/2016/dc3651.doc.htm>; see S.C. Res. 2235, ¶ 5 (Aug. 7, 2015).

90. See U.N. Press Release, DC/3668, *supra* note 89; U.N. Press Release, DC/3651, *supra* note 89.

91. See U.N. Press Release, DC/3651, *supra* note 89.

92. See *Ellesmere Port Facility Completes Destruction of Its Consignment of Syrian Chemicals; Almost Three Quarters of Syria’s Entire Stockpile Now Destroyed*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Aug. 7, 2014), <https://www.opcw.org/news/article/ellesmere-port-facility-completes-destruction-of-its-consignment-of-syrian-chemicals-almost-three-q/>; *OPCW: All Category 1 Chemicals Declared by Syria Now Destroyed*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Aug. 28, 2014), <https://www.opcw.org/news/article/opcw-all-category-1-chemicals-declared-by-syria-now-destroyed/>; *OPCW Confirms Progress in Eliminating Syria’s Chemical Weapons*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Apr. 20, 2014), <https://www.opcw.org/news/article/opcw-confirms-progress-in-eliminating-syrias-chemical-weapons/>; *OPCW Maritime Operation Completes Deliveries of Syrian Chemicals to Commercial Destruction Facilities*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (July 24, 2014), <https://www.opcw.org/news/article/opcw-maritime-operation-completes-deliveries-of-syrian-chemicals-to-commercial-destruction-facilities/>; *OPCW-UN Joint Mission: Total chemical material removed and destroyed raised to 92.5%*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Apr. 24, 2014), <https://www.opcw.org/news/article/opcw-un-joint-mission-total-chemical-material-removed-and-destroyed-raised-to-925/>; *Removal of Syrian Chemicals Passes 86% of Total*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Apr. 22, 2014), <https://www.opcw.org/news/article/removal-of-syrian-chemicals-passes-86-of-total/>; *Update on Syrian Chemical Weapons Destruction and the Fact-Finding Mission into Alleged*

theless, the Joint Mechanism alleged that forces conducted chlorine attacks on multiple occasions even after the destruction⁹³ (chlorine was not part of the Framework because it is an industrial chemical, but its use as a poison gas would violate the CWC⁹⁴). In August of 2016, the Joint Mechanism, once again, found more substantial evidence of chemical weapon use by the Syrian government and ISIS.⁹⁵ The U.N. General Assembly also established the “International, Impartial and Independent Mechanism” in December 2016.⁹⁶ In a recent report, the Commission once again indicated that, in July 2017, Syrian government forces used chemical weapons, primarily chlorine, in Ayn Tarma, Zamalka, and Damascus.⁹⁷ In November 2017, Harastra experienced a chemical attack, where the evidence and symptoms pointed to the use of an organo-phosphorous pesticide by government forces.⁹⁸

Despite the numerous Security Council mechanisms created to collect evidence, the OPCW destruction of Syria’s declared weapons, and continuous allegations that chemical weapons are being deployed in Syria by all parties involved in the war, the international community has not made an effort to intervene and has not held a single person accountable.⁹⁹ The war is entering its seventh year with no

Chlorine Gas Attacks, ORG. FOR PROHIBITION CHEMICAL WEAPONS (May 22, 2014), <https://www.opcw.org/news/article/update-on-syrian-chemical-weapons-destruction-and-the-fact-finding-mission-into-alleged-chlorine-gas/>; *U.S. Completes Destruction of Sarin Precursors from Syria on the Cape Ray*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Aug. 13, 2014), <https://www.opcw.org/news/article/us-completes-destruction-of-sarin-precursors-from-syria-on-the-cape-ray/>.

93. See U.N. Press Release, DC/3651, *supra* note 89; U.N. Secretary-General, *Letter dated 24 August 2016 from the Secretary-General addressed to the President of the Security Council*, ¶ 26, U.N. Doc. S/2016/738 (Aug. 24, 2016) [hereinafter U.N. Secretary-General, Letter dated Aug. 24, 2016].

94. See Dorian Geiger, *How Chlorine Gas Became a Weapon in Syria’s Civil War*, AL-JAZEERA (Mar. 23, 2017), <http://www.aljazeera.com/indepth/features/2017/03/chlorine-gas-weapon-syria-civil-war-170314110043637.html>; Oliver Holmes, *Syria’s Deadly Chlorine Gas Wasn’t Included On Chemical Weapons Ban*, BUS. INSIDER (Apr. 22, 2014, 11:32 AM), <http://www.businessinsider.com/syrias-deadly-chlorine-gas-wasnt-included-on-chemical-weapons-ban-2014-4>.

95. See U.N. Press Release, DC/3651, *supra* note 89; U.N. Secretary-General, Letter dated Aug. 24, 2016, *supra* note 93 (“The Mechanism investigated nine cases, of which eight were related to the use of chlorine or chlorine derivative as a weapon and one was related to the use of sulfur mustard.”).

96. G.A. Res. 71/248, U.N. Doc. A/RES/71/248 (Jan. 11, 2017).

97. Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic of the Human Rights Council on Its Thirty-Seventh Session, U.N. Doc. A/HRC/37/72, annex II, ¶ 13 (Feb. 1, 2018).

98. See *id.* ¶¶ 13-15.

99. See PETER VAN HARN ET AL., CLINGENDAEL, CHEMICAL WEAPONS CHALLENGES AHEAD: THE PAST AND FUTURE OF THE OPCW WITH A CASE STUDY ON SYRIA 4, 49, 78 (Oct.

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.¹⁰⁰ 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.¹⁰¹

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

2017); *OPCW Fact-Finding Mission in Syria Continues Investigations into Allegations of Chemical Weapons Use*, ORG. FOR PROHIBITION 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 WEAPONS, <https://www.noimpunitychemicalweapons.org/en.html> (last visited Apr. 16, 2018); *Fighting Impunity: International Partnership against Impunity for the Use of Chemical Weapons, Declaration of Principles*, FR. DIPLOMATIE (Jan. 23, 2018), https://www.diplomatie.gouv.fr/IMG/pdf/international_partnership_against_impunity_for_the_use_of_chemical_weapons_declaration_of_principles2_en_cle818838-1.pdf.

[The] International Partnership against Impunity for the Use of Chemical Weapons . . . commit[s] to the following:

- Collect . . . and preserve relevant information to support efforts to hold accountable those responsible for the proliferation or use of chemical weapons;
- Facilitate the sharing of such information, with participating States, and international, or regional organisation as appropriate, so that those responsible may be brought to justice;
- Use relevant mechanisms to designate individuals, entities, groups and governments involved in the proliferation or use of chemical weapons for sanctions, as appropriate;
- Publicize the names of individuals, entities, groups or governments placed under sanctions for their involvement in the proliferation or use of chemical weapons through a dedicated website;
- Strengthen the capacity of Participating States, through national and supranational measures, to hold accountable those involved in the use of chemical weapons . . . ;
- Support, where appropriate, common positions in existing fora regarding the use of chemical weapons, for example the OPCW . . . and the UN Security Council and General Assembly.

Id.

101. Gregory D. Koblentz, #NOIMPUNITY: *Will the Newest International Effort to Stop Chemical Attacks in Syria Succeed?*, WAR ON ROCKS (Mar. 2, 2018), <https://warontherocks.com/2018/03/noimpunity-will-newest-international-effort-stop-chemical-attacks-syria-succeed/>.

102. See, e.g., *Media Release: Sanctions Targeting Syria's Chemical Weapons Program*, MINISTER FOR FOREIGN AFF. (AUSTL.) (Aug. 24, 2017), https://foreignminister.gov.au/releases/Pages/2017/jb_mr_20170824.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D (Australia has sanctioned “40 individuals and 14 entities linked to the Syrian regime’s chemical weapons program. These individuals and entities are now subject to targeted financial sanctions, with individuals also subject to travel bans.”).

volved in the Syrian chemical attacks, “the costs imposed by sanctions and the uncertain risk of future prosecution for war crimes are a faint echo of the fear that if the regime falls, their very survival will be threatened.”¹⁰³

IV. A PERMANENT DISINCENTIVE IS NEEDED, FREE FROM THE POLITICS OF THE UNITED NATIONS

“While chemical weapons have so far accounted for only a fraction of the deaths and casualties inflicted by the Syrian civil war, they have the potential to cause far greater destruction if the Assad regime uses them on a larger scale.”¹⁰⁴ Much of the world initially interpreted the 1925 Geneva Protocol to apply only to international armed conflicts.¹⁰⁵ However, in 1966, the UN General Assembly (“UNGA”) called for *all* states to firmly abide by the Protocol.¹⁰⁶ Three years later, the UNGA declared that the ban of the use of chemical and biological weapons in international armed conflicts, as represented in the Protocol, was a standard rule of international law.¹⁰⁷ The International Committee of the Red Cross, a highly respected source on International Humanitarian Law, similarly declares that “state practice establishes th[e] rule as a norm of customary international law applicable in both international and non-international armed conflicts.”¹⁰⁸

Syria is a party to the 1925 Geneva Protocol and is therefore legally bound by its provisions.¹⁰⁹ Based on the development of the Protocol’s interpretation, Syria has violated the provisions several times by engaging in chemical warfare in a non-international armed conflict.¹¹⁰ Syria’s actions also constitute a violation of customary international law. As a recurring theme, however, there are absolutely no interventions or attempts to prosecute the persons responsible for these violations, even though the international community explicitly

103. Koblenz, *supra* note 101.

104. *Id.*

105. See, e.g., Katharine York, *The Chemical Weapons Convention: Preventative Measures Against Horror (Part 2 of 3)*, VIEW FROM ABOVE (May 5, 2014) (quoting Geneva Protocol, *supra* note 1), <http://djilp.org/5159/the-chemical-weapons-convention-preventative-measures-against-horror-part-2-of-3/> (“The Geneva Protocol only applies to international war because the parties only ‘agree to be bound as between themselves’; thus, the prohibition only applies to war between two or more signatory states.”). See generally Geneva Protocol, *supra* note 1.

106. G.A. Res. 2162B (XXI), *supra* note 48.

107. G.A. Res. 2603 (XXIV), *supra* note 48, at 16.

108. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 259 (2005).

109. See Geneva Protocol, *supra* note 1 (indicating that Syria acceded the Protocol on Dec. 17, 1968).

110. See discussion *infra* Section IV.B.

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.

A. *The International Criminal Court*

The Rome Statute is the foundational and governing document for the ICC, which is located in The Hague, Netherlands.¹¹¹ The Rome Statute was adopted at a UN diplomatic conference in 1998 and the treaty was entered into force in 2002.¹¹² 124 countries have acceded to or ratified the Rome Statute, but Syria is not a state party.¹¹³ Syria signed the Rome Statute on November 29, 2000, but has not ratified it.¹¹⁴ The ICC is designed as a court of last resort;¹¹⁵ 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.¹¹⁶

The Rome Statute requires territorial or personal jurisdiction, subject-matter jurisdiction, and temporal jurisdiction before the ICC can prosecute an individual.¹¹⁷ The court has subject-matter jurisdiction to prosecute for international crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.¹¹⁸ Territorial jurisdiction exists if the crime was committed on the territory of a state party and personal jurisdiction is satisfied if the individual is a national of a state party.¹¹⁹ The court can satisfy jurisdictional requirements in three ways: (1) referral from a party state, (2) referral from the UN Security Council, or (3) if a Pre-Trial Chamber of ICC judges grants

111. *About: How The Court Works*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess> (last visited Feb. 13, 2016) [hereinafter *How the Court Works*].

112. Rome Statute, *supra* note 5; see also *Rome Statute of the International Criminal Court*, INT'L CRIM. CT. (July, 17, 1998), <https://ihl-databases.icrc.org/ihl/INTRO/585?OpenDocument>.

113. See Rome Statute, *supra* note 5; see also *Rome Statute of the International Criminal Court*, *supra* note 112.

114. *10. Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> (last visited Apr. 11, 2018). See generally Rome Statute, *supra* note 5.

115. *How The Court Works*, *supra* note 111; see also Richard Dicker, *ICC: The Court of Last Resort*, HUM. RTS. WATCH (June 29, 2012), <https://www.hrw.org/news/2012/06/29/icc-court-last-resort>.

116. See Rome Statute, *supra* note 5, art. 16, 18.

117. Rome Statute, *supra* note 5, art. 11; see also *How the Court Works*, *supra* note 111.

118. Rome Statute, *supra* note 5, art. 5; see also *How the Court Works*, *supra* note 111.

119. Rome Statute, *supra* note 5, art. 12.

an application of the Prosecutor to open an investigation on her own initiative.¹²⁰ 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.¹²¹ Nevertheless, if a state became a party subsequent to the court's establishment, jurisdiction can only retroactively extend to the date of ratification.¹²²

While not a UN organization, the ICC has a cooperation agreement with the UN.¹²³ When a matter is not within the court's jurisdiction, the Security Council can refer the situation to the ICC, granting it jurisdiction.¹²⁴ The ICC Prosecutor then has the discretion to decide whether to pursue an investigation.¹²⁵ 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 2011.¹²⁶

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.

B. *Automatic Referral*

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.”¹²⁷ Automatic referral will finally eliminate loopholes for avoiding punishment, thereby creating a deterrent effect. It will simultaneously motivate the international community to prosecute individuals for chemical weapon use because it is a concrete and easily enforceable system. The lack of resources and mechanisms to prosecute these criminals has resulted in a seemingly helpless situation,

120. *Id.* art. 13.

121. *See id.* art. 29.

122. Rome Statute, *supra* note 5, art. 15 *bis*, 15 *ter*.

123. *Id.*, art. 2; *see also* Int'l Criminal Court [ICC], *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, ICC-ASP/3/Res.1 (July 22, 2004), http://legal.un.org/ola/media/UN-ICC_Cooperation/UN-ICC%20Relationship%20Agreement.pdf.

124. Rome Statute, *supra* note 5, art. 13(b).

125. *Id.* art. 53(1).

126. Tiina Intelman, *The International Criminal Court and the United Nations Security Council: Perceptions and Politics*, HUFFPOST (May 28, 2013, 11:53 AM), https://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html.

127. Koblentz, *supra* note 101.

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.¹²⁸ 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”¹²⁹ 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.”¹³⁰ 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)¹³¹ 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. *See generally* Chemical Weapons Convention, *supra* note 1.

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

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

131. *See* 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.¹³² 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”),¹³³ which warrants application of the law of armed conflict.¹³⁴ Prior to the adoption of the Second Additional Protocol to the Geneva Conventions (“Additional Protocol II”),¹³⁵ NIACs were “under-regulated and under-ex-

132. *Id.* 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” *Id.* 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, *supra* note 5, 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 *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, *The Syrian Civil War and The Achilles’ Heel of the Law of Non-International Armed Conflict*, 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. *See id.* pmbl. 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.” *Id.* art. 1.

amined,”¹³⁶ and were mainly governed by Article 3, common to all four Geneva Conventions of 1949 (“Common Article 3”).¹³⁷

In the June 2010 Review Conference of the Rome Statute, Belgium proposed an amendment to add the language of Article 8(2)(b) to Article 8(2)(e).¹³⁸ This amendment came to be known as the Kampala Amendment.¹³⁹ It has currently been ratified by thirty-two state parties and is only binding on those state parties that have ratified the amendment,¹⁴⁰ but has also become incorporated into the Statute itself.¹⁴¹ The Kampala Amendment to the Rome Statute would grant the ICC subject-matter jurisdiction over the situation in Syria because the amendment expanded the list of war crimes in a NIAC.¹⁴² Security Council referral of Syria can be predicated upon the use of “poison or poisoned weapons” or “asphyxiating, poisonous or other gases.”

Opponents may argue that the Kampala Amendment does not apply to Syria because it has not specifically ratified the Amendment. However, as mentioned above, the language of the Amendment has been incorporated into the Statute. The possible non-binding nature of the Amendment therefore should not make a difference. The earmark of the Security Council referral is the power to “expand the jurisdiction of the ICC to cover acts by nationals of non-parties or on

136. Ruys, *supra* note 134, at 248 (first citing ERIK CASTRÉN, *CIVIL WAR* 244 (1966); and then citing JEAN SIOU, *LE DROIT DE LA GUERRE ET LES CONFLICTS ARMÉS D’UN CARACTÈRE NON-INTERNATIONAL* 248 (1958)).

137. Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135. “In the case of armed conflict not of an international character . . . Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever . . . : (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.* art. 3(1)(a)-(d).

138. See Kampala Amendment, *supra* note 7.

139. *Id.*

140. *Id.* “Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.” Rome Statute, *supra* note 5, art. 121(5).

141. See Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?*, EUR. J. INT’L L. (Aug. 23, 2013), <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>.

142. See *id.*

the territory of non-parties.”¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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 1993.¹⁴⁶

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. See Amal Alamuddin & Philippa Webb, *Expanding Jurisdiction Over War Crimes Under Article 8 of the ICC Statute*, 8 J. INT’L CRIM. JUST. 1219, 1227 (2010) (comparing the different views of commentators).

145. Compare 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 . . .”), with 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.¹⁴⁷ A treaty, however, cannot be interpreted solely based on drafting history.¹⁴⁸

Under the Vienna Convention of the Law of Treaties, the text and terms of a treaty must be interpreted first,¹⁴⁹ whereas drafting history is considered as a supplemental means of interpretation.¹⁵⁰ Words such as "poison," "asphyxiation," "gases," and "liquids" are used in the Rome Statute, the CWC, and the 1925 Geneva Protocol.¹⁵¹ Blood agents under the CWC are poisons (or poisoned weapons), dispersed as gases, that cause the body to suffocate. Suffocation is equivalent to asphyxiation.¹⁵² Choking agents are also gases and result in death by asphyxiation.¹⁵³ 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."¹⁵⁴

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.¹⁵⁵ The parties did not exclude the explicit language because of a disfavor of chemical weapons prohibition.

147. Alamuddin & Webb, *supra* 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]; *see also* Akande, *supra* note 141.

149. Vienna Convention, *supra* 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. *Id.* 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. *See* Rome Statute, *supra* note 5, art. 8(2)(b)(xvii)-(xviii); Chemical Weapons Convention, *supra* note 1, art. XIII; Geneva Protocol, *supra* note 1.

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

153. *See generally* Eneh & Ogbuefi-Chima, *supra* note 2, at 12-13; Haines & Fox, *supra* note 57, at 102.

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

155. Some states at the Rome Conference "insisted that it was unfair or misleading to exclude nuclear weapons — 'the rich man's weapons of mass destruction' — but to include biological and chemical weapons — 'the poor man's' version of what is prohibited." Alamuddin & Webb, *supra* note 144, at 1228 n.41.

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.”¹⁵⁶ 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.”¹⁵⁷

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.¹⁵⁸ The use of chemical weapons is also prohibited under customary international law.¹⁵⁹ 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”¹⁶⁰ 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, *supra* note 5, art. 8(2)(e).

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

158. See Rome Statute, *supra* note 5, art. 8(2)(b)(xvii)-(xviii); Geneva Protocol, *supra* note 1; Kampala Amendment, *supra* note 7, Declarations; Chemical Weapons Convention, *supra* note 1, art. XIII.

159. HENCKAERTS & DOSWALD-BECK, *supra* note 108, at 260.

160. Malaka Gharib, *Can Attacks On Aid Workers Be Stopped?*, NPR (Sept. 29, 2016, 11:49 AM), <http://www.npr.org/sections/goatsandsoda/2016/09/29/495829011/why-is-no-one-punished-for-attacks-on-aid-workers>.

The use of chemical weapons as a general matter, not restricted only to the Syrian conflict, should result in automatic referral to the ICC by means of a Security Council resolution. Instead of leaving it up to the discretion of the Security Council to refer a situation involving chemical weapons on a case-by-case basis, it should adopt a resolution that declares that *any* use of such weapons will trigger automatic referral to the ICC. The political obligations and issues of the Security Council would thus not hinder justice. This system of bypassing politics, however, is not proposed with the intention of defrauding the ordinary course of UN affairs. Rather, it is a necessary step which targets and counteracts Russia's and China's prior biased and self-interested vetoes.¹⁶¹ Both countries have failed to actively address their issues through a referral and have consequently blocked any intervention necessary for the safety of the international community in its entirety.¹⁶²

A possible argument against automatic referral to the ICC is that, over the years, many people have criticized the court as weak.¹⁶³ One particular concern affecting the credibility of the court is that, even though three of the five permanent members of the Security Council are not parties to the Rome Statute and the ICC, they nevertheless have the power to refer other non-parties to the ICC for prosecution.¹⁶⁴ If the Security Council referred the Syrian conflict to the ICC, there would be many parties and individuals to investigate and prosecute, including the Syrian government members, the governmental forces, and the different oppositional groups. Skeptics will also argue that the ICC is limited in resources and has never dealt with such a large-scale case.¹⁶⁵

The purpose of the ICC's existence is to have a permanent and established international tribunal¹⁶⁶—automatic referral will effect-

161. See, e.g., Joseph Logan & Patrick Worsnip, *Anger after Russia, China block U.N. action on Syria*, REUTERS (Feb. 4, 2012, 4:28 PM), <https://www.reuters.com/article/us-syria/anger-after-russia-china-block-u-n-action-on-syria-idUSTRE80S08620120205> (describing an instance where “Russia and China vetoed a U.N. resolution that would have backed an Arab plan urging Syrian President Bashar al-Assad to give up power . . .”).

162. See, e.g., Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, GUARDIAN (May 22, 2014, 11:07 AM), <https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court>.

163. See, e.g., *Courting Disaster?*, ECONOMIST (May 27, 2010), <http://www.economist.com/node/16219717>.

164. See LAWRENCE MOSS, FRIEDRICH EBERT STIFTUNG, *THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT: TOWARDS A MORE PRINCIPLED RELATIONSHIP* 4 (Mar. 2012), <http://library.fes.de/pdf-files/iez/08948.pdf>.

165. See *id.*

166. Rome Statute, *supra* note 5, pmbl.

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.¹⁶⁷

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 *future* 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 held accountable for their actions, even if it is not for the use of chemical weapons.

This system of automatic referral will be beneficial for the ICC because parties to the Rome Statute have recently been withdrawing support for the court.¹⁶⁸ African countries primarily have denounced the court because they believe that only their countries are targeted by the court.¹⁶⁹ All of the ICC's successful prosecutions since its exist-

167. INT'L CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 19 (May 2011), <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>. See generally Rome Statute, *supra* note 5.

168. See, e.g., Elias Meseret, *African Leaders OK Strategy for Mass Withdrawal from ICC*, AP (Jan. 31, 2017), <https://apnews.com/0e19488f91bc4ccfad1e167c6c5742d5>.

169. See Iain Macleod & Shehzad Charania, *Three Challenges for the International Criminal Court*, OUP BLOG (Nov. 16, 2015), <http://blog.oup.com/2015/11/three-challenges-international-criminal-court/>; Nanjala Nyabola, *Does the ICC have an Africa Problem?*, GLOBAL POL'Y F. (Mar. 28, 2012), <https://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/51456-does-the-icc-have-an-africa-problem.html>.

tence as a court have been against African countries.¹⁷⁰ 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 for dealing with such a large-scale problem, it will finally do what it was made for and will improve its reputation. The court will gain importance simply by having automatic jurisdiction over a specific crime—in most aspects it will still be a court of last resort. It is important to keep the court as a last resort to preserve the original ICC system. Automatic referral should take place when domestic courts are not an option, or not functioning, or will be futile—if the system does not change, in that the ICC must defer to national proceedings whether or not they lead to prosecution, then again no parties are going to be held accountable and all the technicalities will help war criminals escape prosecution.

C. *Ruling Out Alternatives*

Alternatives to automatic referral are available, but they will not result in a long-term solution to the overarching chemical weapon problem. An alternate route for pursuing justice could be grounded on Syria's obligations under other treaties and whether Syria violated any of those obligations. Syria is party to the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention")¹⁷¹ and the International Covenant on Civil and Political Rights ("ICCPR"), which protects the right to life and would seem to prohibit the use of chemical weapons.¹⁷² Neither treaty explicitly prohibits the means used to perpetrate genocide, or purely unlawful and intentional killing.¹⁷³ Therefore, these treaties cannot be regarded as

170. See Nyabola, *supra* note 169.

171. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278.

172. International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, 999 U.N.T.S. 172.

173. Blake & Mahmud, *supra* note 1, at 254.

providing a “blanket prohibition” for Syria’s use of chemical weapons.¹⁷⁴ “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.”¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷

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,¹⁷⁸ but that is not a possibility since the war is still enduring and the courts are not in operation.¹⁷⁹

174. *Id.*

175. *Id.*

176. Rodgers et al., *supra* note 13.

177. *See* discussion *supra* Part II.

178. Jones, *supra* note 20, at 804-05.

179. *See id.* 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.¹⁸⁰ Germany and Sweden have started to pursue this avenue of accountability, but have encountered various challenges.¹⁸¹ Since the conflict is still ongoing, authorities are unable to gather evidence from Syria.¹⁸² 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.¹⁸³

Another option is an *ad hoc* international criminal tribunal, which is created under the Chapter VII powers of the Security Council.¹⁸⁴ Russia will not agree to a special *ad hoc* 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.¹⁸⁵ 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.¹⁸⁶ An *ad hoc* tribunal has been created by the Security Council on two different occasions, once for Yugoslavia and another time for Rwanda.¹⁸⁷ However, those tribunals were created to deal with atrocious crimes in specific regions for specific conflicts.¹⁸⁸

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

180. *Universal Jurisdiction*, INT'L JUST. RESOURCE CTR., <http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/> (“[U]niversal jurisdiction” refers to the idea that a national court may prosecute individuals for any serious crime against international law — such as crimes against humanity, war crimes, genocide, and torture — based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect. Generally, universal jurisdiction is invoked when other, traditional bases of criminal jurisdiction do not exist . . .”).

181. See “*These are the Crimes we are Fleeing*”, HUM. RIGHTS WATCH (Oct. 3, 2017), <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>.

182. See *id.*

183. See *id.*

184. See U.N. Charter, *supra* note 47, art. 39-41.

185. See Saloni Malhotra, *Achieving Justice for Syria is Not as Hopeless as it Seems*, FOREIGN POL'Y RISING (Nov. 29, 2017), <https://foreignpolicyrising.com/2017/11/29/achieving-justice-for-syria/> (indicating that Russia supports Syria and the regime of Bashar Al-Assad).

186. See Framework, *supra* note 14.

187. *UN Documentation: International Law*, DAG HAMMARSKJOLD LIBR., <http://research.un.org/en/docs/law/courts> (last visited Apr. 3, 2018).

188. See *Mandate and Crimes Under ICTY Jurisdiction*, U.N. INT'L CRIM. TRIBUNAL FORMER YUGOSLAVIA, <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction> (last visited Apr. 3, 2018); *The ICTR in Brief*, U.N. MECHANISM INT'L CRIM. TRIBUNALS, <http://unictr.unmict.org/en/tribunal> (last visited Apr. 3, 2018).

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.¹⁸⁹

An internationalized criminal tribunal,¹⁹⁰ 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.¹⁹¹ 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.¹⁹² Participation of international officers could additionally contribute dexterity and "increase the perceived independence and impartiality of the criminal justice process."¹⁹³ 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.¹⁹⁴ 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."¹⁹⁵ This is not an explicit provision. Rather, the "Responsibility to Protect" is a result of universal accord.¹⁹⁶ The idea is that States "have a 'Responsibility to Protect' . . . their civilian populations and that other States must act

189. Jones, *supra* 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. *See id.* *See generally* S.C. Res. 827 (May 25, 1993); S.C. Res. 955 (Nov. 8, 1994).

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

192. *See* Jones, *supra* note 20, at 812 (first citing Lindsey Raub, *Positioning Hybrid Trials in International Criminal Justice*, 41 N.Y.U. J. INT'L L. & POL. 1013, 1017, 1041-44 (2009); and then citing Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 306 (2003)).

193. Jones, *supra* note 20, at 812 (citing Dickinson, *supra* note 192, at 306).

194. Jones, *supra* note 20, at 813 ("[T]he involvement of victors in the prosecution of the defeated could result in biased and unfair trials.").

195. *5 Things You Should Know About Chemical Weapons and International Law*, HUM. RTS. FIRST (Aug. 2013), <https://www.humanrightsfirst.org/wp-content/uploads/HRF-Chemical-Weapons-Factsheet.pdf>.

196. *Id.*

affirmatively when a State is unwilling or unable to meet their responsibility.”¹⁹⁷ 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.¹⁹⁸

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.”¹⁹⁹ 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.²⁰⁰ 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

197. *Id.*

198. *Id.*

199. Simon Wessely, *Psychological Implications of Chemical and Biological Weapons*, 323 *BRIT. MED. J.*, 878, 878 (2001).

200. Rep. of the Ind. Int’l Comm. of Inquiry on the Syrian Arab Republic on its Twenty-Fifth Session, U.N. Doc. A/HRC/25/65, at 2 (Feb. 12, 2014).

create such a resolution and to stop the problem before it gets worse or happens again somewhere else.

If the Security Council can avoid a veto from China and Russia, who have vetoed two referral proposals so far,²⁰¹ the provisions of the Rome Statute will present an obstacle. Once the ICC has jurisdiction to prosecute the Syrian government and rebel forces for chemical weapon use, the prohibition of chemical weapons will finally be enforced, and the ICC will earn credibility and support from the international community.

Implementing automatic referral will address the lack of prosecution and accountability for using chemical weapons since World War I. Numerous treaties and international criminal tribunals have been unable to put a stop to the use of these weapons. A conflict that is continuing into its seventh year goes to show that those treaties and tribunals had little, if any, effect outside of their immediate time frames.

An automatic referral system will eliminate the present bias and politicization of the Security Council, both of which undermine the independence of the ICC. The language of the Rome Statute mirrors the 1925 Geneva Protocol, and the ordinary meaning of the terms are equivalent to the terms in the CWC. The use of chemical weapons is prohibited under customary international law.²⁰² Thus, the provisions of the Rome Statute should be construed to prohibit 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 supports automatic referral to the ICC for any use of chemical weapons as a war crime.

The purpose of the ICC's existence is to have a permanent and established international tribunal,²⁰³ and automatic referral will effectuate those goals. With such a structure already in place, it is not necessary to create a new one. Chemical weapons have stained the peace and stability of the international community for hundreds of years. It is necessary to put aside politics because, as members of the interna-

201. See U.N. SCOR, 7825th mtg. at 3, U.N. Doc. S/PV.7825 (Dec. 5, 2016); U.N. SCOR, 7893d mtg. at 4, U.N. Doc. S/PV.7893 (Feb. 28, 2017).

202. HENCKAERTS & DOSWALD-BECK, *supra* note 108, at 260; see also *5 Things You Should Know About Chemical Weapons and International Law*, *supra* note 195.

203. Rome Statute, *supra* note 5, pmbl.

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.

