

## **The Rush to Bomb Syria: Undermining International Law and Risking Wider War**

### **Introduction**

Once again, the President of the United States is leading a rush towards war without regard for the United Nations Charter and the international legal regime intended to control prohibited weapons and to respond to threats to peace and security. Even before United Nations inspectors were on the ground in Syria to determine whether a chemical weapons attack had occurred, the U.S. and its allies began moving ships into attack position in a manner that, in the context of public statements by the leaders of the United States, France, and the United Kingdom, constituted an undeniable military threat to Syria.

Since World War I, use of chemical weapons has been viewed almost universally as monstrous, and as a violation of treaty-based and customary standards of international humanitarian law. If they were used in Syria by any party, that action should be condemned, and all states should cooperate in identifying the perpetrators and in pursuing their apprehension and prosecution by all legal means. There is no provision of international law, however, that allows ad hoc coalitions of countries to determine for themselves who they believe the guilty parties to be, and to punish them by acts of war against the territory of a sovereign state. The United Nations Charter allows unilateral military action only where a country is under attack or imminent threat of attack. None of the countries proposing the use of force against Syria can make any claim that Syria has attacked them, or that they are under imminent threat of attack. International treaties outlawing chemical weapons and prohibiting their use provide no special exception for such ad hoc use of military force. To the contrary, the Chemical Weapons Convention, the most comprehensive instrument concerning chemical weapons, provides for investigation of alleged violations by specialist bodies constituted by the Convention and recourse to the United Nations to authorize any use of force.

In this instance, it is especially important that transparent, credible procedures be followed for investigation of the allegations of chemical weapons use and a determination of the responsible party or parties, as well as for actions to prevent further use and to punish those culpable.

### **Key Findings and Recommendations**

- Chemical weapons are viewed almost universally as abhorrent, and their use as a crime. All states should cooperate in identifying the perpetrators of the apparent use of chemical weapons in Syria and in pursuing their apprehension and prosecution.
- Under the current circumstances there is no basis in the United Nations Charter, the Chemical Weapons Convention, or other international law for the United States to launch strikes against

### **Key Findings and Recommendations (continued)**

Syria absent authorization by the UN Security Council or, if the Council is deadlocked, the UN General Assembly under its Uniting for Peace procedure.

- International law provides no exception for the ad hoc use of force by states in cases involving the actual or possible use of prohibited weapons, such as chemical weapons, by states with which they are not at war. Standing alone, the allegations of chemical weapons use by the Syrian government do not provide a legal basis for military action by any non-party to the conflict.
- Unilateral punitive strikes justified as a defense of the global norm against chemical weapons are unlikely to actually protect Syrians or others against use of chemical weapons and other attacks, may do little to reinforce the norm or even undermine it, and could lead to a significant increase in the level of violence throughout the region.
- There are viable international ways and means to respond to the apparent use of chemical weapons in Syria that should be vigorously pursued before the use of force is considered.
- The U.S. should present its evidence regarding use of chemical weapons in Syria to the Security Council. The Security Council should condemn any use of chemical weapons, forbid further use of chemical weapons, expand the scope of the UN investigation to include the issue of responsibility for attacks, refer the Syrian situation to the International Criminal Court for further investigation and adjudication, and call for convening of a peace conference.
- If the Security Council remains unable to act, the General Assembly should assume responsibility under the Uniting for Peace procedure.
- The U.S.-Russian effort to hold a conference to bring the Syrian conflict to an end should be reinvigorated. The U.S., Russia, and other powers that provide direct or indirect military and logistical support to the warring parties in Syria should use all available means, including cessation of support, to bring about an immediate cease-fire and a negotiated peace.
- The Chemical Weapons Convention (CWC), the most comprehensive instrument concerning chemical weapons, provides for investigation of alleged violations by specialist bodies constituted by the Convention, collective measures by states parties in response to activities prohibited by the Convention, recourse to the UN General Assembly and Security Council in cases of particular gravity, and referral of disputes to the International Court of Justice. Almost all states, 189, are party to the CWC. Syria is among the handful that are not. The agreement governing the relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons, however, makes provision for instances where chemical weapons are used by actors other than CWC parties. Pursuant to CWC procedures, the Executive Council or the Conference of States Parties of the CWC should convene a special meeting to consider the situation in Syria and recommend appropriate responses by states parties and the United Nations.
- For U.S. elected officials, saying no to the easy, violent options offered by a national security and military industrial complex too long ascendant would be the hard choice, the courageous choice, and the right choice.

## **There is no provision of international law that would justify military action against Syria by an ad hoc group of states.**

The United Nations Charter is the highest treaty in the world, superseding states' conflicting obligations under any other international agreement.<sup>1</sup> The Charter is a treaty of the United States, and as such forms part of the "supreme law of the land" under the U.S. Constitution.<sup>2</sup> Adopted in the wake of World War II and proclaiming the determination "to save succeeding generations from the scourge of war," the Charter established a prohibition on the use of force to resolve disputes among states. Article 2(4) bans the threat or use of force (1) against the territorial integrity of a state, (2) against the political independence of a state, and (3) in any other manner inconsistent with the purposes of the United Nations. The Charter contains two exceptions to the prohibition, authorizing the Security Council to use force on behalf of the United Nations to maintain international peace and security, and recognizing the right of self-defense against an armed attack. These are the only bases for legitimate use of force generally accepted in present-day international law. Here, none of the states proposing military action against Syria have anything close to a credible claim that they are acting in self-defense. Syria has not attacked any of these states, their troops or installations abroad, or their allies. Under circumstances other than self-defense where disputes exist "the continuance of which is likely to endanger international peace and security," the countries involved first must seek resolution of the dispute by all available peaceful means, and if that fails, must refer their dispute to the Security Council.<sup>3</sup> It is for the Security Council to determine the existence of a threat to peace and to decide upon appropriate measures, including the use of force.<sup>4</sup>

There is no provision in international law providing an exception for the ad hoc use of force by states in cases involving the actual or possible use of prohibited weapons, such as chemical weapons, by states with whom they are not at war. The closest principle is that of reprisal, where as a matter of customary international law one belligerent may engage in otherwise unlawful uses of military force in reprisal for unlawful acts of an adversary. Reprisals must be employed "only as an unavoidable last resort to induce the enemy to desist from unlawful practices." They are to be undertaken "only after careful inquiry into the alleged offense."<sup>5</sup> This principle would not apply directly here, as the states proposing military action are not at war with the government of Syria. The rules relevant to those states are set out in the UN Charter, which permits self-defense only in response to an armed attack and arguably prohibits any forceful reprisals outside the context of an armed conflict. Any military action aimed at inducing a state to stop unlawful actions should proceed from the Security Council, or in circumstances of Security Council

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<sup>1</sup> UN Charter, Article 103.

<sup>2</sup> U.S. Constitution, Article VI, Clause 2.

<sup>3</sup> UN Charter Chapter VI, Articles 33 and 37.

<sup>4</sup> UN Charter Chapter VII, Articles 39-42.

<sup>5</sup> FM 27-10, Department of The Army Field Manual, The Law of Land Warfare, United States Department Of The Army, July 1956, Chapter 8, Section 1, para.497.

paralysis, a comparably legitimate multilateral body, the General Assembly under its Uniting for Peace procedure.<sup>6</sup>

The Chemical Weapons Convention (CWC) and the comprehensive institutions and procedures it establishes for responding to alleged violations involving chemical weapons, including chemical weapons use, support this view regarding responses to chemical weapons use, mandating wherever possible collective rather than unilateral and ad hoc processes for investigation and response to alleged treaty violations. 189 states, including all states proposing military action here, are parties to the CWC, although Syria is not. Accession to the CWC is sufficiently universal, however, that its rules and procedures constitute at minimum persuasive authority regarding responses to chemical weapons use.

The CWC establishes permanent expert bodies for the investigation and, where possible, resolution of disputes regarding violations of the CWC, including chemical weapons use. It provides for referral of disputes where necessary to the International Court of Justice. The CWC allows the Conference of the States Parties to make recommendations to enforce the Convention of “collective measures to States Parties in conformity with international law,” but also requires that “The Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.”<sup>7</sup> Under the CWC, both the Conference of State Parties and the Executive Council are empowered to hold special meetings.

While the CWC concerns the obligations of states parties, it nonetheless is a natural setting for deliberation regarding the Syrian situation. The CWC’s aim, stated in its preamble, is “for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation” of the treaty. The agreement between the United Nations and the Organization for the Prohibition of Chemical Weapons (OPCW) makes provision for instances where chemical weapons are used by actors other than CWC parties, stating that the OPCW shall “closely cooperate with the Secretary-General in cases of the alleged use of chemical weapons involving a State not party to the Convention or in a territory not controlled by a State Party to the Convention and, if so requested, shall in such cases place its resources at the disposal of the Secretary-General”. This is the provision under which OPCW is participating in the current UN inspections in Syria.<sup>8</sup>

All of these considerations reinforce the case for careful and transparent fact-finding, and for adherence to the procedures of the CWC and the United Nations.<sup>9</sup> The United States instead has

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<sup>6</sup> This procedure enabling General Assembly action when the Security Council is paralyzed was created by the Assembly’s Uniting for Peace Resolution, res. 377(5) November 3, 1950. See <http://untreaty.un.org/cod/avl/ha/ufp/ufp.html>.

<sup>7</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Articles IX, XII, XIV.

<sup>8</sup> Agreement concerning the relationship between the UN and the OPCW, approved by the OPCW Conference of the States Parties in decision C-VI/DEC.5 dated 17 May 2001 and by the United Nations General Assembly in resolution A/RES/55/283 dated 7 September 2001, <http://www.opcw.org/about-opcw/un-opcw-relationship/>, accessed September 1, 2013.

<sup>9</sup> An additional point worth noting is that both the government of Syria and the irregular forces opposing it receive military assistance from states that are parties to the CWC. Some of these states now are advocating speedy military action without waiting for the outcome of fact-finding efforts by teams that include inspectors from the UN, the

attempted to marginalize the investigative efforts of the UN and the Organization for the Prohibition of Chemical Weapons, claiming, for example, without technical basis that the inspection teams arrived too late to be able to gather relevant evidence.<sup>10</sup>

The spare talking points offered by the Obama administration that might be interpreted as legal rationales for a military strike have at most a tangential relationship to accepted principles of international law. U.S. government spokespeople—again, in the absence of proof, and before the evidence can be gathered by any agency independent of the U.S. government—claim that the Syrian government has used chemical weapons to kill large numbers of its own people. They then assert that “...there are core national security interests at stake for the United States here. The mass-scale use of chemical weapons or, of course, the potential proliferation of those weapons flagrantly violates an important international norm and threatens American national security,” and that “this is taking place in a region that’s already incredibly destabilized, taking place in a country that borders many countries, our allies and friends that we work closely with together. So we believe that it’s important that we send a strong message that this type of mass-scale, indiscriminate use of chemical weapons is not acceptable.”<sup>11</sup> President Obama, in his formal statement calling for military action and announcing his submission of the matter to the U.S. Congress for debate, said the following:

“If we won't enforce accountability in the face of this heinous act, what does it say about our resolve to stand up to others who flout fundamental international rules? To governments who would choose to build nuclear arms? To terrorists who would spread biological weapons? To armies who carry out genocide?”<sup>12</sup>

However, no principle of international law allows any state to attack another merely because its national security elites proclaim that “core national security interests are at stake,” or even because it believes that another state has violated international law. No country lawfully can attack another to deter future possible acts by other countries; doing so would constitute an

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World Health Organization, and the Organization for the Prohibition of Chemical Weapons. If chemical weapons were used by one or another party to the conflict, they may have been assisted directly or indirectly—e.g. through the provision of technical assistance or logistical support, or even provision of chemical weapons or delivery systems themselves—by one or more states that are CWC parties. Under the CWC, states parties undertake not to “transfer, directly or indirectly, chemical weapons to anyone” or to “assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.” Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Article I. If chemical weapons were used at any time by any of the warring parties in Syria, one or more parties to the CWC ultimately may be implicated in providing prohibited assistance.

<sup>10</sup> This claim has been disputed even by experts from within the U.S. nonproliferation establishment. See Robert Windrem, “Delay reaching site of alleged chem weapons attack shouldn’t hamper probe,” NBC News investigations, 8/26/13, accessed 8-28-13, <http://investigations.nbcnews.com/news/2013/08/26/20201820-delay-reaching-site-of-alleged-chem-weapons-attack-shouldnt-hamper-probe?lite>; see also Gareth Porter, “In Rush to Strike Syria, U.S. Tried to Derail U.N. Probe,” IPS, August 27, 2013, <http://www.ipsnews.net/2013/08/in-rush-to-strike-syria-u-s-tried-to-derail-u-n-probe/>, accessed August 29, 2013.

<sup>11</sup> Marie Harf, Deputy Spokesperson, U.S. Department of State. Daily Press Briefing, Washington, DC, August 28, 2013, <http://www.state.gov/r/pa/prs/dpb/2013/08/213585.htm>, accessed August 29, 2013.

<sup>12</sup> Statement by the President of the United States on Syria, Washington, D.C. August 31, 2013, <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>, accessed August 31, 2013.

extension of the notion of anticipatory self-defense far past even that claimed by President Obama's predecessor, George W. Bush. To the extent that anticipatory defense is recognized in international law, it is limited to extreme, immediate circumstances. A generally recognized guide to the conditions for anticipatory self-defense is Daniel Webster's statement regarding the Caroline affair of 1837: Self-defense is justified only when the necessity for action is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."<sup>13</sup> Nothing of the kind exists here.

One of the main goals of the United Nations, and a central purpose of its Charter, is to prevent countries from attacking each other, and to create procedures for resolving conflicts. These procedures address directly the fact that powerful countries often will go to war based on one pretext or another, claiming that they are in danger of attack, or even that they have been attacked. (Germany attacked Poland in 1939, using as part of its justification a border incident entirely fabricated by Germany.) After World War II, the United States led the world in founding the United Nations. The U.N. Charter created the Security Council, to provide a forum for an international determination of whether an act of aggression or other threat to peace had occurred. Even in the case of self defense, preserved in Article 51 of the United Nations Charter, member states must immediately report measures taken in self defense, in order to allow the Security Council to take necessary steps to restore international peace and security. When the Security Council has done so, the right of self-defense ceases. Where a state can make no claim that it has been attacked or directly threatened, the determination of whether or not a threat to peace has occurred, and what measures should be authorized to restore peace, lies with the Security Council.

### **The "responsibility to protect" principle does not provide a legal basis for the use of force against Syria under these circumstances.**

The remaining legal rationale for military intervention would be a strong interpretation of the "responsibility to protect" principle, based on a compelling factual case that immediate military intervention could, with a reasonable degree of certainty, prevent a grave harm to a civilian population. This was one of the main rationales upon which the countries initially advocating military strikes relied. Prior to the parliament's rejection of military action, the United Kingdom's publicly released legal position, for example, states that the UK is seeking a Security Council resolution that will "authorise member states, among other things, to take all necessary measures to protect civilians in Syria from the use of chemical weapons and prevent any future use of Syria's stockpile of chemical weapons...."<sup>14</sup> Even in the presence of the requisite circumstances, what authority there is in this developing area of law indicates that UN authorization for use of force is required.<sup>15</sup> Merely presenting the case to the Security Council

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<sup>13</sup> Letter from Daniel Webster, Secretary of State, to Lord Ashburton, August 6, 1842, reprinted in 2 John Bassett Moore, *A Digest of International Law* 409, 412 (1906).

<sup>14</sup> "Chemical Weapon Use by Syrian Regime, UK Government Legal Position," 29 August, 2013, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf) accessed August 29, 2013.

<sup>15</sup> See, e.g., "Responsibility to protect: timely and decisive response," Report of the Secretary-General of the United Nations, 25 July 2012, A/66/874 S/2012/578, which stated that in taking action pursuant to the responsibility to protect that "Only the Security Council can authorize the use of force, under Chapter VII, Article 42, of the Charter." (at para. 32).

and receiving an unsatisfactory result does not provide a state or states with grounds to take military action based on their own assessment of the situation.

In any event, no compelling case has been presented here that missile attacks and air strikes on Syrian government and military targets would prevent further chemical weapons use. So far, the case is weak on all counts. Although circumstantial evidence that a chemical weapons attack occurred appears strong from what has been presented to the public via media accounts and the statements of Western governments, the process of gathering evidence and analyzing even to establish this threshold fact is not complete. There is as yet no agreed upon process for determining who might be responsible for chemical weapons attacks if one or more did occur—and forces opposed to the government had an incentive to disburse chemical agents, knowing that it might provide factions in Western governments an opportunity to push for military action to topple the Assad regime. Even U.S. intelligence agencies admit that evidence that Syria's leadership ordered a chemical weapons attack is not conclusive.<sup>16</sup> The declassified intelligence summary released August 29 by the United States<sup>17</sup> adds little. It describes rather than discloses evidence, and the evidence described all points in the direction of its conclusions; the complete absence of any contradictory or ambiguous evidence worthy of discussion is remarkable given the complexity of the circumstances. On the whole, the U.S. intelligence brief fails to meet even minimal standards of transparency and believable objectivity. Finally, if the Syrian government can be proven to have used chemical weapons on its own population, there is little reason to believe that military action by a U.S.-led coalition would either prevent further attacks or reduce, rather than increase, the risk of civilian deaths and damage to civilian societies, not only in Syria but throughout the region.

Responsibility to protect is an emerging international legal doctrine that remains both incomplete and controversial. Here, the alleged chemical weapons use took place in the context of a high-intensity civil war, fought in a densely populated, urbanized society. Shifting battle lines, defection of combatants from one side to another, and the presence of irregular forces on both sides make the task of determining who is responsible for particular atrocities—including possible chemical weapons use—very difficult. Even more difficult would be the lawful punishment or deterrence of culpable parties via missile and air strikes, apparently the intention of the U.S.-led coalition now moving towards such an attack.

As the “responsibility to protect” doctrine has developed, it has become apparent that even where it arguably is applicable, the law of state-on-state warfare cannot be applied in an unqualified manner. Most problematic in this context is the association of the population of a state with its government and military. In wars among states, targeting civilians is prohibited, and all reasonable measures must be taken to minimize civilian casualties when attacking lawful military objectives. But the killing of some civilians and the destruction of civilian objects and

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<sup>16</sup> Kimberly Dozier and Matt Apuzzo, “AP sources: Intelligence on weapons no ‘slam dunk’,” Associated Press, August 29, 2013, <http://www.sfgate.com/default/article/AP-sources-Intelligence-on-weapons-no-slam-dunk-4770117.php#page-1>, accessed August 29, 2013.

<sup>17</sup> The White House, Office of the Press Secretary, “Government Assessment of the Syrian Government’s Use of Chemical Weapons on August 21, 2013,” August 30, 2013, <http://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21>, accessed August 30, 2013.

infrastructure implicitly is permitted, so long as means are used that discriminate between military and civilian targets, and civilian death and destruction is proportional to the “concrete and direct” military advantage to be gained by the attack.<sup>18</sup> In the “responsibility to protect” context, however, large portions of the civilian population may be in need of protection from their government and military. In the current Syrian context, the identification of a civilian population with its government and military should not apply.

Instead, any military action undertaken pursuant to “responsibility to protect” should be held to a higher standard, akin to legal doctrines of necessity in domestic law, where the harm prevented by the action outweighs the harm caused. Such a standard, one aspect of what has been termed “responsibility while protecting,” has in fact been proposed; here as formulated in a concept paper by the government of Brazil:

“The use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorized to prevent;”<sup>19</sup>

This kind of higher standard seems particularly applicable here. Air and missile attacks inevitably cause civilian damage and casualties. At the same time, the kind of missile and aerial bombardment contemplated by the U.S. and its allies would have little certainty of preventing or deterring the Syrian government from further chemical weapons attacks (assuming *arguendo* that they are proved to have done so). Direct attacks on chemical weapons stockpiles or facilities may result in release of chemical agents and mass civilian casualties, and hence are likely to be ruled out. Attacks of sufficient scope to destroy enough of the potential delivery platforms for chemical weapons to deter a government desperate enough to use chemical weapons on its own people are likely to cause large civilian casualties. Smaller attacks—akin to reprisals—are at best of uncertain effectiveness, and will result in harm to civilian populations with little likely deterrent effect.

Further, any military action against Syria by the United States and its allies risks a significant increase in the level of violence throughout the region. U.S. bases and the countries that host them, or that are perceived as participating in or supporting the U.S. action, could be subject to retaliation by Syria or attack by irregular forces for a variety of reasons. Sectarian strife, which encompasses much of the region in one form or another, could be intensified by U.S. action and responses, with the states in the region that support irregular forces pursuing their own disparate agendas and intensifying the level of conflict through the provisions of arms and other material

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<sup>18</sup> Geneva Conventions, Additional Protocol I, Article 51 sec. 5 (1977):

“5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

<sup>19</sup> Annex to the letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, “Responsibility while protecting: elements for the development and promotion of a concept,” November 11, 2011, A/66/551-S/2011/701, p.3, para.11(e).

support. Even the threat of U.S. military action by the U.S. and its allies raises tensions, while at the same time narrowing options for the investigation of the alleged chemical attacks, and for responding to them with the least possible increase in violence. The United Nations Charter requires that all members “settle their international disputes by peaceful means” and “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations.”<sup>20</sup> The immediate and conspicuous deployment of naval forces by the United States, the United Kingdom and France, together with a rush to judgment that from the beginning essentially treated fact-finding and decision-making processes by the United Nations and the Organization for the Prohibition of Chemical Weapons as irrelevant, directly contravened these obligations.

### **The military actions apparently contemplated by the United States are more likely to undermine than reinforce the rule of law.**

Missile attacks designed, in the words of President Obama, to be a “shot across the bow, saying ‘stop doing this,’ that can have a positive impact on our national security over the long term,”<sup>21</sup> have far less to do with protecting civilians than with the political fortunes of “leaders” who want to appear “strong,” or of national security establishments of powerful states who wish to retain threats as a “credible” part of their diplomatic portfolio. They not only fail to meet any test for an appropriate action under a “responsibility to protect,” but also the general requirement of proportionality, that military action like self-defense or reprisal be reasonably related to accomplishment of a legitimate objective, as well as standards for lawful warfare requiring that attacks that result in civilian death and destruction not be “excessive in relation to the concrete and direct military advantage anticipated.” The bombardment of Syria to “send a strong message” in order to “have a positive impact on [U.S.] national security over the long term” would have little relationship to causing Syria to desist from further use of chemical weapons, or to achievement of “concrete and direct military advantage.”

The allegations of chemical weapons use by the Syrian government do not provide the legal basis for military action by any party. The kinds of military action likely to be forthcoming from the states that have the intent and capacity to act are, on the basis of recent history and currently expressed intentions, at least as likely to increase rather than reduce the levels of death and destruction in Syria and in the wider region, and hence cannot be justified as protecting civilian populations. Ad hoc military actions by coalitions of states with geopolitical interests in the region justified as enforcement of international prohibitions against chemical weapons are more likely in the long run to undermine international enforcement of international humanitarian law and arms control agreements than to reinforce them. This is particularly likely if states act on the basis of evidence gathered and interpreted unilaterally, based on secret means of intelligence gathering, with interpretations and decisions made by institutions that are neither transparent nor democratic.

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<sup>20</sup> UN Charter, Article 2, sections 3 and 4.

<sup>21</sup> Mark Mazzetti and Mark Landler, “U.S. Facing Test on Data to Back Action on Syria,” *The New York Times*, August 28, 2013, <http://www.nytimes.com/2013/08/29/world/middleeast/us-facing-test-on-data-to-back-action-on-syria.html?pagewanted=all&pagewanted=print>, accessed August 29, 2013.

The post-World War II international legal order—one which still could encompass war in some circumstances as “lawful” in a crowded world bristling with high-tech weapons--was dangerous enough. An “order” in which the elites of the most powerful states feel free to send “messages” written in the blood of the powerless is an order in which a permanent state of war has been normalized. The main message of punitive action against Syria, conducted in the absence of any credible international legal process consistent with the UN Charter, will be that the United States is prepared to discard the post WW-II international legal framework in favor of the pure rule of force.

**There are viable, non-military alternatives. Investigation of any chemical weapons use in Syria should proceed through established international bodies. All concerned states, and especially those who provide support for the warring parties in Syria, should use every available peaceful means to bring about a cease fire and negotiated settlement**

In his August 31 Statement on Syria, President Obama declared, “I’m comfortable going forward without the approval of a United Nations Security Council that, so far, has been completely paralyzed and unwilling to hold Assad accountable.” Warning about of the “costs of doing nothing,” he asked:

“What’s the purpose of the international system that we’ve built if a prohibition on the use of chemical weapons that has been agreed to by the governments of 98 percent of the world’s people and approved overwhelmingly by the Congress of the United States is not enforced?”<sup>22</sup>

Indeed, why is the U.S. President dismissing out of hand, the very international system he invoked, along with any notion of non-military alternatives to “doing nothing?” If the intention of the powers pushing for punitive action against the perpetrators of alleged chemical attacks in Syria is to reinforce norms against the use of these terrible prohibited weapons, any conclusion reached and action taken will carry far more weight if it follows transparent, lawful, and credible consideration in representative international forums. Both the investigation of these allegations and the formulation of appropriate responses should proceed along two main tracks. All states should allow the inspection process initiated under UN auspices to go forward. Its ambit should be expanded by the Security Council to include determination, if possible, of the party or parties responsible for any use of prohibited weapons. This investigation could produce evidence regarding the responsibility of states, organizations, and individuals. The matter should be referred simultaneously to the International Criminal Court, with information produced in the investigation conducted under UN auspices also made available for the prosecution and trial of culpable individuals.

While Syria is not a party to the International Criminal Court, by the terms of the Rome Statute the Security Council can refer a situation involving a non-party state to the Court. The Prosecutor would be obligated to examine the possible culpability of all actors, regime or not. Among others, general rules of the Statute criminalizing direct or disproportionate attacks on civilians

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<sup>22</sup> Statement by the President of the United States on Syria, *Supra*.

would seem to apply to the alleged use of chemical weapons. Further, there is a basis for the Court to adjudicate culpability under a specific crime of using chemical weapons.

The Chemical Weapons Convention prohibition on use of chemical weapons applies in all circumstances, including non-international armed conflicts. It is widely accepted, as evidenced by the position taken by International Committee of the Red Cross, the guardian of international humanitarian law, that the prohibition in all circumstances applies as a matter of customary law even to states, like Syria, that are not party to the CWC. The Rome Statute makes the use of chemical weapons as such a crime in international armed conflicts,<sup>23</sup> and an amendment, so far ratified by only a small number of states, extends that rule to non-international armed conflicts. The Court could consider whether the criminalization (not just the prohibition) of use of chemical weapons in non-international armed conflicts is now customary law the Court can apply. The answer probably would be yes, and actors in Syria could be held criminally liable on the basis of that specific crime as well as general crimes protecting civilians against direct and disproportionate attacks.

If the intention is to take more immediate action to alleviate the suffering of the Syrian people, the power players on all sides of this terrible drama have means available less dangerous and destabilizing than another round of high tech destruction. The conflict in Syria is fueled by financial, military, and logistical support of the Syrian government and its adversaries that comes directly or indirectly from a number of states. Hans Blix, who headed the weapons of mass destruction inspection teams in Iraq and has direct experience with the interplay of arms control and great power agendas, notes that

“...the government in Syria, as well as all rebel groups, depends upon a flow of weapons, munitions and money from the outside. Much is reported to come to the rebels from Saudi Arabia, Qatar and Turkey; and much is reported to come to the government from Russia and Iran. The supplier countries have leverage. Agreement should be sought, under the auspices of the security council, that all parties that have given such support demand that their clients accept a ceasefire – or risk losing further support.”<sup>24</sup>

The United States is the largest arms supplier for the entire region, and could exercise similar influence over its regional allies. Rather than using this crisis as another opportunity to ratchet up the bloodletting, all states should recognize it as an indication that the complex of overlapping, intractable conflicts are spiraling out of control, and that the constant flow of arms into the region in itself plays a significant role in creating an accelerating humanitarian catastrophe. The discovery that chemical weapons have been used, if proven, should only be more cause for collective alarm. The only courses of action that might serve the interests of ordinary people in the region are those that might reduce rather than increase the intensity of these conflicts and the dangers they pose. It should be noted in this regard that the United States has for decades failed

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<sup>23</sup> Art. 2(b)(xviii). The language used, “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,” is that of the 1925 Geneva Gas Protocol. This is considered, in general, to cover chemical weapons as defined in the Chemical Weapons Convention; and the CWC itself makes clear that it is building on, and preserving, the 1925 instrument. Syria is a party to the Geneva Gas Protocol.

<sup>24</sup> Hans Blix, “Even if Assad used chemical weapons, the west has no mandate to act as a global policeman,” *The Guardian*, August 28, 2013, <http://www.theguardian.com/commentisfree/2013/aug/28/chemical-weapons-west-global-policeman>, accessed August 29, 2013.

to facilitate in any meaningful fashion negotiations on a Weapons of Mass Destruction Free Zone in the Middle East, despite joining in multilateral commitments to advance such negotiations repeatedly, most recently in the final document of the 2010 Nuclear Non-Proliferation Treaty Review Conference.

## **Conclusion**

The airwaves are full of pundits and politicians saying that both the chemicals weapons use and the broader crisis in Syria present no good choices. But it is hard to see how breaking solemn undertakings to most of the countries in the world by neglecting treaties and principles of international law that the United States has agreed to will either bolster U.S. “credibility” or enhance respect for international law. President Obama says he is ready to make the “hard choices.” But giving in to the powerful, omnipresent American war caucus once more by sending cruise missiles against a country that cannot respond in kind is neither a hard choice for an American president nor a good one. It is a course of action that will take many lives with little promise of saving others, and that will once again lead us all down a dangerous road with no visible end. For American elected officials, saying no to the easy, violent options offered by a national security and military industrial complex too long ascendant would be the hard choice, the courageous choice, and the right choice.

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