

CEPS COMMENTARY



Thinking ahead for Europe

Syria and the red lines of international law

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A year ago many predicted, this author included, that by now Bashar al-Assad would have been removed from his presidential palace in Damascus. But he is still there, although apparently desperate enough to use chemical weapons to keep himself 'in power'.

Since the start of the conflict in March 2011, there are now more than 100,000 dead, 4.25 million internally displaced persons and 2 million refugees. The spill-over of the conflict puts enormous strain on Syria's neighbours, some of which have provided military support to opposing sides in this conflict.

The specific offence that has pushed the Obama administration across its self-imposed red line is not the humanitarian disaster, or even the mass atrocities, of the Syrian civil war so far. It is the apparent use, on August 21st, of chemical weapons, which allegedly killed more than 1,400 people in the suburbs of Damascus.

As the US and its allies France and Turkey dither over whether or not to punish Assad for having used sarin gas on his own people, the crucial question is: What response might the world legally take without the authority of the UN Security Council, which remains blocked by the opposition of two veto-wielding members, Russia and China? Sadly, international law provides no clear-cut answers to this dilemma. The basic arguments that would justify armed intervention under international law are sharply contested by states, lawyers and diplomats. Yet, to respond to what US Secretary of State John Kerry has rightly called a "moral obscenity", formal interpretations of international law should give way to a more pragmatic approach.

***Jus in bello*: Crime and (the limits to) punishment**

The use of chemical weapons amounts to a breach of the *jus in bello* – international humanitarian law. Ever since 19th century Russia developed a kind of musket-ball that would detonate on impact after being fired, the development of this strand of international law has been rapid. Predicting the disastrous effect on diplomatic relations with its neighbours and the start of a grisly arms race, Russia decided to negotiate an international ban on the creation, development, and use of weapons that would cause 'unnecessary suffering'. The 1868 Saint Petersburg Declaration prompted the adoption of further declarations and regulations at the two Hague Peace Conferences of 1899 and 1907. The prohibition was codified in the four 1949 Geneva Conventions and the first of the 1977

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Additional Protocols, to which Syria and 172 other UN states are party (but not the US, Israel, Turkey or Iran).

Over time, further technical limits have been fixed at which the necessities of war ought to yield to the requirements of humanity, so as to prevent injury and unnecessary suffering. Following the use of mustard gas, Yperite, in World War I, the 1925 Poison Gas Protocol was adopted. In 1993, the Chemical Weapons Convention (CWC) widened the scope of the prohibition of toxic chemicals and outlawed the production, stockpiling and use of chemical weapons. No fewer than 191 states of the United Nations have signed up to the CWC. The global *opinio juris* and consistent state practice of the ban on the use of chemical weapons have raised the status of the prohibition to that of *jus cogens*, i.e. non-derogable pre-emptory norms of international law, which bind even the five UN states that have not signed the CWC: Angola, Egypt, North Korea, South Sudan and Syria. If the government of Syria has used chemical weapons that injured or killed a large number of civilians, there can be no doubt that the regime has breached international humanitarian law.

So there are good reasons to punish Assad, but the legal way to do this would be to treat him as a war criminal and indict him at the International Criminal Court (ICC). The ICC was founded in 2002 by the Rome Statute to "bring to justice the perpetrators of the worst crimes known to humankind – war crimes, crimes against humanity, and genocide", especially when national courts are unable or unwilling to do so. Currently, 122 states are party to the Rome Statute. It has been signed but not been ratified by Syria, the US, Russia and 29 other UN members. The fact that the US has in the meantime informed the UN Secretary General that it no longer intends to become state party and, as such, has no legal obligations arising from its former representative's signature of the Statute, poses a serious objection to American claims of justification to punish Syria via other avenues than the ICC.

According to the Rome Statute, the ICC has four mechanisms that grant it jurisdiction: i) if the accused is a national of a state party to the Rome Statute, ii) if the alleged crime took place on the territory of a state party, iii) if a situation is referred to the Court by the UN Security Council and iv) if a state not party to the Statute 'accepts' the Court's jurisdiction. On the basis of the facts of the case at hand, the way to the ICC is thus excluded.

The only other mechanism that could land Assad and his cronies in the dock is if countries were to claim criminal jurisdiction over an accused person, regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence or any other relation with the prosecuting entity. Only a handful of countries (Australia, Belgium, Canada, France, Germany, Ireland, Israel, Malaysia, Spain and the UK) have prosecuted crimes under laws on universal jurisdiction, which are considered crimes against all (*erga omnes*), i.e. too serious to allow them to go unpunished. However, confronted with a sharp increase in cases (e.g. in 2003 against Israeli Prime Minister Ariel Sharon for his involvement in the 1982 Sabra-Shatila massacre in Lebanon, and against George W. Bush, Donald Rumsfeld and Dick Cheney for the 2003 invasion of Iraq), some of these countries (e.g. Belgium and the UK) have recently repealed this legislation and refocused it on the extra-territorial jurisdiction over crimes committed by their own nationals abroad. If, however, a prosecutor in France, Germany or Spain would press charges against Assad for having committed war crimes, international rules on the immunity of heads of state would in any case normally still shield the Syrian president from universal jurisdiction.

The unsatisfactory state of international criminal law has triggered the question whether a 'pinprick' assault on Assad's military installations could serve as a legal remedy to enforce the *jus cogens* on chemical warfare and prevent Assad from further overstepping the red lines of international humanitarian law, which he has reportedly done several times before the sarin attack on Damascus' eastern suburbs, albeit on a smaller scale.

Jus ad bellum: Humanitarian intervention?

According to Article 24 of the UN Charter, the Security Council has the “primary responsibility for the maintenance of international peace and security”. In formal terms, it is the world’s only institution with the authority to decide whether armed force may be used to maintain or restore international peace and security. Otherwise, there is a near-absolute prohibition on the use of force, except in limited circumstances of self-defence. The US has cited the possible “collective” defence of neighbouring states, including Jordan, Turkey and Israel, but those countries have not signalled a request for assistance in their own self-defence, so arguably the legal exception could not be invoked. Bypassing the Security Council and launching targeted strikes (however limited) to punish an illegal act is therefore not an easy policy to defend.

One approach, which – in all but name – has been used by the US and its allies, is to claim that the use of chemical weapons aggravates the humanitarian crisis in Syria, and that therefore intervention in the internal affairs of a state is justified in order to protect civilian populations against mass atrocities that are plainly prohibited by international law.

However, it is far from settled that this doctrine, known as the “Responsibility to Protect” (R2P) has been accepted as binding international law. Certain states like Russia and China were deliberately cautious about developing the concept since they were worried by the new humanitarianism that NATO displayed in the 1999 Kosovo intervention. Their reservations are reflected in UN General Assembly Resolution 60/1 of 2005. This Resolution places the concept of R2P firmly in the hands of the Security Council. The formal legal argument on this basis speaks against unilateral action by (coalitions of) states. Moreover, the view of Russia and China that NATO abused a limited mandate by the Security Council for humanitarian intervention in Libya to bring about regime change has certainly reduced their willingness to grant any formal authority through Security Council authorisation.

In today’s increasingly multi-polar world, the political legitimacy that on this occasion made the argument plausible as an alternative to a formal legal one is not really evident. Should the United States and/or its allies act alone, they cannot depend on the same general sense of political legitimacy for actions anywhere in the world that NATO benefited from in Kosovo. Moreover, they would risk creating an invitation for Russia and China, for example, to freely do the same in other conflicts.

In geopolitical terms, the Obama administration is faced with an onerous dilemma in Syria. Either it intervenes and reinforces the US position as the world’s only superpower in real terms, thereby violating formal international law so as to shape the international order according to values that it preaches but not always practices, which would mean an order premised on the validation of human security over state-centred security. Or it decides to abide by formal UN law, which it helped to formulate at the end of the Second World War, but thereby risks ceding its place to other countries in deciding on how to deal with other hotspots around the world.

Illegal but legitimate

The international community finds itself at a crossroads. Who would have thought that, after the gradual evolution of a pre-emptory norm of international law over almost a century, the world would countenance the use of chemical weapons in Syria – a war crime that has shocked the entire world – with merely token or perhaps no consequences? And that this would largely be because of legal arguments that those who might respond to preserve a

pre-emptory humanitarian norm could not lawfully do so under the formal, but partially outdated, law of the UN Charter?

Surely, a more pragmatic and dynamic reading of the *jus ad bellum* is required to allow for a necessary and proportional armed response, driven by a robust defence of international humanitarian law and designed for the express purpose of protecting civilians from predation at the hands of their government, while avoiding making things worse. It is up to the US and its allies in Europe, especially those EU member states that have introduced universal criminal jurisdiction into their law books, to push the obligation *erga omnes*: all states are under the legal obligation to save the populations of Damascus, Aleppo, Homs and other Syrian cities, towns and villages from the criminal regime of Bashar al-Assad inflicting further injury and unnecessary suffering upon them. His is a regime that has lost every shred of legitimacy and the right to be recognised as the lawful government of the Syrian people. After all, the interpretation of the formal requirement of “effective control of the state” to establish whether a government is legal under international law cannot be stretched to legitimise war crimes and crimes against humanity. Using armed force in collective self-defence of the Syrian people against a criminal gang of thugs who are violating non-derogable norms of international humanitarian law is not the same as breaking a pre-emptory norm of *jus ad bellum* by using force against UN member state ‘Syria’.

Under the given circumstances, a coalition of able and willing states should therefore be allowed to intervene militarily in Syria, even if this is contrary to formal UN law. The responsibility to protect is an international responsibility and not the exclusive burden of the United States. Indeed, the EU and all of its member states should support the limited US-led operation to hold the regime of Bashar al-Assad accountable for the gross breach of international humanitarian law, to ‘deter’ its calculus in using chemical weapons again, and to ‘degrade’ his capacity to do so again.