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Chemical Weapons and Other Atrocities: Contrasting Responses to the Syrian Crisis

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CONTENTS

I. The Syrian Crisis.....	513
II. Use of Chemical Weapons and Multilateral Responses	516
III. Other Serious Violations of International Law and Multilateral Responses	526
IV. Explaining Disparate Multilateral Responses.....	531
A. Chemical Weapons Evoke a Particularly Visceral Reaction.....	531
B. Coalescing Interests Make for Substantive Action	533
V. Implications for International Law.....	534
A. Strengthening the Legal Prohibition on the Use of Chemical Weapons.....	534
B. Global Criminal Justice Still Has a Long Way to Go	536
C. Responsibility to Protect Takes a Hit	537
D. Disparate Responses are not so Disparate.....	542

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I. THE SYRIAN CRISIS

The Syrian crisis is a humanitarian catastrophe with devastating reverberant effects. The International Committee of the Red Cross (ICRC) characterizes the conflict “now in its sixth year . . . [a]s the largest and most complex humanitarian crisis in the world, with no end in sight.”¹ Statistics on the direct effects of the conflict are shocking. Estimates of the number of deaths since March 2011 vary, but as recently as April 2016 in the context of attacks on the northern Syrian city of Aleppo, the United Nations and Arab League Envoy for Syria, Staffan de Mistura, claimed that the toll had climbed to 400,000.² While de Mistura conceded that his figure was a personal one and did not represent an official UN estimate, his claim is corroborated by the Syrian Center for Policy Research (SCPR), which in 2015 estimated a death toll of 470,000.³ The UN officially stopped counting deaths in Syria in 2014, presumably because of a lack of access to areas involving intense hostilities, so the previous UN estimate of 250,000 deaths no longer reflects reality. According to the SCPR’s analysis, 400,000 deaths have resulted from hostilities and an additional 70,000 have resulted indirectly from the collapse of Syria’s health system and consequent lack of medical treatment, poor sanitation, the spreading of communicable diseases, scarcity of food and consequent malnutrition.⁴ The SCPR also estimates that almost two million additional Syrians have been wounded in the conflict⁵ and, given the relative lack of effective medical care and the ongoing intensive military hostilities in the country, such figures suggest that the ultimate death toll will continue to rise.

1. *Syria Crisis*, ICRC, <https://www.icrc.org/en/where-we-work/middle-east/syria> (last visited Sept. 13, 2016).

2. See *Syria Death Toll: UN Envoy Estimates 400,000 Killed*, AL JAZEERA (Apr. 24, 2016), <http://www.aljazeera.com/news/2016/04/staffan-de-mistura-400000-killed-syria-civil-war-160423055735629.html>.

3. SYRIAN CENTER FOR POLICY RESEARCH, CONFRONTING FRAGMENTATION! 61 (2015), <http://scpr-syria.org/publications/confronting-fragmentation/> (follow SCPR-report-Confronting-fragmentation-2015-EN.pdf hyperlink) [hereinafter SCPR REPORT]. For an analysis of the report’s findings, see Priyanka Boghani, *A Staggering New Death Toll for Syria’s War: 470,000*, FRONTLINE (Feb. 11, 2016), <http://www.pbs.org/wgbh/frontline/article/a-staggering-new-death-toll-for-syrias-war-470000/>.

4. SCPR REPORT, *supra* note 3, at 51–52; Boghani, *supra* note 3.

5. SCPR REPORT, *supra* note 3, at 51.

The numbers of dead and wounded reflect a devastating aspect of the conflict, but other statistics reveal compounded human misery. The ICRC estimates that eight million Syrians have become internally displaced within their own war-torn country⁶ and the United Nations High Commissioner for Refugees reports that an additional 4.8 million Syrians are now registered as refugees, the overwhelming bulk of them in neighboring Turkey, Lebanon, Jordan and Iraq.⁷ The combined total of Syrians forced to leave their homes and livelihoods is now close to, or in excess of, half the entire population of the country. These statistics reflect a mind-numbing scale of devastation, yet they remain merely symptomatic of the comprehensive disintegration of Syria as an independent nation-State.

The conflict has destroyed Syria's economy, ruined production, forced dramatic increases in prices of basic necessities and dragged large numbers of the population into extreme poverty. The SCPR estimates that 70 percent of the population no longer have the means to provide the essentials for survival and so are dependent upon humanitarian aid and assistance merely to survive.⁸ That harsh reality has produced insatiable dependency and imposed a massive economic burden on major donor nations. Effective central governance is no longer exercised in many regions and various parties to the conflicts, all vying for increased control over territory, are the only entities capable of exercising authority and control. Government services are in abeyance, formal education is haphazard or non-existent and the health services that have persisted are understaffed, inadequately resourced and often deliberately targeted in attacks.

Quite apart from the overwhelming humanitarian need within Syria and the challenges of gaining access for the delivery of relief convoys, the humanitarian, social and economic impacts outside the country have also been overwhelming. The flood of refugees from Syria has inundated neighboring countries, stretching their limited resources. Tens of thousands of Syrian refugees have attempted to flee beyond nearby States to Europe, exacerbating the regional political and economic crisis involving already large numbers of asylum seekers from North African conflicts.

The Syrian crisis was initiated during the so-called "Arab Spring," a term coined to describe popular protests in a succession of Middle Eastern

6. *Syria Crisis*, *supra* note 1.

7. See *Syrian Regional Refugee Response: Inter-Agency Information Sharing Portal*, UNHCR, <http://data.unhcr.org/syrianrefugees/regional.php> (updated as of Sept. 4, 2016).

8. SCPR REPORT, *supra* note 3, at 46, Boghani, *supra* note 3.

States against dictatorial rule.⁹ Even in those States in which past repressive dictatorships have been removed, however, there has been little, if any, evidence of a triumph of liberalism and new-found personal and collective freedoms. Instead, regime removals seem to have either unleashed pre-existing animosities along tribal, local or religious lines, and/or created power vacuums which different interest groups have been quick to exploit.

In Syria, however, where the regime of Bashar al-Assad has tenaciously clung to power, the carnage has been prodigious. When the popular revolt in Syria commenced in March 2011, al-Assad responded as the al-Assads and their Alawite minority have routinely done.¹⁰ Bashar al-Assad learned from his father and adopted a similar approach to that used in Hama in 1982 in attempting to crush the emergent insurrection in 2011. The difference this time around compared to uprisings in the past was that the rebellion was popular and widespread—not limited to a single city—and the regime was unable to crush it at its inception. The conflict in Syria has escalated in intensity and morphed in complexity ever since.

The devastation wrought upon the country has been, and continues to be, characterized by egregious violations of international law. At the time this article was finalized, for example, the international media was reporting that rebel-held eastern Aleppo's sole remaining medical facility had been targeted and destroyed¹¹—just like all other medical facilities before it throughout the brutal siege of that northern Syrian city. In the maelstrom of egregious violations of the law by many of the parties to the conflicts, international law's constraining influence appears weak at best. Prodigious effort has been expended to exhort restraint, to demand compliance with

9. The Western media has been credited with coining the term “Arab Spring,” but the term has also been criticized as overly simplistic. For an explanation of the terminology and criticisms of it, see *Definition of the Arab Spring*, ABOUT, <http://middleeast.about.com/od/humanrightsdemocracy/a/Definition-Of-The-Arab-Spring.htm>.

10. For example, in 1982 Hafez al-Assad turned the Syrian military on his own people in Hama following the emergence of a dissident armed force there. The retribution was withering and resulted in an estimated 20,000 dead—a crushing lesson to any others who might dare to attempt insurrection against the regime. For discussion of the Hama attacks see, e.g., Jason Rodrigues, *1982: Syria's President Hafez al-Assad Crushes Rebellion in Hama*, THE GUARDIAN (Aug. 1, 2011), <http://www.theguardian.com/theguardian/from-the-archhive-blog/2011/aug/01/hama-syria-massacre-1982-archive>; Deborah Amos, *Thirty Years Later, Photos Emerge from Killings in Syria*, NPR NEWS (Feb. 2, 2012), <http://www.npr.org/2012/02/01/146235292/30-years-later-photos-emerge-from-killings-in-syria>.

11. *Battle for Aleppo: “All Hospitals are Destroyed,”* AL JAZEERA (Nov. 20, 2016), <http://www.aljazeera.com/news/2016/11/battle-aleppo-hospitals-destroyed-161119143126110.html>.

international legal obligations and to insist on accountability for those responsible for flagrant violations. Prodigious effort also has been expended on the negotiation of ceasefire agreements, on the declaration of safe corridors for flight of besieged civilians, on securing guarantees for humanitarian access and on provision of emergency assistance. But after six long years of the crisis, there is no apparent abatement in the infliction of brutality and the international community's impotence to stop it.

The one violation of international law that has triggered a more substantive response has been the alleged use of chemical weapons in the Syrian conflicts. The UN Security Council has not only condemned the use of chemical weapons but established investigative mechanisms jointly with the Organisation for the Prohibition of Chemical Weapons (OPCW) in The Hague to send investigators to Syria. The Security Council has met repeatedly to condemn the use of chemical weapons and to demand that those responsible be held accountable. I am intrigued by the disparity of response to alleged chemical weapon use on one hand and to virtually all other egregious atrocities on the other. My intention here is to expose the disparities of approach and attempt not only to explain reasons for disparate responses, but also to identify some key emergent implications for international law.

Ultimately, it is clear that the apparent disparities of approach are less stark than they initially appear and that for all the effort to identify those parties responsible for the violation of the prohibition on the use of chemical weapons, the international community is no closer to individual accountability for those crimes as for any other war crimes perpetrated throughout the Syrian crisis.

II. USE OF CHEMICAL WEAPONS AND MULTILATERAL RESPONSES

When the situation in Syria began spiraling out of control in the transition from widespread protests against the regime of Bashar al-Assad to all-out civil war, concerns were raised about Syria's stockpile of chemical weapons and of the possibilities either of the weapons being used by the al-Assad regime or of those weapons falling into the hands of terrorist groups.¹² The Syrian government had never explicitly confirmed its possession of chemical weapons, but "in July 2012, implicitly admitted what had long been sus-

12. *Syria Chemical Weapons Allegations*, BBC (Oct. 31, 2013), <http://www.bbc.com/news/world-middle-east-22557347>.

pected by experts in the field of chemical weapons proliferation—that Syria had stocks of chemical weapons.”¹³ Several weeks later on August 20, President Obama made his famous “red line” statement about Syria’s chemical weapons. At a White House press conference, he was asked about the safekeeping of the stockpile of Syrian chemical weapons and stated that:

We cannot have a situation where chemical or biological weapons are falling into the hands of the wrong people. We have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation.¹⁴

Tragically it did not take long for these early concerns to materialize with the first allegations of the use of chemical weapons in the Syrian conflict. The Syrian government and rebel forces each accused the other of responsibility for separate chemical weapons attacks on March 19, 2013 in the Khan al-Assal neighborhood in Aleppo and in Al-Otaybeh in Damascus.¹⁵ Other allegations of chemical weapons use followed shortly thereafter in relation to attacks in Adra on March 24, Sheikh Maqsoud on April 13 and Saraqeb on April 29.¹⁶ On March 20, the day after the Khan al-Assal and Al-Otaybeh attacks, the Syrian government requested the UN Secretary-General (UNSG) to launch an official investigation under the auspices of the “Secretary-General’s Mechanism”—an authority to investigate alleged uses of chemical or biological weapons conferred by UN General Assembly Resolution 42/37C in 1987 and reaffirmed in 1988 by UN Security Council Resolution 620.¹⁷

Following finalization of arrangements between the UN and the Syrian government on August 14, 2013, the UNSG’s Mission to Investigate Alle-

13. *Id.*

14. Press Release, Office of the Press Secretary, Remarks by the President to the White House Press Corps (Aug. 20, 2012), <https://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>.

15. *Syria Chemical Weapons Allegations*, *supra* note 12.

16. *Id.*

17. G.A. Res. 42/37C (Nov. 30, 1987); S.C. Res. 620 (Aug. 26, 1988). *See also* UN Office for Disarmament Affairs, *Frequently Asked Questions About the United Nations Mission to Investigate the Allegations of the Use of Chemical Weapons in the Syrian Arab Republic* (Sept. 20, 2013), http://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/09/FAQ_Syria_CW_updated_20092013.pdf [hereinafter *Frequently Asked Questions*].

gations of the Use of Chemical Weapons in the Syrian Arab Republic was established and the investigative team arrived in Damascus just a few days later on August 18.¹⁸ While the investigators were still *in situ* preparing to commence investigations into the earlier incidents, allegations of a large-scale chemical weapons attack on the Damascus suburb of Ghouta emerged.¹⁹ The Ghouta attack, involving many more victims than previous attacks, captured the international community's attention. Photos and video footage were posted online revealing graphic images of victims struggling to breathe, experiencing convulsions, receiving treatment in overcrowded and makeshift hospitals and of row after row of dead bodies, including many children.

The UNSG's investigative team turned their attention immediately and exclusively to Ghouta and in just three weeks produced a report on the attack which they transmitted to the UNSG on September 13.²⁰ The report concluded that surface-to-surface rockets containing the nerve agent sarin were used to attack "civilians, including children, on a relatively large scale."²¹ The report did not attribute responsibility for the attack, but the UNSG was scathing in condemning

in the strongest possible terms the use of chemical weapons and believes that this act is a war crime and grave violation of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare and other rules of customary international law. The international community has a moral responsibility to hold accountable those responsible and for ensuring that chemical weapons can never re-emerge as an instrument of warfare.²²

While the UN investigation was in progress, the United States and Russia were intimately involved in influencing President al-Assad to accede to the Chemical Weapons Convention (CWC)²³ and to surrender his stockpile

18. *Frequently Asked Questions*, *supra* note 17.

19. *Syria Chemical Weapons Allegations*, *supra* note 12.

20. See UN Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Report on Allegations of the Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, U.N. Doc. A/67/997-S/2013/553 (Sept. 16, 2013), http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/553 [hereinafter Use of Chemical Weapons Report].

21. *Id.* ¶¶ 27–28.

22. *Id.*, UN Secretary-General's transmittal note, ¶ 1.

23. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.

of chemical weapons for supervised destruction. Marie Jacobsson provides an excellent analysis of the critical steps which led Syria to lodge its instrument of accession.²⁴ Russia had demonstrated its determination to block any UN Security Council authorization of forceful measures against the regime of Bashar al-Assad and so the United States was threatening unilateral military action against the al-Assad regime. While the international community was waiting for release of the findings of the UN investigation, it became clear that the investigators had unearthed incontrovertible proof of chemical weapon use and, as Jacobsson explains, rumors circulated that the investigative report might name the al-Assad regime as the responsible party.²⁵ On September 9, U.S. Secretary of State John Kerry responded to questioning at a press conference in London by stating that al-Assad had one week to hand over his entire stockpile of chemical weapons to stave off a U.S. attack against him.²⁶ Moscow, presumably desirous of avoiding U.S. military action against the regime, successfully pressured al-Assad to forego his chemical weapons capability. On September 12, Syria announced its intention to accede to the CWC and actually deposited its instrument of accession with the UNSG's Treaty Secretariat just two days later.²⁷ On that same day, the United States and Russia announced their agreement on a Joint Framework for Elimination of Syrian Chemical Weapons for consideration by the Executive Council of the OPCW.²⁸

With the United States, Russia and the al-Assad regime in unusual unison, developments at the multilateral level moved apace. The Executive

24. Marie Jacobsson, *Syria and the Issue of Chemical Weapons: A Snapshot of a Legal Time-Frame: The United Nations Security Council Resolution (2118) and the OPCW Executive Council Decision*, in *INTERNATIONAL LAW AND CHANGING PERCEPTIONS OF SECURITY: LIBER AMICORUM SAID MAHMOUDI* 134 (Jonas Ebbesson, Marie Jacobsson, Mark Klamberg, David Langlet & Pål Wrange eds., 2014).

25. *Id.* at 134–35.

26. *Id.* at 135.

27. *See* Use of Chemical Weapons Report, *supra* note 20, UN Secretary-General's transmittal note, ¶ 3.

28. Media Note, U.S. Department of State, Framework for Elimination of Syrian Chemical Weapons (Sept. 14, 2013), <http://www.state.gov/r/pa/prs/ps/2013/09/214247.htm>. The text of the Framework Agreement was transmitted to the UNSG on September 19 and designated as an official UN document on September 24. *See* Permanent Representative of the Russian Federation to the UN and the Permanent Representative of the United States of America to the UN, Letter dated Sept. 19, 2013 addressed to the Secretary-General, Annex, U.N. Doc. A/68/398-S/2013/565 (Sept. 24, 2013), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2013_565.pdf.

Council of the OPCW met in The Hague on September 27 and adopted a formal Decision on the Destruction of Syrian Chemical Weapons (OPCW Decision).²⁹ This decision outlined the Executive Council's key requirements and timelines for Syrian compliance with its CWC obligations, including full disclosure and relevant declarations (within weeks) and destruction of chemical agents, material and equipment (within months).³⁰ The UN Security Council met later that same day and adopted Resolution 2118³¹—arguably the most strongly worded Council resolution on the Syrian conflict to that date. The Council determined, *inter alia*, that any use of chemical weapons constitutes a threat to international peace and security; condemned any use of chemical weapons in Syria, including the Ghouta attack on August 21; expressed its strong conviction that those responsible for the use of chemical weapons in Syria should be held accountable; endorsed the decision of the OPCW Executive Council on special procedures for the expeditious destruction of Syria's chemical weapons program; and demanded that Syria cooperate fully with all aspects of the OPCW Decision.

To implement Resolution 2118, the OPCW-UN Joint Mission for the Elimination of the Chemical Weapons Programme of the Syrian Arab Republic was formally established on October 16, 2013, although an OPCW-UN advance team had already arrived in country on October 1.³² The Joint Mission conducted its operations through the end of September 2014 and during that period of almost twelve months it

successfully verified the destruction of 13 mobile and stationary chemical weapons production, mixing and filling facilities; the destruction of unfilled chemical munitions and isopropanol declared by the Syrian Arab Republic; and the removal of chemical-warfare agents and precursors from the territory of Syria for their destruction outside that country.³³

29. OPCW Executive Council Decision, Destruction of Syrian Chemical Weapons, OPCW Doc. EC-M-33/DEC.1 (Sept. 27, 2013), https://www.opcw.org/fileadmin/OPCW/EC/M-33/ecm33dec01_e_.pdf.

30. *Id.* ¶ 1.

31. S.C. Res. 2118 (Sept. 27, 2013).

32. See *About OPCW-Joint Mission: Background*, OPCW-UN JOINT MISSION, <http://opcw.unmissions.org/AboutOPCWUNJointMission/Background.aspx> (last visited Sept. 13, 2016).

33. RALF TRAPP, LESSONS LEARNED FROM THE OPCW MISSION IN SYRIA: REPORT, ¶ 1 (Dec. 16, 2015), https://www.opcw.org/fileadmin/OPCW/PDF/Lessons_learned_from_the_OPCW_Mission_in_Syria.pdf.

In addition to the achievements of the Joint Mission, Ralf Trapp claimed in December 2015 that the destruction of the remaining chemical weapons production facilities in Syria was ongoing and would be “completed soon.”³⁴ On January 4, 2016, the OPCW announced the completion of the destruction of all chemical weapons declared by Syria.³⁵

The OPCW-UN Joint Mission concluded its work despite the ongoing Syrian conflict and with all the resultant security, logistical and political challenges that such a volatile environment presented. Trapp characterized the entire enterprise as a “test of the [OPCW] Secretariat’s ability to implement a complex and highly demanding task under extremely difficult circumstances”³⁶ and the UNSG, Ban Ki Moon, congratulated the Joint Mission coordinator and the OPCW and UN staff members on successfully completing their work “under extremely challenging and complex circumstances.”³⁷ However, despite the significance of all the Joint Mission achievements, allegations were raised early in 2014, well before the completion of its work, about ongoing use of chlorine gas in Syria.³⁸

On April 29, 2014, the OPCW Executive Council announced the establishment of a fact-finding mission (FFM) mandated to establish the facts surrounding allegations of the use of toxic chemicals, specifically chlorine, for hostile purposes in Syria.³⁹ The FFM presented quarterly reports, in

34. *Id.*

35. Press Release, OPCW, Destruction of Syrian Chemical Weapons Completed (Jan. 4, 2016), <https://www.opcw.org/news/article/destruction-of-syrian-chemical-weapons-completed/>.

36. *Id.*

37. UN Chief Commends Special Coordinator and Her Team on Successful Completion of OPCW-UN Joint Mission, OPCW-UN JOINT MISSION (Oct. 1, 2014), <http://opcw.unmissions.org/AboutOPCWUNJointMission/tabid/54/ctl/Details/mid/651/ItemID/343/Default.aspx>.

38. See *Ninety-Six Percent of Syria’s Declared Chemical Weapons Destroyed—UN-OPCW Chief*, OPCW-UN JOINT MISSION (Sept. 4, 2014), <http://opcw.unmissions.org/AboutOPCWUNJointMission/tabid/54/ctl/Details/mid/651/ItemID/341/Default.aspx> (comments by the U.S. Permanent Representative to the UN, Samantha Power, raising concerns about the alleged use of chlorine and that “the elimination effort is not complete”).

39. Press Release, OPCW, OPCW to Undertake Fact-Finding Mission in Syria on Alleged Chlorine Gas Attacks (Apr. 29, 2014), <https://www.opcw.org/news/article/opcw-to-undertake-fact-finding-mission-in-syria-on-alleged-chlorine-gas-attacks/>. For the text of the mandate, see Third Report of the OPCW Fact-Finding Mission in Syria, OPCW, OPCW Doc. S/1230/2014 (Dec. 18, 2014), <http://photos.state.gov/libraries/netherlands/>

June, September and December 2014 and concluded, at least in the second and third reports, with “a high degree of confidence that chlorine ha[d] been used as a weapon” in the Syrian villages of Talmenes, Al Tamanah, and Kafr Zita.⁴⁰ These findings constituted the first confirmed use of chemical weapons on the territory of a State party to the CWC and, although the FFM was not mandated to attribute responsibility to specific parties to the conflicts or to specific individuals, the conclusion that chemical weapons had been used was troubling. In addressing the OPCW Executive Council in response to the second report, the Director-General claimed that it

is a tragic irony that a hundred years after chlorine was first used on the battlefield, its misuse to kill and terrorize unarmed civilians has again raised its ugly head. The OPCW must show zero tolerance for any actions that threaten the norm against the use of any chemical as a weapon.⁴¹

Following the presentation of the third report in December 2014, the OPCW Executive Council met in February 2015 and adopted a decision condemning the use of chemical weapons as a violation of international law and confirming that those responsible should be held accountable.⁴² One month later, the UN Security Council adopted Resolution 2209⁴³ condemning the use of chemical weapons, endorsing the decision of the OPCW Executive Council to continue the work of the FFM, demanding that those responsible for the ongoing use of chemical weapons be held accountable and threatening measures pursuant to Chapter VII of the UN Charter in the event of future non-compliance with earlier Council resolutions.

Despite the adoption of Resolution 2209, allegations of ongoing use of chlorine persisted. On March 16, 2015, for example, only ten days after the adoption of Resolution 2209, chlorine was allegedly used in an attack on the Syrian town of Sarmin. U.S. Secretary of State Kerry was quick to con-

s/328666/pdfs/THIRDREPORTOFTHEOPCWFACTFINDINGMISSIONINSYRIA.pdf [hereinafter FFM Third Report].

40. See FFM Third Report, *supra* note 39, Note by the Technical Secretariat, ¶ 3.

41. Press Release, OPCW, Executive Council Discusses Findings of Fact-Finding Mission (Sept. 26, 2014), <https://www.opcw.org/news/article/executive-council-discusses-findings-of-fact-finding-mission/>.

42. OPCW Executive Council Decision, Reports of the OPCW Fact-Finding Mission in Syria, OPCW Doc. No. EC-M-48/DEC.1 (Feb. 4, 2015), https://www.opcw.org/file-admin/OPCW/EC/M-48/ecm48dec01_e_.pdf.

43. S.C. Res. 2209 (Mar. 6, 2015).

demn the attack, indicating that if the allegations were correct, this most recent violation of international law (the CWC and Resolution 2209) was completely unacceptable.⁴⁴ Secretary Kerry called for a quick and effective investigation to hold those responsible to account. Over the next two months the number of chlorine attacks allegedly escalated dramatically (although the numbers of victims of such attacks were typically small)⁴⁵ leading the Security Council to adopt even stronger measures. Resolution 2235 was adopted unanimously on August 7⁴⁶ following agreement between the United States and Russia on the draft text.⁴⁷ The Council reiterated its condemnation; expressed its determination to identify those responsible and reiterated its demand that they be held accountable; and established an OPCW-UN Joint Investigative Mechanism (JIM).

The JIM's mandate is stronger than that given to the OPCW FFM in that it includes the mandate not only to investigate allegations of chemical weapons use, but also "to identify to the greatest extent feasible, individuals, entities, groups or governments who were perpetrators, organisers, sponsors or otherwise involved in the use of chemicals as weapons, including chlorine or any other toxic chemical."⁴⁸ The UNSG declared the JIM fully operational on November 13⁴⁹ and its work has been ongoing since.

The head of JIM, Virginia Gamba, presented its initial report to the Security Council in a confidential session in February 2016. According to the official UN press release, the JIM reported on its detailed review of the OPCW FFM's findings and listed seven incidents identified by the FFM and prioritized by the JIM for investigation.⁵⁰ Since the presentation of an

44. Press Statement, U.S. Secretary of State John Kerry, Allegations of Chemical Weapons Use in Sarmin, Syria (Mar. 19, 2015), <http://www.state.gov/secretary/remarks/2015/03/239510.htm>.

45. See, e.g., Kareem Shaheen, *Assad Regime Accused of 35 Chlorine Attacks Since Mid-March*, THE GUARDIAN (May 24, 2015), <http://www.theguardian.com/world/2015/may/24/syria-regime-accused-of-using-chlorine-bombs-on-civilians>.

46. S.C. Res. 2235 (Aug. 7, 2015).

47. See Michael R. Gordon, *US and Russia to Back U.N. Vote on Chemical Attacks in Syria*, NEW YORK TIMES (Aug. 6, 2015), http://www.nytimes.com/2015/08/07/world/syria/syria-chemical-attacks-un-resolution.html?_r=0.

48. S.C. Res. 2235, *supra* note 46, ¶¶ 1, 4–5.

49. See Press Release, United Nations, United Nations Signs Status of Mission Agreement with Syria, U.N. Press Release DC/3596 (Dec. 11, 2015), <http://www.un.org/press/en/2015/dc3596.doc.htm>.

50. Press Release, United Nations, Joint Investigative Mechanism Presents its First Report to Security Council, U.N. Press Release DC/3608 (Feb. 22, 2016), <http://www.un.org/press/en/2016/dc3608.doc.htm>.

initial report to the Security Council, the JIM has now completed its investigation of nine specific incidents and has presented its second⁵¹ and third⁵² reports to the Council. In its third report the JIM explained its investigative methodology and outlined its findings in relation to the specific incidents. The JIM reached conclusions on the “(a) date and time; (b) weather conditions; (c) impact location; (d) munition (e.g., remnants); (e) delivery method (e.g., means and direction); (f) damage and effects (e.g., on buildings, the environment, flora and fauna); and (g) medical effects”⁵³—precisely the factors of alleged use of chemical weapons to be expected from a thorough investigation.

There is nothing novel or unprecedented in the findings on the technical aspects of alleged chemical weapons use. The real breakthrough here, as the third report itself explains, is in the determinations of responsibility for use given there are “no precedents for an investigation into the identification of perpetrators, organizers, sponsors or those otherwise involved in the use of chemicals as weapons.”⁵⁴ Investigations pursuant to the Secretary-General’s Mechanism are undertaken consistently with published guidelines and procedures, but any such investigations are concerned solely with verification of whether or not chemical and/or biological weapons were used, not the naming of responsible parties. Even the foundational UNSG’s Specialist Investigative Team deployed in the 1980s to verify allegations of the use of chemical weapons in the Iran-Iraq War did not have an explicit mandate to determine which parties were responsible for particular incidents of chemical weapons use.⁵⁵

51. Second Report of the Organization for the Prohibition of Chemical Weapons—United Nations Joint Investigative Mission, transmitted by Letter dated June 10, 2016 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2016/530 (June 10, 2016), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_530.pdf.

52. Third Report of the Organisation for the Prohibition of Chemical Weapons—United Nations Joint Investigative Mission, transmitted by Letter dated August 24, 2016 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2016/738, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_738.pdf [hereinafter OPCW-JIM Third Report].

53. *Id.* ¶ 21.

54. *Id.* ¶ 18.

55. The terms of reference for the UNSG’s Specialist Investigative Team were “to determine, to the extent possible, whether chemical weapons had been used, and, if so, the type and extent of their use.” Report of the Specialists Appointed by the Secretary-General to Investigate Allegations by the Islamic Republic of Iran Concerning the Use of Chemical Weapons, ¶ 1, U.N. Doc. S/16433 (Mar. 26, 1984). For more detail on the in-

Of the nine investigated incidents, eight involved the use of chlorine and one involved the use of sulfur mustard. In three of the nine investigated incidents, the JIM found “sufficient information” to reach conclusions about the chemical weapon used, the means of delivery and the identity of the responsible party.⁵⁶ In another three of the incidents the JIM “was close to having sufficient” information on the identity of the responsible party⁵⁷; in the remaining three incidents there was “contradictory or insufficient” information about the use of chemical weapons and the means of delivery.⁵⁸ In two of the three situations in which the JIM discovered sufficient evidence to reach its conclusions—in Talmenes (Idlib area) on April 21, 2014 and in Sarmin (Idlib area) on March 16, 2015—the JIM concluded that Syrian armed forces had deployed chlorine in modified barrel bombs from helicopters.⁵⁹ In the third incident—in Marea (Aleppo area) on August 21, 2015—the JIM concluded that Islamic State of Iraq and the Levant (ISIL) forces had deployed sulfur mustard in artillery shells.⁶⁰

Following receipt of the JIM reports, including the JIM findings of Syrian armed forces and ISIL use of chemical weapons, it is now up to the UN Security Council to decide what, if any, measures to take in response, including whether or not to establish an accountability mechanism to investigate which individuals were most responsible and to bring them to trial. The JIM findings of Syrian government use of chlorine as a weapon is a double novelty—the first occasion on which a State party to the CWC has been found to have violated its treaty obligations and the first occasion on which a body established by the Security Council has explicitly named the Syrian Government as responsible for international law violations. At

vestigations conducted throughout the 1980s, see Timothy L. H. McCormack, *International Law and the Use of Chemical Weapons in the Gulf War*, 21 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 1 (1991). Admittedly, Saddam Hussein had bragged openly about his use of chemical weapons against Iran and there was little ambiguity about responsibility for the use of such weapons. The complexity of conflicts and different parties to them in the Syrian Crisis renders the question of responsibility for chemical weapons use significantly more complicated than in the course of the Iran-Iraq war of the 1980s.

56. OPCW-JIM Third Report, *supra* note 52, ¶ 53

57. *Id.* ¶ 60.

58. *Id.* ¶ 71.

59. *Id.* at 43 (Annex IV, Talmenes), 76 (Annex VIII, Sarmin). The JIM has not identified individuals responsible for ordering the attacks and is in no position to suggest that President Bashar al-Assad is personally implicated.

60. *Id.* at 93 (Annex X, Marea).

the time of writing, the Council has not yet responded to the JIM conclusions other than to extend the mandate of the JIM for another year.⁶¹

III. OTHER SERIOUS VIOLATIONS OF INTERNATIONAL LAW AND MULTILATERAL RESPONSES

Tragically, egregious violations of international law have been a ubiquitous characteristic of the Syrian crisis from its inception. Elsewhere in this Syria Forum Beth Van Schaack writes more comprehensively on many of the recurrent war crimes perpetrated in the various conflicts that have wracked the country.

The Syrian people have been subjected to deliberate, indiscriminate, and disproportionate attacks; the misuse of conventional, unconventional, and improvised weapons and weapon systems; industrial-grade custodial abuses, including deaths in detention; unrelenting siege warfare; the denial of humanitarian aid and what appears to be the deliberate use of starvation as a weapon of war; sexual violence, including sexual enslavement of Yezidi women and girls and sexual torture of men and boys in detention; and the intentional destruction of cultural property. Thousands of Syrians have disappeared without a trace, many of them victims of enforced disappearances. The emergence of the Islamic State of Iraq and the Levant/Daesh (ISIL) introduced a new set of ruthless perpetrators who have brought the violence to an even more alarming level of brutality. In addition to war crimes under international humanitarian law (IHL), the Syrian people have experienced other crimes under international criminal law, including crimes against humanity, summary execution, terrorism and, potentially, genocide against ethno-religious minorities.⁶²

Van Schaack provides a detailed analysis of most of these distinct categories of offenses and there is no need to attempt to replicate her excellent work here. It is not immediately obvious why there has been such a relatively weak multilateral response to repeated allegations of international crimes compared to that for chemical weapons. The disparities of approach cannot be explained by ignorance of the carnage. On the contrary, there has been extensive and protracted expenditure of effort to report on, and

61. S.C. Res. 2319, ¶ 1 (Nov. 17, 2016).

62. Beth Van Schaack, *Mapping War Crimes in Syria*, 92 INTERNATIONAL LAW STUDIES 282, 283–84 (2016).

to investigate, alleged offenses, as well as repeated calls for effective accountability structures to prevent impunity for atrocities.

International media outlets have been reporting on the Syrian crisis since the popular uprising in 2011. During Syrian government crackdowns in towns and villages in the initial phase of the crisis, the government blocked off locations of military operations from external media sources—presumably in the hope of preventing media coverage of the efforts of Syrian armed forces to suppress the protests—banned mobile phones and shut down Internet access in Syria.⁶³ That strategy of excluding the media was successful in 1982 in relation to the military assault on Hama, but it is now obsolete. Smart phones are everywhere and footage from them can be uploaded onto the Internet almost immediately. In 2011, global media outlets broadcast YouTube clips from Homs, Hama, Daraa, Baniyas, Aleppo and other Syrian towns and cities, always with the necessary qualification that the outlet could not verify the video footage. But the sheer volume of consistent images corroborated the appalling reality of a brutal governmental crackdown. International media outlets have reported on the Syrian crisis throughout its entire duration, as have other organizations located both within and outside Syria. The SCPR, based out of the American University in Beirut but clearly with extensive local contacts inside Syria, is a good example of such an organization.⁶⁴ It provides excellent analysis of the crisis, with detailed statistics on the devastating socio-economic impact on the country. The combination of reporting on, and analysis of, the crisis ensures a steady flow of information.

In addition to widespread reporting on the crisis, extensive efforts continue in the investigation of alleged war crimes and crimes against humanity. For example, the UN Human Rights Council established an Independent International Commission of Inquiry on the Syrian Arab Republic in August 2011 with a mandate “to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic.”⁶⁵ The Commission undertakes preliminary investigations and produces regu-

63. See *10 Most Censored Countries: CPJ's New Analysis Identifies Eritrea, North Korea, Syria, Iran as Worst*, COMMITTEE TO PROTECT JOURNALISTS (May 2, 2012), <https://cpj.org/reports/2012/05/10-most-censored-countries.php#3> annual survey of the (listing Syria third, just behind Eritrea and North Korea).

64. SYRIAN CENTER FOR POLICY RESEARCH, <http://scpr-syria.org/> (last visited Sept. 13, 2016).

65. See *Independent International Commission of Inquiry on the Syrian Arab Republic*, UN-HCHR, <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx> (last visited Sept. 13, 2016).

lar reports detailing its findings on “the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.”⁶⁶ The Commission is conducting systematic investigations of alleged international crimes and, in addition to its general reports to the Human Rights Council, it produces thematic reports on investigations into critical aspects of the Syrian crisis, including, most recently, on ISIL genocide of the Yazidis of Iraq⁶⁷ and on summary execution and deaths in detention of Syrian civilians.⁶⁸ Other initiatives are also ongoing in the gathering and preservation of evidence of international crimes which may be utilized for accountability purposes at some future date. For example, the Syria Justice and Accountability Centre (SJAC), with offices in The Hague and Washington, D.C. and with documenters on the ground all over Syria,

collects documentation of violations from all available sources, stores it in a secure database, catalogues it according to human rights standards, and analyzes it using legal expertise and big data methodologies. SJAC also supports documenters inside Syria, providing them with resources and technical guidance, and coordinates with other actors working toward similar aims: a Syria defined by justice, respect for human rights, and rule of law.⁶⁹

The establishment and ongoing work of both the Independent International Commission of Inquiry and the Syria Justice and Accountability Centre reflect a conviction by many that those responsible for international crimes in Syria should be held accountable and that impunity will not facilitate a transition to peace. Unfortunately for Syria, the Security Council is divided on the desirability of accountability. That division was exemplified in the joint veto by Russia and China of the draft resolution which would

66. *Id.*

67. Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016), http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf.

68. U.N. Human Rights Council, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, U.N. Doc. A/HRC/31/CRP.1 (Feb. 3, 2016), http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf.

69. *About Justice*, SYRIA JUSTICE AND ACCOUNTABILITY CENTRE, <https://syria-accountability.org/about/> (last visited Sept. 13, 2016).

have referred the alleged violations of human rights and international humanitarian law (IHL) to the Prosecutor of the International Criminal Court (ICC).⁷⁰ The draft resolution, co-sponsored by fifty-nine member States, was debated by the Council on May 22, 2014.

The draft text recalled the Council's full endorsement of the Geneva Communiqué of June 30, 2012 demanding accountability for crimes committed during the Syrian conflict; noted the reports of the International Independent Commission of Inquiry and the statements of the UNSG and the UN High Commissioner for Human Rights that international crimes had been committed in Syria; and referred the situation to the ICC Prosecutor pursuant to Chapter VII of the UN Charter. Despite the thirteen affirmative votes, the negative votes of Russia and China prevented adoption of the resolution.⁷¹ Nothing has changed since 2014 to diminish the resolve of those two countries to continue to oppose referral of the situation to the ICC Prosecutor and, as Van Schaack explains, to also oppose the establishment of an ad hoc international criminal tribunal for Syria.⁷²

Despite the lament for lack of an effective international criminal forum for Syria, it is misleading to create the impression that there have been no substantive multilateral responses to international crimes other than in response to the use of chemical weapons. In September 2014, the government of Iraq wrote to the Security Council pursuant to Article 51 of the UN Charter advising that Iraq had invited the United States to lead strikes against ISIL forces because they had established a safe haven in Syria from where their forces were launching attacks against Iraq.⁷³ Several States filed similar letters following the Iraqi letter, including the United States,⁷⁴ UK,⁷⁵

70. U.N. Doc. S/2014/348 (May 22, 2014), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/348.

71. See Press Release, Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution, U.N. Press Release SC/11407 (May 22, 2014), <https://www.un.org/press/en/2014/sc11407.doc.htm>.

72. See Van Schaack, *supra* note 62, at 331–34.

73. Permanent Representative of Iraq to the U.N., Letter dated September 20, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2104/691 (Sept. 22, 2014).

74. Permanent Representative of the United States of America to the U.N., Letter dated September 23, 2014 from the Permanent Representative of the United States of America to the United States addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014).

75. Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the U.N., Identical letters dated November 25, 2014 from the Permanent Rep-

Turkey,⁷⁶ France⁷⁷ and Australia.⁷⁸ Each of those States claimed the right to use lethal military force against ISIL forces in Syria on the basis of Article 51. The UK, Turkey and Australia all claimed the right of collective self-defense of Iraq as the legal basis for undertaking aerial bombing of ISIL forces in Syria. France, however, additionally claimed that ISIL attacks perpetrated against French targets gave it the right to act in its own individual self-defense in bombing ISIL targets in Syria.

The increasing number of States which claimed the right of self-defense (individual or collective in support of Iraq) against ISIL confirmed a widely held view that ISIL represented a significant threat to international peace and security. Terrorist attacks around the world for which ISIL claimed responsibility only fueled the growing sense that “it could be us next” and that it was not good enough to sit back and watch increasingly audacious attacks while leaving it up to others to respond. In November 2015 the Security Council adopted Resolution 2249,⁷⁹ unequivocally condemning ISIL’s horrifying terrorist attacks in Sousse in June 2015, in Ankara in October 2015, over Sinai in October 2015, in Beirut in November 2015 and in Paris in November 2015, and also authorizing all necessary measures to prevent and suppress terrorist attacks by ISIL. This was a resolution Russia could agree to because it is focused not on the al-Assad regime but on a key opponent of the regime. Subsequent to the adoption of Resolution 2249, a number of States have also written Article 51 letters, but with the additional legal basis of Security Council authorization.

representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014).

76. Chargé d’affaires a.i. of the Permanent Mission of Turkey to the U. N., Letter dated July 24, 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/563 (July 24, 2015).

77. Permanent Representative of France to the U.N., Identical letters dated September 8, 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 9, 2015).

78. Permanent Representative of Australia to the U.N., Letter dated September 9, 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015).

79. S.C. Res. 2249 (Nov. 20, 2015).

IV. EXPLAINING DISPARATE MULTILATERAL RESPONSES

It is not immediately obvious why the Ghouta attack, involving as many as 1,400 deaths, provoked the threat of a military response in Syria, while the deaths to that date of more than 100,000 Syrians, mostly civilians killed in willful attacks by al-Assad regime forces did not. President Obama characterized the Ghouta attacks as “an assault on human dignity” and asked “what message will we send if a dictator can gas hundreds of children to death in plain sight and pay no price.”⁸⁰ Precisely the same question could be asked of laying siege to cities, of artillery and rocket barrages on residential areas, and of abductions and summary executions in which many children have also been killed. The combination of two key factors help explain responses to the use of chemical weapons in Syria: that these weapons evoke a particularly visceral reaction and that the interests of both Russia and the United States coalesced in pressuring Bashar al-Assad to relinquish his chemical weapons capability.

A. Chemical Weapons Evoke a Particularly Visceral Reaction

Media outlets clearly understood that there was a big story in the Ghouta sarin attack. Perhaps that understanding was fueled in substantial part by President Obama’s “red line” statement and widespread speculation that the attack may have acted as a catalyst to U.S. military intervention in Syria. Whatever the precise rationale (or combination of rationales) for the reports, the images were graphically grisly and the media response was overwhelming.

An alternative, or possibly an additional, explanation for the media attention on the attack is the particularly visceral reaction chemical weapons evoke. Jackie Northam, a reporter for National Public Radio in Washington, D.C., attempted her own explanation for the extensive reaction to the Ghouta attack. Northam interviewed a number of experts including Gregory Koblenz from the bio-defense program at George Mason University who claimed that “chemical weapons are part of a class of risk called dreaded risk. These are kinds of hazards that people have a disproportion-

80. Press Release, Office of the Press Secretary, Statement by the President (Aug. 31, 2013), <https://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

ate, psychological response to in terms of fear, anxiety, disgust.”⁸¹ Perhaps there is some truth in Koblenz’s analysis, but Northam queried it:

[T]here are other equally terrible ways to die in an armed conflict and many people question why the U.S. should respond so strongly to one chemical weapons attack in Syria and not to other atrocities committed in that conflict. Why of all the horrible things that happen in warfare have chemical weapons been singled out?⁸²

One answer to such questions was offered by Richard Price, author of *The Chemical Weapons Taboo*,⁸³ who asserted that “the anxiety many people feel about chemical weapons stems from more than just fear and revulsion.”⁸⁴ According to Northam, “Price says unlike other weapons, they’ve only been used a handful of times, there’s a prohibition against them, and a long history of political efforts to restrain their use.”⁸⁵

With respect to Price’s analysis, I do not agree that the United States and Russia, in compelling Syria to commit to the CWC, were motivated either by revulsion for the attack on the civilian population of Ghouta or by the fact that chemical weapons have only seldom been used, are prohibited and have long been the subject of extensive efforts to restrain their use. Starvation as a method of warfare, for example, has also rarely been used and is unambiguously prohibited in both international and non-international armed conflicts by treaty and by customary IHL.⁸⁶ However, the utilization of starvation as a method of warfare in Syria has simply not evoked anything like the same substantive response as the confirmed use of chemical weapons. Nor do I accept that media reporting of the use of

81. Jackie Northam, *Why do Chemical Weapons Evoke Such a Strong Reaction?*, NPR (Sept. 4, 2013), <http://www.npr.org/templates/story/story.php?storyId=218995964>.

82. *Id.*

83. RICHARD M. PRICE, *THE CHEMICAL WEAPONS TABOO* (2007).

84. Northam, *supra* note 81.

85. *Id.*

86. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 54(1), June 8, 1977, 1125 U.N.T.S. 3 (prohibiting starvation as a method of warfare in international armed conflicts); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art. 14, June 8, 1977, 1125 U.N.T.S. 609 (prohibiting starvation as a method of warfare in non-international armed conflicts); 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 53 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (asserting the prohibition as a customary rule of IHL in international and non-international armed conflicts alike).

chemical weapons captured the imagination of Washington and Moscow and acted as a catalyst for bilateral action. Media reports of other atrocities have also graphically exposed some of the horrors of the Syrian crisis and, on occasions, some images have evoked an outpouring of shock and dismay around the world. However, the media reporting of those other atrocities have not provided a catalyst for substantive action and part of the explanation for that surely has to do with vested national interests.

B. Coalescing Interests Make for Substantive Action

The United States and Russia have rarely found themselves in agreement in their responses to the Syrian crisis. Russia has strategic vested interests in Syria, not least of which is its only naval base on the Mediterranean Sea in the Syrian coastal city of Latakia. Russia has consistently vetoed Security Council initiatives to take stronger action against the al-Assad regime⁸⁷ and has insisted instead on intervening militarily to ensure the al-Assad regime does not lose control of yet more Syrian territory and that it remains in power. However, when the United States and Russia have found their interests aligned in Syria, they have been able to act effectively to produce substantive results.

One such aspect of the conflict involved the use of chemical weapons. Both the United States and Russia are original States parties to the CWC and, as such, both have foregone the inclusion of chemical weapons in their national arsenals. Having made that commitment, neither country desires proliferation of chemical weapons or the emergence of a situation in which their respective armed forces face possible exposure to such weapons. The United States, in particular, purportedly justified its invasion of Iraq to disarm Saddam Hussein of weapons of mass destruction (WMD) and led an international coalition of States ostensibly to finally rid Iraq of its alleged WMD stockpiles. The invasion of Iraq and subsequent search for alleged stockpiles of weapons of mass destruction was the catalyst for

87. See, e.g., Julian Borger & Bastien Inzaurrealde, *Russian Vetoes are Putting UN Security Council Legitimacy at Risk, Says US*, THE GUARDIAN (Sept. 23, 2015), <https://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us> (referring to four draft Security Council resolutions vetoed by Russia). More recently, Russia vetoed another draft resolution on October 8, 2016. See Julian Borger, *Russia Vetoes UN Resolution to Stop Bombing of Aleppo*, THE GUARDIAN (Oct. 8, 2016), <https://www.theguardian.com/world/2016/oct/08/russia-vetoes-un-resolution-syria-bombing-aleppo>. For the text of the draft resolution, see U.N. Doc. S/2016/846 (Oct. 8, 2016).

ongoing devastation for Iraq and a slight on United States foreign policy. One can imagine the United States would be keen to intervene earlier in the process of chemical weapon development and/or acquisition in the hope of avoiding yet another drawn-out experience of attempting to contain the spread of weapons of mass destruction.

Another aspect of the crisis in Syria in which Russian and United States interests have coalesced involves the rise of ISIL and the desire to combine forces to erode ISIL capacity. ISIL sympathizers around the world are undertaking acts of brutality that have challenged many societies and the prospects are only that attempts to perpetrate audacious attacks will persist. Quite apart from establishment of the self-declared caliphate in Syria and Iraq and the instability that brings for the sovereignty of both nations, there is a growing acknowledgement of the stark reality that allowing ISIL to prosper in Syria and in Iraq is a recipe for disaster in many other countries around the world. The United States and Russia readily agree on this and so substantive multilateral action has followed.

V. IMPLICATIONS FOR INTERNATIONAL LAW

A. Strengthening the Legal Prohibition on the Use of Chemical Weapons

Out of the abject mire of the Syrian crisis some would argue that one positive—a lone, shining light—has been the international community's reaffirmation of the normative prohibition on the use of chemical weapons. After all, the al-Assad regime was convinced to accede to the CWC, declare the existence of its chemical weapons program and to surrender its chemical stockpile, its means of delivery and its production facilities for destruction, a process all verified by OPCW inspectors. In so doing, Syria became the 190th State party to the CWC.⁸⁸ Strategically, at least in terms of the goal of universal adherence to the normative prohibition, Syrian participation in the CWC brought a major chemical weapons-capable State into the treaty regime with the potential to influence the subsequent participation of other key non-States parties. Both Israel and Egypt, for example, have justified their respective non-participation in the CWC on the refusal of other regional States to accede to the treaty and, in Egypt's case, also on Israel's

88. There are now 192 States parties to the CWC. Myanmar and Angola have both acceded to the treaty since Syria. *OPCW Member States*, OPCW, <https://www.opcw.org/about-opcw/member-states/> (last visited Sept. 13, 2016).

refusal to relinquish its nuclear weapons capability.⁸⁹ This “regional non-participation” argument may be more difficult to sustain now that Syria is a party to the CWC.⁹⁰

I have already argued that the catalyst for unprecedented multilateral, and particularly U.S.-Russian bilateral, action in Syria had much less to do with the humanitarian catastrophe in the country and much more to do with a shared bilateral commitment to preventing a re-emergence of chemical weapons. Having renounced their use, neither the United States nor Russia wants other States to use them and, in so doing, challenge the stigma attached to the normative prohibition on chemical weapons.

Despite the investigations and publicly released findings of the UN-OPCW JIM, which might have been expected to have induced an end to alleged use of chemical weapons in Syria, allegations of the ongoing use of chlorine dropped in barrel bombs⁹¹ from Syrian armed forces helicopters continue at an alarmingly frequent rate.⁹² Of course, each of those incidents warrant careful investigation before an unequivocal assertion can be made that chlorine is still being used as a weapon in Syria. But the repeated allegations are disconcerting in light of previous developments. Syria now has the dubious “honor” of becoming the first CWC State party in which chemical weapons use has been confirmed. It would be ironic indeed if the end result of chemical weapons use in Syria is a weakening of the global normative prohibition by virtue of a State party to the CWC—one of the newest members of the treaty regime no less—being seen to have repeated-

89. See *Egypt Refusing to Sign WMD Treaties*, JERUSALEM POST (May 13, 2009, <http://www.jpost.com/Middle-East/Egypt-refusing-to-sign-WMD-treaties>); Barak Ravid, *Israel Adamant it Won't Ratify Chemical Arms Treaty Before Hostile Neighbors*, HAARETZ (Sept. 12, 2013), <http://www.haaretz.com/israel-news/.premium-1.546613>.

90. See, e.g., Edmund Sanders, *Israel Also Facing Questions about Chemical Weapons*, LOS ANGELES TIMES (Sept. 12, 2013), <http://articles.latimes.com/2013/sep/12/world/la-fg-wn-israel-chemical-weapons-20130912>.

91. Simon Cotton, *Syria Chlorine Attack Claims: What This Chemical Is and How it Became a Weapon*, THE CONVERSATION (Sept. 8, 2016), <http://theconversation.com/syria-chlorine-attack-claims-what-this-chemical-is-and-how-it-became-a-weapon-65068>.

92. See *supra* note 45 and accompanying text. *But see* Ambassador Michele Sison, U.S. Deputy Representative to the United Nations, Remarks before the UN Security Council: Explanation of the Vote for UN Security Council 2314 on the Renewal of the Joint Investigative Mechanism (transcript available at <https://usun.state.gov/remarks/7521>) (observing that in the year since the JIM was first established, there was a substantial reduction in the number of reported incidents of chemical weapons attacks (down from one hundred in the year prior to the JIM's establishment to twelve during the year following its creation)).

ly violated the treaty prohibition with impunity. If that is the end result, some may question whether it would have been better for the United States and Russia not to have compelled Syria to join the CWC. At least then the use of chemical weapons could have been condemned as a violation of a customary norm of international law perpetrated on the territory of a non-State party to the CWC by government armed forces and by non-State armed groups, thus preserving the integrity of the treaty regime.

B. Global Criminal Justice Still Has a Long Way to Go

Early in 2015, the then Israeli Foreign Minister, Avigdor Lieberman, was quoted criticizing the ICC Prosecutor, Fatou Besouda, for opening a preliminary examination into the situation in Palestine, but not one for Syria.⁹³ Lieberman alleged an anti-Israel bias given the Prosecutor's apparent indifference to the then more than 200,000 dead resulting from the Syrian conflict. Lieberman's criticism reflected a comprehensive misunderstanding of the limitations to the ICC's jurisdiction.

In the absence of a Security Council referral of the Syrian situation to the Prosecutor, the ICC has no jurisdiction over alleged violations of the Rome Statute⁹⁴ perpetrated on the physical territory of Syria unless the conduct in question is perpetrated by nationals of a State party to the Rome Statute, either government armed forces intervening in Syria or foreign fighters who are nationals of State parties. Lieberman was correct on one basic level though. The Syrian crisis has been characterized by such appalling international crimes that the situation should be within the remit of the ICC Prosecutor. The fact that Syria has not been referred to the Prosecutor is not because the notion has not been contemplated. As discussed earlier, France presented a draft resolution to the Security Council which would have referred the Syrian situation, but the draft was vetoed by Russia and China.⁹⁵

Van Schaack has explained in detail that aspects of the Syrian crisis might present problems for the ICC given some of the limitations of the subject matter jurisdiction in the Rome Statute and she provides a compelling argument for an ad hoc international criminal tribunal to overcome

93. See Jonathan Lis, *ICC Opens Initial Probe into Possible War Crimes in Palestinian Territories*, HAARETZ (Jan. 16, 2015), <http://www.haaretz.com/israel-news/1.637518>.

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

95. See *supra* notes 70–71 and accompanying text.

some of those limitations.⁹⁶ But as Van Schaack concedes, Russian opposition to any accountability processes (ICC or other) for al-Assad regime supporters (including Russian military personnel) is unshakeable. The rest of the international community lacks the political will to establish any such mechanism in the face of such strident opposition.

The reality, unpalatable though it is for some, is that the ICC does not represent a comprehensive and systematic mechanism for achieving international criminal justice and is dependent upon the support and commitment of the international community to render it effective. The constant refrain of the UNSG, the OPCW, the UN Human Rights Council and the Security Council that “those responsible must be held accountable” has a hollowness about it in the face of inefficacious challenges to Russian and Chinese opposition.

C. *Responsibility to Protect Takes a Hit*

The relatively weak Security Council reactions to the Syrian crisis and Russian determination to veto any attempt by the Council to impose substantive measures against the Assad regime may not only have weakened adherence to the prohibition on the use of chemical weapons and demonstrated the inadequacy of the existing global criminal justice system, but also raise serious questions for the emerging responsibility to protect (R2P) doctrine. Given the rationale for the doctrine (which I will address shortly), the Syrian crisis exposes some profound limitations to its efficacy. In discussing lessons from the 2011 NATO intervention in Libya, Gareth Evans claimed that:

The question on many minds, not least my own, has been whether this represents a serious setback for the responsibility to protect norm, giving new traction to those who would seek to not only undermine but reverse everything that has been achieved over the past decade. Or does it just reflect the degree of difficulty and controversy that is absolutely bound to be present—as I for one have always acknowledged—whenever the hardest and sharpest instrument in the RtoP response toolbox, coercive military action, is called in aid.⁹⁷

96. Van Schaack, *supra* note 62, at 331–32.

97. Gareth Evans, *Interview: The R2P Balance Sheet after Libya*, in THE RESPONSIBILITY TO PROTECT: CHALLENGES AND OPPORTUNITIES IN LIGHT OF THE LIBYAN INTERVENTION 35 (2011), <http://www.e-ir.info/wp-content/uploads/R2P.pdf>.

These are important questions to ask. Proponents of the R2P doctrine celebrated the Security Council's adoption of Resolution 1973⁹⁸—the high-water mark of multilateral implementation of the doctrine. But the morphing of NATO's interpretation of the Council's mandate—that the only way Libya's civilians could be protected was to ensure a military victory and the removal of Gaddafi from office⁹⁹—was controversial and hardened the resolve of some not to allow a repeat reinterpretation of a Security Council mandate in the case of Syria.

A preliminary issue for international lawyers though is the characterization of the status of the R2P doctrine as a “norm.” The doctrine was initially articulated in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS) entitled *The Responsibility to Protect*. The report was predicated on two “Basic Principles”:

- A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
- B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.¹⁰⁰

The ICISS, created by then Canadian Foreign Minister Lloyd Axworthy, was constituted with the appointment of a group of leading international experts each acting in their individual capacities. As such, the Commission could not, and certainly did not purport to be attempting to, create legally binding obligations. Rather, the report was an attempt to reframe the humanitarian intervention debate and to identify common ground for the protection of “people at risk.” Perhaps the major contribution of the ICISS's report was the proposition of sovereignty as a “dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In inter-

98. S.C. Res. 1973 (Mar. 17, 2011).

99. For a detailed analysis of the morphing of NATO's interpretation of the Security Council mandate, see Spencer Zifcak, *The Responsibility to Protect after Libya and Syria*, 13 MELBOURNE JOURNAL OF INTERNATIONAL LAW 59 (2012).

100. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* xi (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

national human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility.”¹⁰¹ Gareth Evans, a key architect of the report, characterized the approach of the Commission as turning “the notion of the ‘right to intervene’ upside down. Talk not about the ‘right’ of big states to do anything, but the responsibility of all states to protect their own people from atrocity crimes, and to help others to do so.”¹⁰²

The publication of the ICISS’s report proved highly influential, engendering a global discourse on national and international responsibilities for the protection of people from the perpetration of international crimes. The UN General Assembly adopted both the notion and the gist of R2P in its 2005 World Summit Outcomes Document by declaring, in relevant part, that:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to

101. *Id.* at 8.

102. Evans, *supra* note 97, at 35–36.

protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.¹⁰³

The following year the Security Council endorsed the General Assembly's approach to R2P. In Resolution 1674 the Council reaffirmed "the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."¹⁰⁴ Consequently, within just five years of the publication of the ICISS report, both the UN's plenary body and its executive organ had endorsed the "sovereignty as responsibility" approach of the Commission.

The international community did not have long to wait for a major test of its resolve to ensure effective implementation of the R2P doctrine. Libya was not spared its own domestic version of the Arab Spring, but the response of the regime of Muammar Gaddafi was particularly swift and brutal. On or around February 15, 2011, Gaddafi declared war on insurrection and unleashed his military forces on his own civilian population. Casualties mounted rapidly and the responding chorus of international condemnation was unusually rapid, unified and vocal. The Arab League, the Organisation of Islamic Cooperation and the African Union all condemned the violence and, on February 22, 2011, the Arab League went so far as to suspend Libya's membership.¹⁰⁵ The UN Human Rights Council met on February 25 and decided to establish and deploy an independent international commission of inquiry to investigate alleged human rights violations in Libya.¹⁰⁶ The UN Security Council adopted Resolution 1970 on February 26, demanded "an immediate end to the violence" and referred the situation in Libya to the ICC Prosecutor for investigation of alleged international crimes.¹⁰⁷

103. 2005 World Summit Outcome, U.N. Doc. A/60/L.1, ¶¶ 138–39 (Sept. 15, 2005), <http://www.who.int/hiv/universalaccess2010/worldsummit.pdf>.

104. S.C. Res. 1674, ¶ 4 (Apr. 28, 2006).

105. Natasha Mozgovaya & Shlomo Shamir, *Arab League Suspends Libya as Deadly Crackdown Persists*, HAARETZ (Feb. 23, 2011), <http://www.haaretz.com/world-news/arab-league-suspends-libya-as-deadly-crackdown-persists-1.345096>.

106. See Human Rights Council Res. S-15/1, U.N. Doc. A/HRC/S-15/1, at 3–5 (Feb. 25, 2011), http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/HRC-S-15-1_AUV.pdf.

107. S.C. Res. 1970, ¶¶ 1, 4 (Feb. 26, 2011).

Attacks on civilians escalated and Gaddafi forces surrounded Benghazi—Libya’s second major city and the base of the rebel movement—as Gaddafi threatened a massacre.¹⁰⁸ On March 17, just over a month after the eruption of violence, the Security Council adopted Resolution 1973.¹⁰⁹ In it the Council expressed its determination “to ensure the protection of civilians and civilian populated areas”¹¹⁰ and authorized “all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi,”¹¹¹ as well as to enforce a no-fly zone in Libya to prevent Gaddafi’s attacks on civilians from the air.¹¹² On the basis of the Resolution, NATO initiated an aerial bombing campaign against Gaddafi’s forces and it is clear that this forceful intervention prevented a large-scale massacre in Benghazi.

But the implementation of a Security Council resolution such as 1973 does not constitute the emergence of a customary norm of international law—especially one on military intervention in the absence of Security Council authorization. Gareth Evans has acknowledged as much:

[I]t would have been premature in 2005, and still is now, to describe the responsibility to protect as a new rule of customary law. It may become one, but that will depend upon how comprehensively this new concept is implemented and applied in practice, as well as recognised in principle, in the years ahead. But with the weight behind it of a unanimous General assembly resolution at head of state and governmental level, the responsibility to protect could already in 2005 properly be described as a new international norm, not just an emerging norm: a new standard of behavior, and a new guide to behavior, for every state.¹¹³

The Syrian crisis represents a profound challenge to the R2P doctrine. There are, of course, substantial international military interventions in Syria—by Russia in support of government forces against organized armed groups fighting against the Assad regime and by the United States and other Western allies against ISIS forces. Those interventions have not resulted

108. David K. Kirkpatrick & Kareem Fahim, *Qaddafi Warns of Assault on Benghazi as U.N. Vote Nears*, NEW YORK TIMES (Mar. 17, 2011), http://www.nytimes.com/2011/03/18/world/africa/18libya.html?pagewanted=all&_r= .

109. S.C. Res. 1973, *supra* note 98.

110. *Id.*, pmb, para. 9.

111. *Id.* ¶ 4.

112. *Id.* ¶ 6.

113. Evans, *supra* note 97, at 36.

in protection of the lives of the civilian population of Syria. Any progress that proponents of the R2P doctrine assume had been made in the Libyan context seems to have evaporated in the lack of multilateral response to the Syrian crisis.

D. Disparate Responses are not so Disparate

International Law as a constraint on the conduct of parties to the armed conflicts in Syria—what Martti Koskeniemi has coined the “gentle civilizer of nations”¹¹⁴—seems to have had little effect over the past six years. Instead, the conflicts have been replete with egregious violations of international law and characterized by compounding human misery. A tragic irony for the Syrian population is that despite all the international rhetoric about determination not to tolerate the use of chemical weapons and of President Obama’s “red line” statement, even the confirmed use of chemical weapons has failed to provoke a massive military intervention to end the carnage in Syria. I do not wish to suggest that massive military intervention could or would stop the carnage in Syria. Russian military engagement on the side of the al-Assad regime complicates any suggestion of intervention on behalf of the civilian population. However, the strategic military and political complexities of the Syrian crisis underscore some of the limitations of the responsibility to protect doctrine. In these particular circumstances, where the national State has monumentally failed to meet its principal responsibility for the protection of its own population, the international community has been precluded from stepping in to undertake any effective supplementary protective role.

It is surely of little comfort to Syrian victims to be told that because their son was killed by exposure to chlorine or to sarin that the international community takes his death more seriously than the death of a neighbor’s son from artillery shells pounding a civilian residential apartment building. Nor must it be of any comfort that some wounded civilians died as a result of a war crime because the hospital in which they were patients was deliberately targeted, whereas other patients did not die from a war crime because the hospital they were in was mistakenly hit. While the Security Council and the OPCW have deployed JIM investigators into Syria to determine which parties to the conflicts are responsible for chemical weapons

114. MARTTI KOSKENIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001).

use, the UN Human Rights Commission's International Independent Commission of Inquiry and the Syria Justice and Accountability Centre are required to undertake their work of documenting and investigating alleged international crimes outside the country with whatever contacts they can access from within Syria. But, in relation to both the JIM and the other two mechanisms, there is as yet no capacity to lay charges against particular individuals or to hold them accountable. As Beth Van Schaack so eloquently explains, all these measures are undertaken in the hope that at some future stage there may be an international criminal forum with jurisdiction over the appalling crimes which have been committed.¹¹⁵ It is in this sense that the responses to the use of chemical weapons are not as disparate to those for all other atrocities as first appearances suggest.

Some parties to some conflicts in Syria are attempting to comply with IHL in the conduct of their military operations knowing that some other parties have no intention of even pretending to comply with the law. That is a challenging situation to confront and I sincerely hope that those States committed to complying with the law are not dissuaded from doing so. A former Australian general claims that situations in which an adversary has no intention of complying with the law is precisely the scenario where

[t]he potential is greatest for the lines of morality to be crossed. In such circumstances, operations are viewed through a lens that might lead someone to believe the "end justifies the means." But the concept of beating the opponent "at his own game" can lead otherwise moral people to commit immoral acts. When nation-states decide to employ the tactics of their non-state adversaries, a descent to the lowest standards of conduct is inevitable. The proliferation of this attitude increases the risk that moral ascendancy will be lost. It is also the moment when the very cause a nation chooses to fight can be forsaken. The greatest danger is that the side seeking moral ascendancy morphs into the enemy they have pledged to oppose.¹¹⁶

As laudable as those efforts to comply with the law in the face of egregious and routine violations are, the Syrian crisis represents a significant normative challenge to IHL. Condemnation of atrocities in Syria unmatched by efforts to hold responsible individuals accountable has the potential to reinforce impunity for those regimes protected from global justice

115. Van Schaack, *supra* note 62, at 284–86.

116. Lieutenant General Mark Evans (Ret.), *A Commander's Perspective*, in *MORAL INJURY: UNSEEN WOUNDS IN AN AGE OF BARBARISM* 48, 52–53 (Tom Frame ed., 2015).

structures by permanent members of the Security Council. This is as much a reality for the repeated demands that those responsible for the use of chemical weapons be held accountable as it is for other egregious violations of IHL. And the long-suffering civilian population of Syria is surely entitled to ask penetrating questions about the purported efficacy of regimes for the enforcement of international law. For those benighted people, international law itself must seem illusory.