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Dulce et Decorum: The Unique Perception of Chemical Warfare and the Enforcement of the Geneva Protocol in the 21st Century

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Dulce et Decorum: The Unique Perception of Chemical Warfare and the Enforcement of the Geneva Protocol in the 21st Century

Catherine Joyce*

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*If in some smothering dreams you too could pace
Behind the wagon that we flung him in,
And watch the white eyes writhing in his face,
His hanging face, like a devil's sick of sin;
If you could hear, at every jolt, the blood
Come gargling from the froth-corrupted lungs,
Obscene as cancer, bitter as the cud
Of vile, incurable sores on innocent tongues,
My friend, you would not tell with such high zest
To children ardent for some desperate glory,
The old Lie; Dulce et Decorum est
Pro patria mori.¹*

—Wilfred Owen

I. INTRODUCTION

On August 21, 2013, a rocket attack in the Ghouta area of Damascus killed numerous civilians and left many others wounded and complaining of a range of symptoms, from shortness of breath to general disorientation.² UN investigators later confirmed that the shells from the attack contained the nerve agent sarin, delivered in artillery rockets against a target area that included civilians.³

UN Secretary General Ban Ki-moon denounced the attack as a “war crime,” and the international community mobilized to take action⁴—despite the fact that Syria is not a party to either the Chemical Weapons Convention⁵ or the Biological and Toxin Weapons Convention⁶—because customary international law drawn from the Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare

1. Wilfred Owen, *Dulce et Decorum Est* (1917), available at <http://www.warpoetry.co.uk/owen1.html>. Owen's poem describes the horror of a gas attack as the troops in the trenches would have experienced it. He died in battle seven days before the Armistice that ended World War I. *Wilfred Owen, Greatest of the War Poets Who Have Written in the English Language*, THE WAR POETRY WEBSITE, <http://www.warpoetry.co.uk/owena.htm> (last visited Oct. 27, 2013).

2. *Syria Crisis: UN Report Confirms Sarin 'War Crime,'* BBC NEWS (Sept. 16, 2013, 2:02 PM), <http://www.bbc.co.uk/news/world-middle-east-24113553>.

3. *Id.*

4. *Id.*

5. See Joshua Meir Freedman, *Don't Let Assad Sign the Chemical Weapons Convention on Syria's Behalf: Allowing Bashar al-Assad to Sign an International Treaty on Behalf of Syria*, ALJAZEERA (Sept. 29, 2013), <https://en-maktoob.news.yahoo.com/dont-let-assad-sign-chemical-weapons-convention-syrias-144718406.html>.

6. See U.S. DEPT. OF STATE, *Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitment*, 17 (July 2014).

(hereinafter “Geneva Protocol,” or “the Protocol”) forbids the use of chemical weapons.⁷

In 1925, the major global powers drafted the Geneva Protocol, a document that, by 1970, had eighty-four nations that were parties to the treaty.⁸ The Geneva Protocol forbade “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices,” a description that can be read to cover nerve agents like sarin.⁹

Just around two and a half months after the chemical attacks in Syria, the United States Supreme Court heard oral arguments on a case that, on its surface, bears no resemblance to the horrors of chemical warfare the civilians of Damascus experienced.¹⁰ Carol Anne Bond, upon learning that her friend was pregnant with her husband’s child, stole toxic chemicals from her workplace and applied them to her friend’s doorknobs, car door handles, and mailbox.¹¹ Bond’s friend, Myrlinda Haynes, suffered minor burns from the chemicals.¹² What would appear to be a simple case of poisoning in fact transformed into a national debate about the power of the Federal government to enact legislation that implements treaties.¹³ Rather than charge Bond under state law, where the penalty would range from three months to two years in prison, prosecutors charged Bond under 18 U.S.C.A. section 229, the statute implementing the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (hereinafter “Chemical Weapons Convention” or “CWC”), which carries much higher penalties.¹⁴ Sentenced to six years in prison, Bond challenged the constitutionality of the statute, while the Obama administration cautioned that any move by the Supreme Court to limit the applicability of the statute enforcing the treaty at home could cause difficulties in enforcement abroad.¹⁵ In part this is because prosecutors charged Bond under the

7. Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Jun. 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 (hereinafter “Geneva Protocol”); R. R. Baxter & Thomas Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 AM. J. INT’L L. 853 (1970).

8. Baxter & Buergenthal, *supra* note 7, at 854.

9. Geneva Protocol, *supra*, note 7.

10. *Bond v. United States*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, http://www.oyez.org/cases/2010-2019/2013/2013_12_158#bluebook (last visited Nov. 24, 2013). The case was argued before the Supreme Court on November 5, 2013 and decided June 2, 2014.

11. *Id.*

12. *Id.*

13. *Id.*

14. Warren Richey, *Is a Thumb Burn a Chemical Weapons Violation? Supreme Court Takes up Case*, THE CHRISTIAN SCIENCE MONITOR (Nov. 4, 2013), <http://www.csmonitor.com/USA/Justice/2013/1104/Is-thumb-burn-a-chemical-weapons-violation-Supreme-Court-takes-up-case>; 18 U.S.C.A. § 229 (1998).

15. *Id.*; The Supreme Court ruled in her favor, finding that it was unreasonable to interpret the phrase “chemical weapon” to cover Bond’s actions, despite noting that the definition in the statute is broad enough to encompass Bond’s actions. *Bond v. United States*, 134 S. CT. 2077 (2014). For an in-depth discussion of the *Bond* case, see *infra* Part IV.B.

statute implementing the same treaty that Syria agreed to sign after pressure from the international community.¹⁶

Clearly, the effects of a sarin gas attack and the minor burns that result from touching corrosive chemicals left by a jealous rival are hardly on the same scale, yet both implicated the Chemical Weapons Convention, a 1993 treaty that set out to further codify the international prohibition on chemical weapons first set forth in the Geneva Protocol.¹⁷ How is it possible to bring two such disparate examples of chemical use under the same treaty?

The answer may lie in the phrasing of the treaty itself, which defines chemical weapons as “Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes.”¹⁸ The breadth of chemicals covered under such a definition therefore can be read to include both sarin gas and the toxic chemicals Bond used against her rival.¹⁹

The over-broad description of banned chemical weapons—first found in the Geneva Protocol and carried over into subsequent treaties—coupled with the lack of specific enforcement mechanisms,²⁰ creates a situation where compliance is dependent on general fear and international disapproval of the idea of chemical weapons. Under-application of prohibitions on chemical weapons has the potential to make the treaties meaningless, while over-application removes the uncommon character of chemical weapons and the fear that prevents their use.²¹

This Comment will begin by looking at the history of chemical weapons in the modern era and the various prohibitions against them. This will provide a description of the pattern of behavior that informs modern opinions on chemical weapons and illustrate the origins of these fears.²² Part II will begin with a look at the fin de siècle prohibitions that influenced World War I, and will then look at the War and its impact on subsequent international agreements.²³ Part III will look at subsequent tests of Geneva and the development of additional agreements

16. Richey, *supra* note 14.

17. Organization for the Prohibition of Chemical Weapons, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, with Annexes, Jan. 13, 1993, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45 (hereinafter “CWC”).

18. *Id.*

19. Richey, *supra* note 14; *See also* Bond, 134 S.Ct. at 2095 (Scalia, J., concurring).

20. Geneva Protocol, *supra*, note 7; CWC, *supra* note 17, 1974 U.N.T.S. 45, art. II, XII. It should be noted that the CWC does provide a schedule for destruction of stockpiles of chemical weapons, and a monitoring and enforcement body to do on-site inspections and investigations, but as three states have achieved complete destruction of all chemical weapons stockpiles and the United States has missed both its deadlines and now projects a completion date of 2023, it is hard to argue that these mechanisms are overly effective. James Lewis, *Fact Sheet: Chemical Weapons and Their Destruction*, CENTER FOR ARMS CONTROL AND NON-PROLIFERATION (Feb. 4, 2014) http://armscontrolcenter.org/issues/biochem/fact_sheet_cw/.

21. *See infra* Part III .B, for a discussion of under-enforcement; *See infra* Part IV.A, for a discussion of the consequences in Syria, and *infra* Part IV.B, for a discussion of over-enforcement.

22. *See infra* Part II.

23. *See infra* Part II.

to expand upon the prohibitions, as well as looking at the more notable breaches of the agreements in the second half of the 20th century.²⁴ Part IV will look at the application of chemical weapons treaties in the contemporary setting, and will investigate what binds nations to these agreements by looking at the attacks in Syria and the *Bond* case to determine what enforcement mechanisms are in place and how adequate these mechanisms are in the modern world.²⁵ The history of chemical weapons treaties—and how they were understood by the societies that adopted them—informs the context of treaty provisions issues the *Bond* case and Syria both raise. Part V will suggest a means of strengthening chemical weapons treaties by creating better enforcement mechanisms and more specific definitions of what constitutes a chemical weapon.²⁶

II. THE FIRST WORLD WAR & THE GENEVA PROTOCOL

A. *The Origins of Chemical Warfare in the Modern Era: The Push for Development and the Call for Restrictions*

On April 22, 1915, German troops at the Ypres salient²⁷ launched what was to that date the largest use of chemical gas against enemy combatants in warfare, releasing chlorine gas against French and British troops and provoking moral outrage and indignation from Allied leaders.²⁸ While Ypres is the best-known use of asphyxiating gas, and the one that drew the most attention, the French had been using milder chemical gas irritants against German troops as early as 1914 in efforts to break through the enemy line.²⁹ These early attempts were largely unsuccessful in doing more than temporarily impairing the soldiers caught in the attacks, but the French use of gas may have encouraged German research into a more effective chemical weapons program that led to the chlorine attack at Ypres.³⁰

While popular belief fixes the beginnings of chemical warfare at Ypres, in fact it has a much longer history in modern times, reaching all the way back to

24. See *infra* Part III.

25. See *infra* Part IV.

26. See *infra* Part V.

27. A salient is a bulge in the line surrounded by the enemy on three sides. The Ypres salient was one of the best-known of the war. *The Great War 1914-1918, The Ypres Salient Battlefields, Belgium*, <http://www.greatwar.co.uk/ypres-salient/> (last visited Sep. 20, 2014).

28. Ulrich Trumpener, *The Road to Ypres: The Beginnings of Gas Warfare in World War I*, 47 J. MOD. HIST. 460, 460–61 (1975). An estimated 150 tons of compressed chlorine was released into the wind, spreading to cover a 4 mile wide area. Despite the scale of the attack, German troops did not actually achieve any decisive strategic victory, and the Ypres salient remained. *Id.*

29. *Id.* at 461–63.

30. *Id.* at 463.

theoretical discussions of its use during the Napoleonic Wars.³¹ The discussion arose again in 1846, where a government committee in Britain voted against the use of sulfur dioxide launched from ships.³² In addition to being concerned about breaching the rules of “civilized” warfare, the committee was concerned with other nations learning the secret of the new weapon once the British deployed it in war.³³ Given that proliferation is one of the biggest concerns about the use of chemical weapons today, this rationale for discouraging their use suggests a parallel with modern times and indicates that the “othering”³⁴ of chemical weapons extends much further into the past than the First World War.³⁵

Despite the urgings of two separate advocates for their use, the British again declined to deploy poison gases against the Russians during the Crimean War.³⁶ Across the Atlantic, at least two Northerners wrote letters to military authorities suggesting possible designs for chemical weapons shells to use the American Civil War, and there is anecdotal evidence that, late in the war, glass grenades filled with gas-producing chemicals may have been developed, though whether or not they existed or were merely conceptualized is unclear.³⁷

Although there is no evidence of chemical weapons use in any major Western conflict by the close of the 19th century, there was enough concern about the possibility of their use that delegates to the first Hague Conference in 1899 felt the need to include a provision in the Hague Peace Conference known as Hague Declaration IV, banning the use of “projectiles the sole object of which is

31. Wyndham D. Miles, *The Idea of Chemical Warfare in Modern Times*, 31 J. HIST. OF IDEAS 297, 297 (1970). Miles claims that as early as 1811, British Naval Officer Thomas Cochrane began working on a plan to use gas from burning sulfur to attack French fortifications. *Id.*

32. *Id.* at 298.

33. *Id.*

34. The term “othering” is used in anthropology to describe the process by which one group points out the perceived weaknesses of one group in order to make one’s own group seem more powerful in comparison. Sara Rismyhr Englund, *Introductory Essay: “The Other” and “Othering,”* NEW NARRATIVES, <http://newnarratives.wordpress.com/issue-2-the-other/other-and-othering-2/> (last visited May 26, 2014). Here, I use the term to describe the way in which society has come to view chemical weapons as fundamentally different from other means of killing and the creation of the idea that chemical weapons are inherently cruel, while other means of causing death are seen as less so.

35. See, e.g., J. P. Perry Robinson, *Disarmament and Other Options for Western Policy-Making on Chemical Warfare*, 63 INT’L AFFAIRS 65 (1986). (discussing chemical weapons in the context of Cold War deterrence and concerns that Soviet chemical weapons advancements may outstrip American programs.)

36. Miles, *supra* note 31, at 298-99. Thomas Cochrane again pushed for the use of sulfur against Russian forces at Sevastopol, while Lyon Playfair advocated the use of brittle metal shells filled with acodyls cyanide against Russian ships. Both ideas were rejected by the War Department. Once again, proponents sought to combine naval engagements and chemical gas. This historic connection to naval warfare may suggest why the first agreement about chemical weapons following World War I was the Washington Treaty relating to the Use of Submarines and Noxious Gases in Warfare; Treaty relating to the Use of Submarines and Noxious Gases in Warfare, Washington, Feb. 6, 1922, 25 L.N.T.S. 202 (hereinafter “Washington Naval Treaty”).

37. Miles, *supra* note 31, at 300-03. Miles cites a number of letters and articles written during the Civil War that reference chemical weapons in detail, but they contain mostly theoretical discussions, and he is unable to present any direct evidence that any of these weapons actually went into production or were ever tested. *Id.*

the diffusion of asphyxiating or deleterious gases.”³⁸ The wording of this Declaration, while seemingly straight-forward, suggests some leeway regarding the types of weapons it covers, which is also characteristic of later, post-war agreements.³⁹ The Declaration bans projectiles, but says nothing about other methods of delivery.⁴⁰ As the attack at Ypres consisted of cylinders of compressed chlorine gas released into the wind by nozzles, this was technically not a violation of the specific language of the Declaration, though it clearly went against the Declaration’s intent.⁴¹ Germany, France, and Britain were all signatories of Hague Declaration IV and, by the end of the war, all had deployed chemical weapons against enemy troops.⁴²

Indeed, it seems that German High Command, in planning how to deploy chemical weapons, did carefully consider the wording of the Hague Peace Conference as a whole, along with the specifics of Hague Declaration IV.⁴³ Despite the Conference banning poisoned weapons, German officials determined that, since “asphyxiating gases” were covered under an agreement separate from the agreement on poisoned weapons, they did not fall under the stricter ban of the latter.⁴⁴ Additionally, later gas shells carried an explosive payload along with a chemical agent, creating an explosion on impact and discharging gas.⁴⁵ The purpose of the explosive seems to have been to prevent the shells from violating Hague Declaration IV and its “sole object” clause.⁴⁶ Since the shells now created explosive blasts along with releasing chlorine or mustard gases into the air, they were not weapons whose “sole object” was delivery of poison gas.⁴⁷ That these uses were not technical violations, despite clearly being uses of gas weapons, suggests a conundrum later treaties would struggle to solve: how can a treaty be specific enough to clearly state what it intends to ban, yet broad enough to cover weapons not yet developed or even conceived?⁴⁸

38. Hague Declaration IV—Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 998, 187 Consol. T.S. 453 (hereinafter “Hague IV”).

39. See Washington Naval Treaty, *supra* note 36. See also Geneva Protocol, *supra* note 7.

40. Hague IV, *supra* note 38.

41. Ellwood B. Spear, *Some Problems of Gas Warfare*, 8 SCI. MONTHLY 275, 275 (1919).

42. Hague IV, *supra* note 38. Britain became a signatory in 1907, seven years before the start of the war. *Treaties and States Parties to Such Treaties*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Sep. 20, 2014), https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelect ed=165

43. Trumpener, *supra* note 28, at 468.

44. *Id.*

45. Spear, *supra* note 41, at 277.

46. Trumpener, *supra* note 28, at 468.

47. *Id.*

48. Along with its lack of clarity about exactly what types of weapons it bans, Hague Declaration IV contains another important provision that reappears in the 1922 Washington Naval Treaty and the 1925 Geneva Protocol, the clause that it only prohibits the use of chemical weapons by one signatory against another signatory. Hague IV, *supra* note 38. Washington Naval Treaty, *supra* note 36 art. 5; Geneva Protocol, *supra* note 7. Unlike subsequent, post-war treaties, Hague Declaration IV makes it clear that it is not banning the use

In the decades between the drafting of Hague Declaration IV and the Geneva Protocol, chemical weapons transitioned from a theoretical possibility and experimental curiosity to a gruesome reality of trench warfare.⁴⁹ This reality seeped from the battlefield back to the home front, where poets like Wilfred Owen described the horror of a gas attack in lurid detail, capturing the image of a soldier “[a]s under a green sea, . . . guttering, choking, drowning.”⁵⁰ Men who survived gas attacks brought that experience with them when they considered how best to face this new world where chemical gas was now a very real wartime threat.⁵¹ With these new perspectives on the dangers chemical weapons posed, the international community put forth a new agreement with stronger language that reflected the moral disapproval of World War I’s violations of Hague Declaration IV.⁵²

B. Washington and Geneva: Creating the New Norm

By the end of World War I, it was clear that the Hague Conference was completely ineffective in preventing the use of chemical weapons, possibly because it was unclear what would happen if the ban was violated.⁵³ Hague Declaration IV required only that the Contracting Powers “abstain” from using asphyxiating gases, a mild word that did little to prevent the proliferation of chemical gases on both sides.⁵⁴ While the blanket ban on the use of particular types of gas shells was unique within the Conference, which mostly banned particular uses of technology—regarding the weapons themselves as neutral, the

of chemical weapons in all circumstances, only in specific situations against signatories. Hague IV, *supra* note 38. The Declaration states:

“The present Declaration is only binding on the Contracting Powers in the case of a war between two or more of them. It shall cease to be binding from the time when, in a war between the Contracting Powers, one of the belligerents shall be joined by a non-Contracting Power.” *Id.* Compare this to the language of the Geneva Protocol, where the High Contracting Parties “agree to be bound as between themselves according to the terms of this declaration,” and pledge to “exert every effort to induce other States to accede to the present Protocol.” Geneva Protocol, *supra* note 7. The Washington Naval Treaty contains similar language. See Washington Naval Treaty, *supra* note 36. Hague Declaration IV makes it very clear that the Declaration no longer applies whenever a non-Contracting Power joins a war between two or more Contracting Powers, suggesting the prohibition is more of a matter of contract law than an international declaration of disapproval. Hague IV, *supra* note 38.

49. See Trumpener, *supra* note 28, at 460.

50. Owen, *supra* note 1.

51. See Victor Lefebvre, *Chemical Warfare: The Possibility of its Control*, 7 TRANSACTIONS OF THE GROTIUS SOCIETY 153, 153–54 (1921).

52. Richard Price, *A Genealogy of the Chemical Weapons Taboo*, 49 INT’L ORG. 73, 92 (1995). There has been some argument that one of the reasons for the military’s willingness to ban chemical weapons is their lack of effectiveness. While there is some merit to this argument, it is also clear that, in the general consciousness, at least, chemical weapons represent a morally reprehensible method of warfare, and it is this general consciousness that developed following World War I, and which continues to influence how chemical weapons are perceived. For more of a discussion on the various arguments about effectiveness, see *id.* at 82–84.

53. *Id.*

54. Hague IV, *supra* note 38.

Declaration left a great deal unstated, allowing for an interpretation that followed the letter of the law, even while it violated the spirit.⁵⁵

By declaring chemical gas illegal in wartime, even against soldiers, what Hague Declaration IV did was set the stage for public outcry when it was violated (or appeared to be violated, according to popular opinion.)⁵⁶ The Declaration created a new norm for the conduct of “civilized warfare,” and the fact that it was powerless to stop the debacle that unfolded during the First World War paradoxically strengthened that norm, reaffirming international disapproval and solidifying the idea that chemical gas needed to be banned from war.⁵⁷

This new norm appears first in the language of the 1922 Washington Naval Treaty, which proclaims that:

The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the *civilized* world and a prohibition of such use having been declared in treaties to which a majority of the *civilized* Powers are parties.

The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other *civilized* nations to adhere thereto.⁵⁸

Within the space of two sentences, the Treaty uses the word “civilized” three times.⁵⁹ Additionally, in place of Hague Declaration IV’s “inspired by the sentiments which found expression in the Declaration of St. Petersburg of 29 November (11 December) 1868,” rationale for its ban, the Washington Naval Treaty makes clear that chemical gases have been “justly condemned by the general opinion of the civilized world,” a much stronger statement of purpose.⁶⁰

The Washington Naval Treaty never came into effect, but the language prohibiting chemical weapons had a direct impact on the Geneva Protocol of 1925.⁶¹ The Geneva Protocol contains a nearly-identical statement that, “Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world,” the High Contracting Powers agree not to use chemical

55. Price, *supra* note 52, at 90.

56. *Id.*

57. *Id.* at 92.

58. Washington Naval Treaty, *supra* note 36, at art. 5 (emphasis added).

59. *Id.*

60. Hague IV, *supra* note 38; Washington Naval Treaty, *supra* note 36.

61. Price, *supra* note 52, at 90. Interestingly, it was France, not the United States, that prevented the treaty from taking force. The Senate quickly ratified the Washington Naval Treaty, but France objected to provisions regarding submarines, so the treaty never took effect. Daniel P. Jones, *American Chemists and the Geneva Protocol*, 71 *ISIS* 426, 428–29 (1980).

weapons against each other.⁶² Despite only mentioning “civilized” once, the Geneva Protocol makes clear the international stance against chemical warfare and the conviction of the High Contracting Parties to uphold this ideal.⁶³

Beyond moral disapproval, however, the Geneva Protocol is vague on what, specifically, parties may not do under its terms.⁶⁴ The Protocol declares the prohibition on chemical weapons as “universally accepted as a part of International Law, binding alike the conscience and the practice of nations,” yet talks about “induc[ing] other States to accede to the . . . Protocol,” suggesting that the universality of the Protocol even at the time was not completely assured.⁶⁵ The phrase “exert every effort to induce other States to accede” may suggest—but does not explicitly state—that the Protocol gives the High Contracting Powers the ability to use military force to ensure compliance as an enforcement mechanism.⁶⁶ However, it seems that the chief motivating factor in favor of compliance was—and continues to be—fear of what might happen if chemical warfare is able to develop unchecked.⁶⁷ That is to say, the threat of intervention by other nations is less of a deterrent than the perceived horrors of unchecked chemical warfare, particularly against one’s own nation.⁶⁸

As early as 1921, fears of what the next war would look like drove concerns that, without a means of control, chemical weapons would dominate any future conflicts.⁶⁹ The perceived military effectiveness of chemical weapons, combined with opponents pushing for a strong ban cultivated the impression that gas and other chemical weapons played a much larger role in modern warfare than reality supported.⁷⁰

Victor Lefebure, writing in 1921, declared chemical weapons a “far too potent, decisive, flexible, secret, and generally dangerous [thing] to be left unharnessed in a world which pretends to disarm.”⁷¹ His main concern was that anything but strict, complete compliance with chemical disarmament would lead to the few hold-out powers gaining too much control over warfare and threatening peace.⁷² This concern over national defense, coupled with American exceptionalism and isolationist tendencies in the first half of the 20th century, drove the American Chemical Warfare Service branch of the United States Army

62. Geneva Protocol, *supra* note 7.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Price, *supra* note 52, at 93.

68. *Id.*

69. Lefebure, *supra* note 51, at 156.

70. Price, *supra* note 52, at 93. *See also* Lefebure, *supra* note 51, at 155–58. (discussing the perceived relative effectiveness of chemical weapons as cheaper, deadlier alternatives to conventional weaponry).

71. Lefebure, *supra* note 51, at 157.

72. *See generally id.*

to successfully lobby to prevent American ratification of the Geneva Protocol.⁷³ It was not until late 1969 that President Richard Nixon finally announced he would seek the advice and consent of the Senate to ratify the Geneva Protocol, forty-four years after it was first drafted, and well after it had generally come to be accepted as customary international law.⁷⁴

The American pro-chemical weapons arguments parallel the concerns Lefebure puts forth, but come to the opposite conclusion.⁷⁵ Rather than believing that the horrors of gas warfare made complete disarmament a likelihood, a number of Americans championed the cause of chemical warfare as the more humane way of the future and saw agreement to the Geneva Protocol as hamstringing America's position in future wars.⁷⁶ Most of those proponents of chemical weapons were chemists and members of such organizations as the Chemical Foundation.⁷⁷ Because of groups like the Chemical Foundation, America did not ratify the Geneva Protocol until the Nixon Administration.⁷⁸

73. Jones, *supra* note 61, at 420.

74. Baxter & Buergenthal, *supra* note 7, at 853.

75. See J. M. Scammell, *Chemical Warfare in the Future*, 216 N. Am. Rev. 476, 479–80 (1922).

76. *Id.* at 80.). Scammell cites some dubious statistics in his article to support this position and focuses his argument that gas is generally non-lethal and more humane than conventional weapons around the number of gas-related casualties and deaths in the American Army during the War. See *id.* at 480. There are a few issues with these statistics that would suggest unreliability. To begin with, Scammell discounts the possibility that gas causes tuberculosis (or at least increases a survivor's susceptibility to the disease) and claims that it does not mutilate or disfigure, which is contrary to many accounts of survivors of gas attacks who lived with diminished lung capacity from scarring, not to mention psychological damage. *Id.* at 480; See E. Jones, B. Everitt, S. Ironside, I. Palmer and S. Wessely, *Psychological Effects of Chemical Weapons: A Follow-up Study of First World War Veterans*, 38 PSYCHOLOGICAL MEDICINE 1419, 1419–26 (2008) (discussing the various symptoms reported by survivors of gas attacks and attempting to determine which were psychological). This suggests that his figure for deaths from gas attacks is limited only to battlefield casualties and thus is a low estimate of the actual deaths caused by poison gas. On top of that, by focusing only on American casualties, Scammell looks at only the period of time America was involved in the war, from April of 1917 to November 11, 1918. *American Entry into World War I, 1917*, U.S. DEPT. OF STATE, OFFICE OF THE HISTORIAN (May 26, 2014), <https://history.state.gov/milestones/1914-1920/wwi>. Since, realistically, the bulk of the American Army did not arrive in Europe until early 1918, his numbers at most look at around a fourth of the entire war, from only one side. See *id.* Along the same lines, the Americans arrived at the end of the war, after both sides had developed more effective defenses against chemical weapons, so one would expect American casualties to be much lower. See generally Spear, *supra* note 41 (explaining the evolution of gas disbursal methods and gas masks during the war).

77. Jones, *supra* note 61, at 426.

78. *Id.* at 427. While the pressure these groups exerted so successfully may indicate a belief in the utility and importance of chemical weapons for America's future, the actual public sentiment is more difficult to extrapolate from America's apparent support of chemical warfare, since the outpouring of pro-chemical weapons polemics from American chemists were as likely to be responses to vilification of their profession by the American public as genuine expressions of deeply-held beliefs. See *id.* This concern over the perception of chemistry as aiding chemical weapons lingers within chemists' societies today, but rather than producing opposition to restrictions, these concerns promote the gap between legitimate and illegitimate uses of chemicals, increasing the vilification of chemical weapons by juxtaposing it against chemists aiming to improve society. See Brief for the American Chemistry Council as Amicus Curiae in Support of Respondent at 16, *Bond v. United States*, 131 S. Ct. 2355 (2011) (No. 12-158). See *infra* III.B for more discussion of the ratification process.

A better indicator of where Americans stood on the issue of chemical weapons was not whether the Geneva Protocol was ratified, but whether it was followed in the next war, despite the lack of any binding international legal restraints on American decision-making.⁷⁹

III. THE SECOND WORLD WAR & THE COLD WAR: CONSOLIDATION OF NORMS

A. *The Second World War: The Establishment of an International Taboo and the First Test of Geneva*⁸⁰

Despite the apparent victory of the chemical weapons lobby in the interwar years, every American president during those years, beginning with Warren G. Harding, supported abolishing chemical weapons use.⁸¹ However, when war broke out in Europe in 1939, anticipating the potential advent of a new round of a chemical warfare Armageddon, the American Chemical Warfare Service began to re-arm in preparation for attacks.⁸² Given the flagrant breaches of Hague Declaration IV in the last world war⁸³ and the relative lack of specific legal restraints contained within the Geneva Protocol itself,⁸⁴ it should be rather surprising then that the major powers in the European theater refrained from unleashing chemical weapons against each other.⁸⁵

This is not to say that chemical weapons never made an appearance after World War I.⁸⁶ There have been a number of infractions following the signing of the Geneva Protocol, including Spain's use of its remaining World War I arsenal against Moroccan rebels shortly after the Protocol was concluded.⁸⁷ Italy also unleashed chemical weapons against the Ethiopians in its conquest of that region during World War II.⁸⁸ Both of these instances involve a European nation using chemical gas against a non-European population, revealing a remnant of the attitudes contained in the old Hague Declaration IV in that there seems to have

79. John Ellis van Courtland Moon, *Chemical Weapons and Deterrence: The World War II Experience*, 8 Int'l. Security 3, 7 (1984).

80. While perhaps the best-known use of chemical weapons during World War II is Zyklon-B, used for mass killings in concentration camps during the Holocaust, I have chosen not to include that example in my analysis because the Holocaust and all its horrors is so beyond the scale of anything contemplated by the drafters of the Geneva Protocol, it would require a separate article to do justice to all the unique issues it raises. See generally *At the Killing Centers*, THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM (May 26, 2014), <http://www.ushmm.org/outreach/en/article.php?ModuleId=10007714>.

81. Van Courtland Moon, *supra* note 79, at 7.

82. *Id.*, at 9–10.

83. Price, *supra* note 52, at 92.

84. See Geneva Protocol, *supra* note 7; see also Price, *supra* note 52, at 75.

85. Moon, *supra* note 79, at 9.

86. W. Michael Reisman, *Chemical Weapons: Designing Operable Systems for Enforcing Restraint*, 83 PROC. ANN. MEETING, AM. SOC'Y. INT'L. L. 468, 469 (1989).

87. *Id.*

88. *Id.*

been little international concern about this type of use.⁸⁹ However, it is significant that neither of these nations tried to expand their targets to European countries at the time.⁹⁰ Given that much of the debate over chemical weapons proliferation in Europe during the years between the First and Second World War centered around apocalyptic imaginings of the destruction of civilization through chemical weapons, it is perhaps not surprising that none of the major European powers chose to turn their chemical stash against another power they considered able to retaliate in kind.⁹¹

In fact, in many ways it appears that concerns about retaliation drove at least Allied decision makers more than concern for international law.⁹² While President Roosevelt began his 1943 speech enunciating the American stance on the use of chemical weapons by noting that their use “has been outlawed by the general opinion of civilized mankind,”⁹³ the remainder of the speech made it clear that the United States intended to retaliate if Axis powers attacked with chemical weapons, and discussions among high-level military officials indicate that chemical weapons were ruled out by the Allies as a viable tactical option not because they were illegal, but because they could lead to gas warfare in theaters of war less prepared for a chemical attack.⁹⁴ That Geneva’s ban on chemical weapons had stood throughout the war served to strengthen the general perception that chemical weapons were of a unique and dangerous character and reinforced the notion that chemical weapons had no place in “civilized” warfare.⁹⁵

Interestingly, the Allies seemed more willing to consider the use of gas in World War II than the Nazis, due to Hitler’s experience with gas in the trenches of World War I, again suggesting that, at least at this point, international law was much less of a consideration than retaliation in determining chemical weapons policy.⁹⁶ Regardless of the reasons, however, the Second World War established that it was possible to conduct a war in the modern era without the use of

89. *See id.*

90. *See id.* at 469. As Hague Declaration IV was concerned mainly with preventing the use of chemical weapons between signatories, some element of that mentality may have carried over into the mindset of European nations interpreting the Geneva Protocol in that Morocco did not ratify the Geneva Protocol until 1970 and Ethiopia had just ratified the Protocol in 1935, the same year Italy invaded. *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925*, ICRC: TREATIES AND STATES PARTIES TO SUCH TREATIES (May 14, 2012), http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=280; *See* Lina Grip and John Hart, *The Use of Chemical Weapons in the 1935–36 Italo-Ethiopian War*, SIPRI Arms Control and Non-proliferation Programme, 1, 1 (2009), available at <http://www.sipri.org/research/disarmament/chemical/publications/>.

91. Moon, *supra* note 79, at 5; *see also* Reisman, *supra* note 86, at 469.

92. Moon, *supra* note 79, at 14–19.

93. *Id.* at 14.

94. *Id.* at 14–19.

95. Price, *supra* note 52, at 96.

96. Moon, *supra* note 79, at 25–26.

chemical weapons, and that precedent would foster the growing image of chemical weapons as “inhumane” in the decades that followed.⁹⁷

B. *The Second Half of the 20th Century: Rogue States and the “Poor Man’s Bomb”*⁹⁸

Forty-four years after the Geneva Protocol was originally drafted, Richard Nixon brought the treaty before the Senate to ask advice and consent on ratifying an agreement that, even at the time, was considered to be customary international law.⁹⁹ Part of American reluctance to sign on to Geneva centered around debates about whether chemicals like tear gas or anti-plant agents fall under the broad umbrella of the Protocol’s prohibition of “asphyxiating, poisonous or other gases.”¹⁰⁰ The United States used various herbicides, the most famous of which was Agent Orange, to destroy forests providing cover for the Viet-Cong in Vietnam, and to destroy crops providing food to the enemy.¹⁰¹ Concerns over the applicability of the Geneva Protocol to chemicals like Agent Orange prompted the U.S. to vote against a 1969 Resolution specifying that Geneva applied to “[a]ny chemical agents of warfare-chemical substances, whether gaseous, liquid or solid-which might be employed because of their direct toxic effects on man, animals or plants.”¹⁰²

Despite these concerns, the United States ratified the Geneva Protocol on January 22, 1975.¹⁰³ Given U.S. reticence to sign on to the Protocol, it should be unsurprising that the American response to the first use of chemical weapons in warfare since the U.S. ratified the treaty was tempered more by concern about political relations than about compliance with the spirit of the Protocol.¹⁰⁴

97. Price, *supra* note 52, at 73.

98. *Id.*

99. Baxter & Buergenthal, *supra* note 7, at 853.

100. *Id.* at 855.

101. *Agent Orange*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/8993/Agent-Orange> (last visited Feb. 11, 2014). Agent Orange, while the most famous, was not the only herbicide the US used in Vietnam. In fact, a variety of others were used, but gained less notoriety. The chemicals were given color names based on the color-coded bands on their storage drums. *Id.*

102. Baxter & Buergenthal, *supra* note 7, at 865; G.A. Res. 2603 (XXIV), U.N. GAOR, 24th Sess., U.N. Doc. A/RES/2603 (Dec. 16, 1969).

103. *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol)*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/t/isn/4784.htm> (last visited Sept. 16, 2013). Gerald Ford was the president who actually ratified the Protocol, after the Senate unanimously voted for its approval. This was almost exactly fifty years from when the treaty was first signed, and forty-seven years after it came into effect. *Id.*

104. Glen Kessler, *History Lesson: When the United States Looked the Other Way on Chemical Weapons*, THE WASHINGTON POST (Sept. 4, 2013) available at <http://www.washingtonpost.com/blogs/fact-checker/wp/2013/09/04/history-lesson-when-the-united-states-looked-the-other-way-on-chemical-weapons/>.

During the Iran-Iraq War, the Iraqis deployed chemical weapons against Iran, manufactured from materials often supplied by American sources.¹⁰⁵ By 1983, State Department intelligence reports declared that Iraq was deploying chemical weapons against Iran on an almost daily basis, yet Americans did not intervene in any way.¹⁰⁶ In fact, the United States was assisting the Iraqis with battlefield intelligence.¹⁰⁷

Why such a lack of American outrage at the blatant use of chemical weapons? One possibility is that American policymakers were more concerned with the possible rise of Iran than the breach of the Geneva Protocol.¹⁰⁸ The war between Iran and Iraq began in 1980, the year after the Islamic Revolution in Iran placed Ayatollah Khomeini in power¹⁰⁹, and American sentiment toward Iran was fairly hostile.¹¹⁰

This lack of response, or at least lack of affirmative response, illustrates one of the largest flaws in the Geneva Protocol, namely that, without a specific mechanism for enforcement, compliance hinges on its signatories' willingness to require other nations to uphold its prohibitions.¹¹¹ In the case of the Iran-Iraq War, the Protocol's prohibitions simply were not strong enough to overcome American political concerns and interests in Iraqi victory, allowing the American government to simply ignore clear evidence of chemical weapons use by its allies.¹¹² The response of the U.N. was hardly more effective.¹¹³ After an extensive investigation, the U.N. Security Council stated that they were "profoundly concerned" about the findings that Iraq had used chemical weapons, and "strongly condemned" continued use in violation of the Protocol.¹¹⁴ The Security Council and the General Assembly both issued a number of similar statements, declaring that they expected compliance with the Protocol and that they condemned the actions of Iraq, but they took no substantive measures beyond this.¹¹⁵

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Roger Hardy, *The Iran-Iraq War: 25 Years on*, BBC NEWS (Sept. 22, 2005), http://news.bbc.co.uk/2/hi/middle_east/4260420.stm.

110. Kessler, *supra*, note 104. America had long had a special relationship with the Shah, after a 1953 CIA-backed coup installed him in power. When the Shah came to America for cancer treatment in 1979, a mob of Iranian students overran the American Embassy in Tehran. Fifty-two American embassy workers remained hostages in Iran until the end of President Carter's term in office, despite attempts to free them. *The Iranian Hostage Crisis*, THE AMERICAN EXPERIENCE, <http://www.pbs.org/wgbh/americanexperience/features/general-article/carter-hostage-crisis/> (last visited Feb. 12, 2014).

111. See Geneva Protocol, *supra* note 7.

112. Kessler *supra*, note 104.; Geneva Protocol, *supra* note 7.

113. Timothy L. H. McCormack, *International Law and the Use of Chemical Weapons in the Gulf War*, 21 CAL. W. INT'L L.J. 1, 21, 21 (1991).

114. *Id.*

115. *Id.* at 21 –28.

C. *Remodeling the Taboo: The Chemical Weapons Convention*

In an effort to strengthen the prohibitions on chemical weapons, and to clarify what could and could not be traded, the nations of the world came together in 1993 to create a new, more extensive treaty on chemical weapons.¹¹⁶ One of the most important additions the new Chemical Weapons Convention introduced was a verification process, instituting a means for the international community to inspect for compliance with the treaty, and setting up a process for destruction of prohibited chemicals.¹¹⁷ A considerably more extensive document than the Geneva Protocol, the CWC sought to define “chemical weapons” as more than just the “asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices,”¹¹⁸ the CWC lays out the following definition of chemical weapons:

- (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
- (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;
- (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).¹¹⁹

While this is a much longer definition, it still suffers from the same broad language that characterizes the Geneva Protocol, particularly in the range of substances that can be classified as a “toxic chemical,” which the CWC defines as “Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”¹²⁰ In fact, while the CWC does include an Annex, with certain specific chemicals listed, not only is this list non-exhaustive, but the guidelines for determining whether a new chemical falls under the Schedule of chemicals can be read nearly

116. CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, preamble.

117. See David A. Koplow, *Long Arms and Chemical Arms: Extraterritoriality and the Draft Chemical Weapons Convention*, 15 YALE J. INT’L L. 1, 25 (1990).

118. Geneva Protocol, *supra* note 7.

119. CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, art. II.

120. *Id.* For more explanation of how broad this definition is in practice, see the discussion of the *Bond* case, *infra* Part IV.B.

as broadly and mostly relate to the Verification Annex and reporting requirements.¹²¹

The CWC sets out a detailed plan for the systematic destruction of chemical weapons by the signatories and creates a new body, the Organization for the Prohibition of Chemical Weapons (“the Organization”), to oversee compliance.¹²² However, it is unclear what specific measures will follow a violation, as the remedy for cases of “particular gravity” is for the members of the Convention to refer the matter to the U.N. General Assembly and the Security Council.¹²³ Additionally, the powers of the Organization are restricted to enforcing compliance among member States.¹²⁴

IV. A NATION IN REVOLT & A JEALOUS RIVAL: CONTEMPORARY PROBLEMS WITH CHEMICAL WEAPONS

A. *The Syrian Problem: Enforcing the Ban against a Nation in Revolt*

In the early morning hours of August 21, 2013, Syrian government forces launched a series of missiles, loaded with sarin gas, at about half a dozen neighborhoods controlled by rebel forces.¹²⁵ The warheads, Soviet-era M-14 surface-to-surface rockets, were able to carry between 11 and 16 gallons of chemical agent apiece, with several missiles found at each attack site.¹²⁶ Sarin is a nerve agent, an airborne poison gas that is odorless, colorless, and tasteless, making it difficult to detect.¹²⁷ It attacks the nervous system and can cause death within minutes¹²⁸, while those who survive exposure experience a range of

121. *Id.* at Annex on Chemical Weapons. The Guidelines do insert language that can be read as narrowing, describing, for example, Schedule 1 chemicals as those that have “little to no use for purposes not prohibited under this convention.” *Id.* at Annex for Chemicals, (A)(1)(c). The problem with this limitation, though, is that it may be both overbroad and under-inclusive, depending on what situation may arise. While a vast improvement over the Geneva Protocol, the detailed classification standards of the CWC are still less than adequate to prevent the use of chemical weapons by a determined nation.

122. *Id.* at art. IV, art. VIII.

123. *Id.* at art. XII. The CWC also suggests that, for cases where a party has been requested to take action and has failed to do so, the Conference can suspend that party’s rights and privileges under the CWC until it is in compliance. For more serious matters, the Conference “may recommend collective measures to States Parties in conformity with international law.” CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, art. XII.

124. *Id.* at art. VIII.

125. Joby Warrick, *More Than 1,400 Killed in Syrian Chemical Weapons Attack, U.S. Says*, THE WASHINGTON POST (Aug. 30 2013) http://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5_story.html.

126. *Syria Chemical Attack: What We Know*, BBC NEWS (Sept. 24, 2013, 5:46 AM), <http://www.bbc.co.uk/news/world-middle-east-23927399>.

127. *Id.*

128. *Id.*

symptoms, “including shortness of breath, disorientation, eye irritation, blurred vision, nausea, vomiting and general weakness.”¹²⁹

The American response was considerably more disapproving than the response to the Iran-Iraq War use of chemical weapons, but remained cautious while the details of the attack were still under investigation.¹³⁰ As early as June of 2013, the U.S. had raised concerns that Syria was using chemical weapons against rebel forces, and while talk of aid and the possibility of establishing a No-Fly Zone came from the White House, ultimately the international community took a different step to prevent Syria’s continued use of chemical agents.¹³¹

When the attacks took place, Syria was not a signatory to the CWC.¹³² However, as international pressure mounted, Syria’s Assad regime, already bound by the Geneva Protocol, agreed to become a party to the CWC.¹³³ The CWC’s Organization set forth an accelerated plan for the destruction of Syria’s weapons¹³⁴ and the U.N. Security Council adopted a resolution on September 27, 2013 to further implement this program.¹³⁵ The U.S., Russia, and NATO then began working out the details of the long process of destroying Syria’s extensive chemical weapons cache.¹³⁶

How voluntary Syria’s agreement to sign the CWC raises issues about the enforceability of a ban on chemical weapons where even the treaty with the most teeth is limited by its applicability to only signatories, one of the concerns raised by the post-World War I scholars regarding any type of meaningful prohibition of chemical weapons.¹³⁷ With help from Russia, Syria acceded to international pressure fairly easily, but that in itself raises the question of what would happen with a more defiant regime, or a less united international front.¹³⁸

129. *Id.*

130. In the intervening years between Reagan’s response to the Iran-Iraq War and Obama’s steps in dealing with Syria, the United States had gone to war in Iraq during George W. Bush’s administration over claims that Saddam was stockpiling “Weapons of Mass Destruction,” including chemical weapons, in contravention of the CWC. These claims turned out to be false and the resultant war between the U.S. and Iraq drew criticism, possibly contributing to Obama’s caution. See Warrick, *supra* note 125.

131. Karen DeYoung & Anne Gearan, *U.S., Citing Use of Chemical Weapons by Syria, to Provide Direct Military Support to Rebels*, THE WASHINGTON POST (Jun. 13, 2013), http://www.washingtonpost.com/world/national-security/us-concludes-syrian-forces-used-chemical-weapons/2013/06/13/59b03c66-d46d-11e2-a73e-826d299ff459_story.html; *Syria’s Chemical Weapons Stockpile*, BBC NEWS (Jan. 30, 2014), <http://www.bbc.co.uk/news/world-middle-east-22307705>.

132. See Freedman, *supra* note 5.

133. *Id.*

134. *OPCW Director-General Welcomes Agreement on Syrian Chemical Weapons*, ORGANIZATION FOR THE PROHIBITION OF CHEMICAL WEAPONS (Sept. 14, 2013), <http://www.opcw.org/news/article/opcw-director-general-welcomes-agreement-on-syrian-chemical-weapons/>.

135. S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

136. Gabriela Baczyńska & Adrian Croft, *Exclusive: Russia, NATO Plan Joint Operation on Syria’s Chemical Weapons*, REUTERS (Feb. 14, 2014), <http://www.reuters.com/article/2014/02/14/us-syria-crisis-russia-nato-idUSBREA1DOY120140214>.

137. See Freedman, *supra* note 5.

138. *Id.*

The issue is compounded by the fact that, despite a number of breaches of the Geneva Protocol, there is no real historical blueprint for an acceptable international community's response in Syria, since the general response throughout history has been fairly weak at best.¹³⁹ Even using the response to the last confirmed use of chemical weapons in warfare by Iraq provides little guidance, as the U.S. did nothing, and the U.N. did little more than pass resolutions expressing disapproval; neither of these responses is likely to bring about an end to the use of chemical weapons by a determined regime.¹⁴⁰

Given America's pattern of lukewarm enthusiasm for controls on chemical weapons, it is somewhat difficult to exert influence by claiming the moral high ground in this matter, another factor to consider regarding enforcement.¹⁴¹ Additionally, this moral authority, the U.S. Government claims, is at stake in a case raising the issue of whether a statute enacting the CWC can be brought to bear against an individual.¹⁴²

B. Bond v. United States: Chemical Weapons in Everyday Life?

The phrase "chemical weapons" evokes images of war-torn landscapes and battered soldiers or civilians, struggling to breathe as they run from militarized death. It does not generally call to mind a Pennsylvania woman sneaking around the car and mailbox of a romantic rival and covering the other woman's door knobs and car handles with ill-concealed chemicals.¹⁴³ Yet a grand jury in the Eastern District of Pennsylvania charged Carol Anne Bond with possessing and using a chemical weapon under 18 U.S.C. section 229, the statute implementing the 1993 Chemical Weapons Convention, for attempting to poison Myrlinda Haynes with chemicals stolen from work and ordered on the internet.¹⁴⁴

Bond's story seems more at home on a soap opera than at the center of a debate over federalism and an international chemical weapons treaty. Haynes and Bond had been friends, and when Haynes announced she was pregnant, Bond was initially excited.¹⁴⁵ Upon learning that the father of Haynes's child was none other than Bond's own husband, however, Bond decided to exact revenge through poison.¹⁴⁶ Trained as a microbiologist and employed by the chemical manufacturer Rohm and Haas, Bond stole toxic chemicals from work and

139. See *supra* Parts II, III, for a discussion of the international community's responses after World War I, World War II, and the Iran-Iraq War.

140. See Kessler, *supra* note 104; McCormack, *supra* note 113, at 21–28.

141. See *supra* Parts II & III, for a discussion of U.S. reluctance to agree to sign onto the Geneva Protocol.

142. Richey, *supra* note 14

143. *United States v. Bond*, 581 F.3d 128, 132 (3d Cir. 2009) *rev'd and remanded*, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (U.S. 2011).

144. *Id.* at 131–32

145. *Id.* at 131.

146. *Id.*

ordered others over the internet.¹⁴⁷ She then spread these chemicals on Haynes's doorknob, car door handles, and mailbox numerous times over the course of several months.¹⁴⁸ While these chemicals are toxic and have the potential to cause a great deal of harm, the worst injury Haynes sustained was a chemical burn to her thumb on one occasion, mostly because Bond's efforts at concealment were inept enough that Haynes generally was able to avoid the chemicals.¹⁴⁹

When the local police suggested that the substance left around Haynes's house could be cocaine but did little else to help, Haynes contacted the United States Postal Inspection Service, which set up surveillance cameras around Haynes's house and caught Bond stealing an envelope from Haynes's mailbox and placing chemicals inside the muffler of Haynes's car.¹⁵⁰ For these actions, Bond faced two counts of possessing and using a chemical weapon under 18 U.S.C. section 229.¹⁵¹

The federal statute that prosecutors charged Bond under makes it a criminal offence for any person, other than those authorized by law, to knowingly "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."¹⁵² A chemical weapon as defined by the statute constitutes any "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose;"¹⁵³ practically identical wording to the definition of chemical weapons in the Chemical Weapons Convention.¹⁵⁴ Both the statute and the convention define "toxic chemical" as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."¹⁵⁵

While the Bond case presents issues of federalism and the power of Congress to enact legislation implementing treaties,¹⁵⁶ it also illustrates the scope of possible substances that could fall within the convention's definition of "toxic

147. *Id.*

148. *Id.* at 132. The court states that there were at least 24 instances of Bond spreading chemicals around Haynes's house in these locations.

149. *United States v. Bond*, 581 F.3d 128, 132 (3d Cir. 2009) *rev'd and remanded*, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (U.S. 2011).

150. *Id.*

151. *Id.* Bond also faced two counts of mail theft, though these charges are not at issue.

152. 18 U.S.C.A. § 229(a)(1) (West 2013).

153. 18 U.S.C.A. § 229(f)(1)(A) (West 2013).

154. CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, art 2. Note that the only change in wording is that "convention" becomes "chapter" in the American statute.

155. *Id.*

156. *United States v. Bond*, 681 F.3d 149, 151 (3d Cir. 2012) *rev'd and remanded*, 134 S. Ct. 2077(2014). In fact, the case was decided on Federalism grounds, with the majority declining to reach interpreting the Chemical Weapons Convention, instead finding that Congressional intent in enacting the statute could not have possibly meant to cover acts of attempted poisoning at the state level without a clear indication otherwise. *United States v. Bond*, 134 S. Ct. 2077, 2087 (2014)

chemical.”¹⁵⁷ During oral arguments of the case before the Supreme Court on November 5, 2013, Justice Alito noted that, under the strictest reading of the terms of the statutory definition of “toxic chemical,” chocolate would be banned because it is harmful to dogs and therefore meets a strictly literal interpretation of the definition.¹⁵⁸ The Court found that there was no indication that Congress intended the statute to have such a broad interpretation, and decided that “chemical weapon” should be interpreted closer to the popular idea of the term, regardless of the literal text of the statute.¹⁵⁹ While the idea that the purpose of Congress, or the framers of the convention, was to ban chocolate is absurd, the comment raises two very important concerns surrounding the enforcement of the Chemical Weapons Convention: What actually constitutes a chemical weapon, and just how common are they?

The answer to the first of these questions will suggest an answer to the second, as it becomes easier to figure out how common chemical weapons are once they are defined. Unfortunately, none of the chemical weapons treaties of the 20th century offer any real guidance in determining what is *not* a chemical weapon, only in suggesting things that *could* be.¹⁶⁰ Therefore, in order to better understand what a chemical weapon is, we need to look back at the evolution of chemical weapons bans in the 20th century, where it becomes clear that the types of chemicals the original signatories of the Geneva Protocol envisioned were those used by nations against enemy combatants.¹⁶¹ Why, then, was this not spelled out?

One reason for the ambiguous language could be to ensure that the Protocol and its progeny would apply to broader international situations as they arose, rather than requiring a new treaty every time one nation thought up a new chemical weapon, or a different use for an old one.¹⁶² While maintaining a “know

157. See CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, art. 2. Indeed, Justice Scalia, in his concurrence in the *Bond* case makes exactly this point, finding that the definition of chemical weapon, as expressed in 18 U.S.C.A. § 229, does in fact encompass Bond’s actions and would therefore have decided the case on constitutionality grounds. *Bond*, 134 S. Ct. at 2094–95 (Scalia, J., concurring).

158. Lyle Dennison, *Argument Recap: A Tense Hour at the Court*, SCOTUSBLOG (Nov. 5, 2013, 12:54 PM), <http://www.scotusblog.com/2013/11/argument-recap-a-tense-hour-at-the-court/>. Justice Alito was describing the American statutory definition of “toxic chemical,” but as the wording of the American statute and the definition in the convention are identical, his comments could be equally applied to either. *Bond*, 134 S. Ct. at 2084; Compare 18 U.S.C.A. § 229(f)(1)(A) (West 2013) with CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45 art. 2.

159. *Bond*, 134 S. Ct. at 2093.

160. See Geneva Protocol, *supra* note 7. See also G.A. Res. 2603 (XXIV), U.N. GAOR, 24th Sess., U.N. Doc. A/RES/2603 (Dec. 16, 1969); CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, art. 2.

161. See, e.g., Lefebure, *supra* note 51, at 153.

162. See generally Scammell, *supra* note 75. Scammell describes the evolution of chemical warfare over the course of three years during World War I, suggesting the idea that rapid development of new technologies would have been something his contemporaries were familiar with and may have considered in their drafting of the Geneva Protocol.

it when I see it” standard for chemical weapons¹⁶³ might make sense in that context, this standard makes it easy to dilute the power of labeling something a “chemical weapon” in the international community by labeling a disparate array of chemicals used as “weapons,” rather than confining the term to the more traditional concept.¹⁶⁴ When coupled with the lack of definite enforcement mechanisms, the danger becomes more apparent.¹⁶⁵ The most powerful enforcement mechanism for the Geneva Protocol and the CWC is the international community’s fear of and moral outrage against chemical weapons.¹⁶⁶ By being able to classify routine poisonings as violations of the CWC, it removes the power behind that outrage at such an unusual violation of the rules of civilized warfare and reduces it to the commonplace.¹⁶⁷

V. DESIGNING A NEW APPROACH

A. *Clarifying the Definition of Chemical Weapons*

While the CWC expanded the definition of chemical weapons beyond the “asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices” of the Geneva Protocol, it did little to clear up what was—or more precisely, what was *not*—covered by its definition.¹⁶⁸ The drafters of the Geneva Protocol were writing ten years after the first major use of chemical weapons in a theater of war and with knowledge of the horrors these types of weapons can cause.¹⁶⁹ That knowledge is, thankfully, no longer common experience across the

163. In essence, this is the standard for defining a chemical weapon under 18 U.S.C.A. § 229 that the Court adopts in *Bond* case, noting that taking the definition to reach as broadly as possible would produce absurd results. *See Bond v. United States*, 134 S. Ct. 2077, 2090–92.

164. *See Price*, *supra* note 52, at 96 (1995). Price describes the usual course of moral outrage against a particular weapon as such: “the historical record indicates that moral qualms about the use of novel technologies of destruction issue most prominently (if not surprisingly) from those upon whom the weapons initially are inflicted. Moral objections may continue once the monopoly is lost and the initial victim incorporates the new weapon (as with the crossbow), but the overwhelming tendency is for such moral concerns to fall by the wayside as the possibilities of technology are embraced by more than one party,” but points out that, at least so far, gas shells have not followed this path. *Id.*

165. *See supra* Parts II.B, III.C, and IV.A, for a discussion of the lack of enforcement mechanisms in place.

166. *Compare Moon*, *supra* note 79, at 14–19 (describing U.S. concerns about wartime retaliation) with *Kessler*, *supra* note 104 (describing U.S. indifference during the Iran-Iraq War), suggesting that, between moral outrage and fear of consequences, fear is a stronger motivation. *See also Reisman*, *supra* note 86, at 470.

167. One possible distinction regarding how chemical weapons use could be charged might be the difference between use by a state or organized group as opposed to use by an individual. The CWC suggests this could be a distinction, given the wording of Article I, but never explicitly states this. *See CWC*, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45 art. 1.

168. *Compare Geneva Protocol*, *supra* note 7 with *CWC*, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, art. II to see the way each document defines a chemical weapon.

169. *Trumpener*, *supra* note 28, at 460–61. *See supra* Part II.A, for a discussion about the experiences and concerns of the post-World War I world.

globe, but this raises the issue of whether a broad definitions of what constitutes a chemical weapon serves to really protect against their use.¹⁷⁰

Because enforcement of the ban on chemical weapons is so dependent on their perceived unique nature, defining what they are not is as important as defining what they are, and will help facilitate enforcement by giving countries notice about what is and is not acceptable use of substances that can have both lethal and non-lethal uses, along with suggesting appropriate action for different levels of violation.¹⁷¹ While the *Bond* case provides the most extreme case of confusion over the magnitude of what the CWC covers,¹⁷² the Geneva Protocol's wording raises questions as to whether it covers only lethal or potentially lethal agents, or whether compounds such as tear gas are also included in the ban.¹⁷³

An effective way of counteracting this confusion might be to modify the schedule of chemicals and chemical weapons listed in the CWC Annex, which currently is a non-exhaustive list with basic guidelines for including other chemicals similar to those listed, such as how similar its chemical composition is to a listed chemical.¹⁷⁴ Beyond just classifying each known, agreed-upon chemical weapon into levels, these categories could be modified to create two additional sub-sets of classifications with corresponding consequences for use under particular circumstances.¹⁷⁵ Lethal chemicals, such as chlorine and mustard gas, and nerve agents like sarin, used in particular ways, would occupy the first level, as major offenses, and their use would bring about strong international action.¹⁷⁶ While not binding on those nations that do not agree to the modification, such an amendment would memorialize the kind of reaction the international community considers appropriate for a breach, requiring political justification for more lenient measures.

A second level would encompass non-lethal chemical weapons, or chemicals intended to be non-lethal, but which have deleterious effects, such as tear gas or

170. See *supra* Part III.A , B, for a discussion on incidents of chemical warfare since the adoption of the Geneva Protocol.

171. See, e.g., Baxter & Buergenthal, *supra* note 7, at 853–54; Reisman, *supra* note 86, at 470.

172. Dennison, *supra* note 158.

173. Baxter & Buergenthal, *supra* note 7, at 853–54.

174. CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, Annex on Chemical Weapons.

175. Such a scheme could be worked as a modification of the existing CWC, provided all the parties to the CWC agreed to its amendment. The changes would not be binding on parties that choose not to agree, nor would it bind third parties. United Nations Conference on the Law of Treaties, Vienna, Austria, March 26-May 24, 1968, *Vienna Convention on the Law of Treaties*, Part IV, art. 39 et seq. U.N. Doc. A/CONF.39/11/Add.2 (May 23, 1969) (hereinafter “Vienna Convention”).

176. The CWC sets up the international legal framework for this to take place within Article XII, where the Conference may recommend measures to ensure compliance in the event of a breach. In combination with the recommendations in Part V(B), *infra.*, this would provide a more specific set of guidelines than the CWC currently has. See CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, art XII.

herbicides used in warfare.¹⁷⁷ This additional level of classification would allow greater discretion for the international community to take into account specific circumstances in responding, including the purpose of the chemical's use, how widespread the effects were, and whether other, viable, non-chemical options were available to achieve this purpose.¹⁷⁸ To protect the aim of inclusiveness behind the broad definitions of chemical weapons in current treaties, this schedule would not be considered exhaustive, and the Organization created by the CWC would have the power to review new types of chemical weapons to determine which level best describes their characteristics, but it would focus more on the lethality of chemicals than the current Schedules.¹⁷⁹ Significantly, both schedules could explicitly set out circumstances and factors where use of their particular chemicals would not be considered a violation of the CWC, providing a compliment to the current list of factors meant to determine whether something is a chemical weapon.¹⁸⁰ The new classifications could work in tandem with the current Schedules under the CWC, with the existing system suggesting the severity of the violation and the new schedule providing guidance for enforcement.

B. *Agreeing on Enforcement Mechanisms*

While the number of violations of the Geneva Protocol and its progeny has been relatively low, the response to those violations has been less than exemplary.¹⁸¹ The response to Syria's latest use of sarin gas is, to date, the most extensive proactive international action against a nation that has violated the prohibitions on chemical weapons.¹⁸² Much of this has to do with the ambiguous

177. For a discussion on the debate over whether tear gas and Agent Orange qualify as asphyxiating substances under the Geneva Protocol, see Baxter & Buergenthal, *supra* note 7, at 856–57.

178. The standard of review I envision here is similar to that used by the U.S. Supreme Court in deciding Dormant Commerce Clause issues. For an explanation of that standard, see *Dean Milk Co. v. Madison*, 340 U.S. 349, 354–56 (1951).

179. To prevent this provision from running afoul of the non-retroactivity clause of the Vienna Convention on the Law of Treaties, the wording of the schedule would need to include that the list was non-exclusive and that chemicals analogous to those listed would also be considered to violate the prohibition. If the descriptions of what characteristics define each level are specific enough, this would serve to put nations on notice. Vienna Convention, *supra* note 175, U.N. Doc. A/CONF.39/11/Add.2, Part III, sec. 2, art. 28 et seq.).

180. See CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, Annex on Chemical Weapons. The concern about whether poisoning a goldfish to send a message to a governor, *Godfather*-style, could be enough under the current wording to push the use of detergent into the category of terrorism and assassination covered by the CWC could also be addressed by this classification, as detergent, generally intended to be non-lethal, would fall under the second category, where the relatively minor impact of its use on a single goldfish would point to it being classified as not a chemical weapon; See *Bond v. United States*, 134 S. Ct. 2077, 2097 (2014) (Scalia, J., concurrence).

181. See Parts II.B, III.

182. Compare Baczynska & Croft, *supra* note 136 with, e.g., Glen Kessler, *History Lesson: When the United States Looked the Other Way on Chemical Weapons*, THE WASHINGTON POST (Sept. 4, 2013) available

nature of what the Geneva Protocol and the CWC require when there is a breach.¹⁸³ The CWC allows nations to take the “necessary measures” to ensure compliance, but does not specify beyond that, allowing nations to substitute national aims for international action.¹⁸⁴

One solution to this problem is to create more specific examples of consequences for violating the chemical weapons prohibition, tying the level of the violation to the international action.¹⁸⁵

Use of a level one chemical, for example, would be a serious infraction, and could lead to economic sanctions or military intervention, along with the disposal requirements already in place under the CWC.¹⁸⁶ While still allowing for final decisions to be made by the Security Council or General Assembly of the U.N., specifying the types of international responses likely to result from a violation of each level of the prohibition would create more certainty and uniformity in the application of the prohibition and would discourage nations from ignoring violations for political reasons.¹⁸⁷

Of course, none of these modifications to the CWC would have the power to bind any nation that is not already a party to the CWC.¹⁸⁸ This does not mean, however, that a state that is not a party to either agreement can use chemical weapons with unchecked impunity.¹⁸⁹ Under Chapter VII of the Charter of the United Nations, the Security Council has the power to act on any threats it determines to be a breach of the peace, and is authorized to make decisions regarding what methods to use combating such threats.¹⁹⁰ Arguably the use of chemical weapons, as defined by the international community would fall under a breach of the peace, and with more definite parameters for enforcement, it may be easier to convince the Security Council to act.

Additionally, though the Geneva Protocol’s specified prohibitions fall short of those this Comment proposes, they are customary international law, and therefore, a non-party state that uses chemical weapons might be subject to reprisals under the Geneva Protocol, despite never specifically assenting to its

at <http://www.washingtonpost.com/blogs/factchecker/wp/2013/09/04/history-lesson-when-the-united-states-looked-the-other-way-onchemical-weapons/>.

183. Geneva Protocol, *supra* note 7; CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, art. XII.

184. CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, art. XII.

185. *See supra* Part V.A.

186. These actions are currently possible under the CWC, but not specified, and therefore easier to avoid for political reasons. CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45, art. XII. *See supra* Part V.A, for a discussion on what constitutes a level one chemical weapon.

187. The CWC already provides for U.N. intervention, but a clarification of the likely results of a violation would improve the ability to enforce the agreement. CWC, *supra* note 17, S. Treaty Doc. No. 103-21 (1993), 1974 U.N.T.S. 45 art. XII.

188. Vienna Convention, *supra* note 175, U.N. Doc. A/CONF.39/11/Add.2, Part III, sec. 4, art. 34 .

189. U.N. Charter ch. VII, art. 39. The Geneva Protocol is generally considered customary international law, and therefore binding on all states. Baxter & Buergenthal, *supra* note 7, at 853.

190. U.N. Charter ch. VII, art. 39.

provisions.¹⁹¹ While the specific proposed provisions in this Comment would not apply in a situation where a state was party to neither agreement—or even where a state was only a signatory of the Geneva Protocol—having a defined concept of an appropriate response under the proposed clarifications could help direct the international community’s response in situations where the legal standing is less clear, or where chemical weapons are used by a non-state actor.¹⁹²

VI. CONCLUSION

Ambiguity is nothing new in chemical weapons agreements, nor is a lack of clearly defined enforcement mechanisms.¹⁹³ The Geneva Protocol—now considered customary international law—was born out of the anxieties of post-World War I Europe.¹⁹⁴ There was a fear that, “Unless [chemical weapons development was] checked, [Europe would] find nations working on diverging lines of protective and aggressive chemical warfare.”¹⁹⁵ A broad definition of “chemical weapons” would have helped further that cause by including the known weapons of World War I with any new weapons that could be invented.¹⁹⁶

While that ambiguity makes it possible to bring in international organizations to coordinate the removal and destruction of Syria’s chemical weapons¹⁹⁷ and to charge a jealous wife with using chemicals against her rival,¹⁹⁸ this does not necessarily mean the treaty is stronger or easier to enforce because its ambiguity allows both readings. In fact, widening the possible applications of the treaty may actually weaken the most powerful enforcement mechanism of any chemical weapons treaty: the perception of chemical weapons as rare and uniquely heinous instruments of war that must be avoided by civilized nations.¹⁹⁹

191. See Baxter & Buergenthal, *supra* note 7, at 853. This issue did not arise with Syria because, although not a party to the CWC prior to the attacks on Ghouta, Syria was a signatory to the Geneva Protocol. S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 27, 2013).

192. Vienna Convention, *supra* note 175, U.N. Doc. A/CONF.39/11/Add.2, Part III, sec. 4, art. 34. For guidance on how to interpret the Geneva Protocol, the Vienna Convention on the Law of Treaties states that treaties should be read in context with subsequent agreements between the parties. *Id.* While, again, this would not absolutely control the actions of signatory states dealing with non-signatory states, the agreements between signatory states as to how they will deal with each other could suggest possible solutions to dealing with third party violators. *See id.*

193. See Hague IV, *supra* note 38. *See also* Geneva Protocol, *supra* note 7.

194. Geneva Protocol, *supra* note 7.

195. Lefebure, *supra* note 51, at 156.

196. *See id.* at 157.

197. *Chemical Arms Watchdog Adopts Syria Stockpile Plan*, BBC NEWS (Nov. 15, 2013, 4:33 PM), <http://www.bbc.co.uk/news/world-middle-east-24966482>.

198. Richey, *supra* note 14.

199. See Reisman, *supra* note 86 at 468–69. Reisman discusses a number of myths surrounding the use of chemical weapons, challenging the idea that they are especially cruel or unusual. *Id.* Despite concluding that general compliance with chemical weapons treaties is a myth, Reisman’s discussion of these “myths” suggests a prevailing attitude about chemical weapons that helps explain why treaties with relatively weak explicit

Because compliance with chemical weapons treaties has always depended on the societal “othering” of chemical weapons—the notion that chemical weapons are especially dangerous and immoral—applying the prohibitions in the treaty too often has the potential to be as detrimental to compliance as applying it too infrequently, because over-application dilutes the special nature of chemical weapons.²⁰⁰ Without this special nature, chemical weapons become mundane.²⁰¹ Because the legal enforcement mechanisms are weak and dependent on this long-standing fear, making the treaty applicable to more infractions has the inverse effect of making it more difficult to enforce by diluting the moral outrage against chemical warfare.²⁰² On the other hand, under-enforcement of the treaty could lead to rogue states turning to chemical weapons as a means of increasing their position of power within the international community or as a method of controlling their populace.²⁰³ By allowing acts that should fall within the prohibited category of the treaty to pass unaddressed, the likelihood of more attacks like the ones in Syria could increase.

The Geneva Protocol and its progeny have never been, on their own, terribly strong or effective international law.²⁰⁴ Instead, it is the fear of the unique character of chemical weapons as particularly inhumane and “uncivilized,” combined with a concern about retaliation, that has fostered general international compliance—with a few notable exceptions—to the prohibition on chemical weapons.²⁰⁵ The vague nature of the treaties’ definitions of chemical weapons, combined with the lack of any cognizable enforcement mechanism, and a lack of historical precedent for enforcement methods, leads to the dual threat of under-enforcement—creating an atmosphere where the events in Syria can take place—and over-enforcement—leading to a case like *Bond* that threatens to dilute the only real strength of the treaties: the rare nature of chemical weapons use.²⁰⁶ The way to remedy these concerns is by clarifying what does and does not qualify as a chemical weapon, and what the consequences of lack of compliance are.²⁰⁷

enforcement mechanisms still draw such international outrage and attention when they are violated. *See generally id.*

200. Price, *supra* note 52, at 96.

201. *See* Reisman *supra* note 86, at 470.

202. Price, *supra* note 52, at 77–78.

203. *See* Reisman, *supra* note 86, at 470.

204. *See supra* Parts II & III.

205. *See supra* Parts II & III.

206. *See supra* Part IV.

207. *See supra* Part V.

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