



NATIONAL LAWYERS GUILD INTERNATIONAL COMMITTEE MILITARY LAW TASK FORCE

Short Version of Briefing Paper on Military Action in Syria

The International Committee of the National Lawyers Guild and the Military Law Task Force of the National Lawyers Guild are very concerned that the debates on whether the United States should use military force in Syria have not addressed the United States' obligations under the United Nations Charter, as well as its international obligations. It appears to us that the only alternatives being presented are either some form of military intervention or doing nothing. We think this is a false dichotomy. Below is a short briefing paper on the law, which is short due to time constraints. We are planning to provide a longer, more comprehensive briefing paper in the future as time permits. The paper addresses the international norm against the use of chemical weapons, the illegality of military action, and what alternatives exist to military force.

I. THERE IS AN INTERNATIONAL NORM AGAINST THE USE OF CHEMICAL WEAPONS

There is no question that the use of chemical weapons violates an international norm against the use of poison or poisoned weapons in war. The use of any type of chemical weapon by any party is a war crime. Chemical weapons that kill and maim people are illegal and their use violates the laws of war. The illegality of chemical and poisoned weapons was first established by the Hague regulations of 1899 and Convention of 1907. It was reiterated in the Geneva Convention of 1925 and the Chemical Weapons Convention. The Rome Statute for the International Criminal Court specifically states that employing "poison or poisoned weapons" and "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" are war crimes, under Article 8. The prohibition on the use of these weapons is an international norm regardless whether any convention has been ratified. **As these weapons do not distinguish between military combatants and civilians they violate the principle of distinction and the ban on weapons which cause unnecessary suffering and death contained in the Hague Convention of 1907.** Under the Nuremberg Principles, violations of the laws of war are war crimes for which leaders may be criminally prosecuted. Thus far, it has not been proven what chemical weapons were used or who used them, although it is assumed Sarin gas was used. For the purpose of this briefing paper it is assumed that chemical weapons were used and it is possible to determine who used them. Even if we assume the Assad regime has used chemical weapons – an assumption not yet proven in an appropriate forum – we must still address the question of whether military action in response to the use of these weapons is legal.

II. IT IS ILLEGAL FOR THE UNITED STATES TO TAKE MILITARY ACTION TO PUNISH THE SYRIAN REGIME FOR USE OF CHEMICAL WEAPONS

The United States ratified the United Nations Charter in 1945. As a ratified treaty the UN Charter is part of United States domestic law pursuant to Article VI section 2 of the United States Constitution which states that the Constitution, federal laws made pursuant to it and treaties made under its authority, constitute the supreme law of the land. Thus, the provisions of the UN Charter addressing when force may be used should be considered binding on the US under both domestic and international law.

The UN Charter requires countries to settle their international disputes peacefully. Article 2(4) makes it illegal for any country to either use force or threaten to use force against another country. **Article 2(7) prohibits intervention in an internal or domestic dispute in another country.** The only time military force is lawful under the Charter is when the Security Council approves it, or under Article 51, which allows a country to defend itself if attacked. “The use of chemical weapons within Syria (as alleged) is not an armed attack on the United States. Also the right to use force preemptively in self-defense or in anticipation of an attack was defined by the *Caroline* case, which holds that such actions may be justified only in cases in which the "necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." That is not the case here. It is also clear that Article 2(4) makes it illegal to carry out a military strike as a reprisal or punishment. On September 3, 2013, Secretary General Ban Ki-Moon stated that military action taken without UN approval would be illegal. Under the “two wrongs do not make a right” theory, the United States does not turn an illegal act into a legal one because it is going after people who have violated an international norm. It is pure vigilantism for the United States to take military action based on the claim it has to punish Syria’s government for use of chemical weapons.

III. IT IS A FALSE DICHOTOMY TO CLAIM IN RESPONSE TO THE USE OF CHEMICAL WEAPONS THERE ARE ONLY TWO CHOICES: TAKE MILITARY ACTION OR DO NOTHING

The debate regarding military action in Syria has thus far been framed as there being only two options: the United States engages in military action or does nothing. This is a false dichotomy.

The Briefing Paper by the Western States Legal Foundation makes this point at pages 10-11. (<http://wslfweb.org/docs/wslfsyriabrief1.pdf>) The authors of that paper, with which we agree, state: “why is the U.S. President dismissing out of hand, the very international system he invoked, along with any notion of non-military alternatives to ‘doing nothing?’ If the intention of the powers pushing for punitive action against the perpetrators of alleged chemical attacks in Syria is to reinforce norms against the use of these terrible prohibited weapons, any conclusion reached and action taken will carry far more weight if it follows transparent, lawful, and credible consideration in representative international forums. Both the investigation of these allegations and the formulation of appropriate responses should proceed along two main tracks. All states should allow the inspection process initiated under UN auspices to go forward. Its ambit should be expanded by the Security Council to include determination, if possible, of the party or parties responsible for any use of prohibited weapons. This investigation could produce evidence regarding the responsibility of states, organizations, and individuals. The matter should be referred simultaneously to the International Criminal Court, with information produced in the investigation conducted under UN auspices also made available for the prosecution and trial of culpable individuals. While Syria is not a party to the International Criminal Court, by the terms of the Rome Statute the Security Council can refer a situation involving a non-party state to the Court. The Prosecutor would be obligated to examine the possible culpability of all actors, regime or not. Among others, general rules of the Statute criminalizing

direct or disproportionate attacks on civilians would seem to apply to the alleged use of chemical weapons. Further, there is a basis for the Court to adjudicate culpability under a specific crime of using chemical weapons.”

Since Russian President Putin has already stated that the United States should present its evidence to the Security Council, there is a good chance that a resolution of this sort would not be vetoed. Even if the evidence goes against the Assad regime, accountability in the form of criminal prosecution would be as much of a deterrent against further use of chemical weapons as the United States sending bombs which are likely to kill more civilians. If the United States takes the matter to the Security Council demanding prosecution it will help the credibility of the United States.

Also, it is possible to invoke the procedures under the Chemical Weapons Convention even though Syria has not acceded to the convention.

Other actions which could be taken as suggested by others include

1. The U.S. can escalate diplomacy rather than escalating the violence (which will kill many more innocent civilians). We must force the parties to pursue a diplomatic route that will lead to a negotiated ceasefire and political resolution to the crisis.
2. The U.S. can tell its allies (like Saudi Arabia, Qatar, Turkey, France, England, Israel) to stop all arms shipments to Syrians, and tell the Russians to get their allies (China, Iran) to do the same. (Iran, which was the victim of Saddam Hussein's gas attacks, might be willing if assured other countries would also stop sending arms.)
3. The U.S. can escalate the level of humanitarian aid it provides to displaced Syrians and refugees who have fled Syria.
4. The U.S. must sign onto the International Criminal Court (it is not yet a signatory) and pursue prosecution of war criminals through the ICC (in our view, its refusal to ratify the Rome Treaty is far more damaging to its credibility than would be a failure to respond to the use of chemical weapons in this instance).
5. The U.S. can ratchet up the sanctions imposed on the Syrian government and on individual Syrians (whether in government or the opposition) who are alleged to have committed war crimes.
6. The U.S. can dismantle its own stockpile of chemical weapons to set an example and challenge other nations that have them to do the same.
7. The U.S. can, at long last, ratify the convention banning land mines which, like chemical weapons, make no distinction between civilians and combatants and are particularly dangerous to children.

If military action is taken, the International Committee and the Military Law Task Force are concerned about the possible irreparable damage it will do to the rules-based system of the UN Charter which the United States was instrumental in writing. (Is this action analogous to the Italian invasion of Ethiopia which had the effect of killing the League of Nations and led directly to World War II?) The same point is made in the [Op-Ed](#) of Professors Oona Hathaway and Scott Shapiro from Yale University Law School in the September 4, 2013, New York Times. We believe, as the International Crisis Group has articulated in its [Statement on Syria](#), that the efforts to have a political breakthrough will be set back in a very damaging way.