

Syria's Chemical Weapons: Force of Law or Law of Force?

by *Marc Finaud*

Key Points

- There have been worrying reports about possible loss of control or transfer of Syrian chemical weapons to non-state armed groups as well as use of such weapons against combatants or civilians.
- Responses by the international community have consisted of clear warnings against such developments as well as low-scale military contingency planning by Western states.
- Syria has shifted its policy from denial to indirect admission of possession of chemical weapons in a move to deter adversaries.
- Legally speaking, although Syria is not party to the Chemical Weapons Convention (CWC), it is under a legal obligation not to use chemical weapons under any circumstances.
- The challenge for the international community is to convince the Syrian leadership to maintain its control over its stockpiles and not to use them against any target. Threats of prosecution of leaders and commanders for war crimes or crimes against humanity may help in this endeavour and may be more effective and credible than threats of military intervention.

Syrian Confirmation of Possession of Chemical Weapons

In the Middle East, there is not only one “worst-kept secret”, the one regarding Israel’s nuclear capability. Most experts and intelligence agencies are also convinced that Syria is the largest possessor of chemical weapons in the region. But Damascus, until recently, denied such allegations. It only explained its non-signature of the Chemical Weapons Convention in 1993 by stating that, until Israel renounced its nuclear weapons, it could not give away its right to possess chemical weapons.

On 23 July 2012, for the first time, a Syrian Foreign Ministry spokesman officially acknowledged that Syria possessed chemical weapons but denied that they could ever be used against Syrian insurgents: “Any stock of WMD or unconventional weapons that the Syrian Army possesses will never be used against the Syrian people or civilians during this crisis, under any circumstances. These weapons are made to be used strictly and only in the event of external aggression against the Syrian Arab Republic”.¹ He added that those weapons were under the secure control of the Syrian armed forces. Later, the Syrian Foreign Ministry attempted to revert to a declaratory policy of “neither confirm nor deny” possession: “The goal of the statement

“For the first time, a Syrian Foreign Ministry spokesman officially acknowledged that Syria possessed chemical weapons”

and the press conference wasn’t to declare but rather to respond to a methodical media campaign targeting Syria to prepare world public opinion for the possibility of military intervention under the false premise of weapons of mass destruction (similar to what happened with Iraq) or the possibility of using such weapons against terrorist groups or civilians, or transporting them to a third party”.² However, those statements were clearly received worldwide as both a confirmation and a warning intended to deter Syria’s adversaries. Apart from chemical weapons, the suspicion that Syria also possesses biological weapons may not be unfounded.

It is true that in the weeks that preceded the 23 July press conference, several Western countries and Israel had expressed concern about possible seizure of Syrian chemical weapons by insurgent groups (including jihadists) or their transfer to Hezbollah in Lebanon.³ Some reports indicated that chemical weapons were moved from their storage areas. According to opposition sources, such weapons could be shipped to the port of Tartus where the Assad regime allegedly plans to form an Alawite enclave from where it would continue fighting the civil war. The Syrian rebels announced that their fighters

1 “Syria Acknowledges It Has Chemical Weapons, Will Use Them if Attacked”, *NBCNews.com*, 23 July 2012.

2 A. Bright, “Chemical Weapons? Syria ‘Backpedaling Furiously’ over Weapons Threats”, *The Christian Science Monitor*, 24 July 2012.

3 C.P. Blair, “Fearful of a Nuclear Iran? The Real WMD Nightmare is Syria”, *Bulletin of the Atomic Scientists*, 1 March 2012.

had found chemical protection gear and ready-to-launch missiles which had been converted to carry non-conventional warheads, demonstrating the readiness of the regime to use those weapons in the civil war. In September, *Der Spiegel* reported that, according to witnesses, the Syrian Army had tested missile systems for poison gas shells in the presence of Iranian experts at Safira the previous month. Later, the former head of Syria's chemical arsenal, Major-General Adnan Sillu, who had defected in June, told the *Times* of London that he had with the Syrian leaders "a serious discussion about the use of chemical weapons, including how we would use them and in what areas." The scenarios under discussion included use of chemical weapons against rebels "as a last resort -- such as if the regime lost control of an important area like Aleppo."⁴

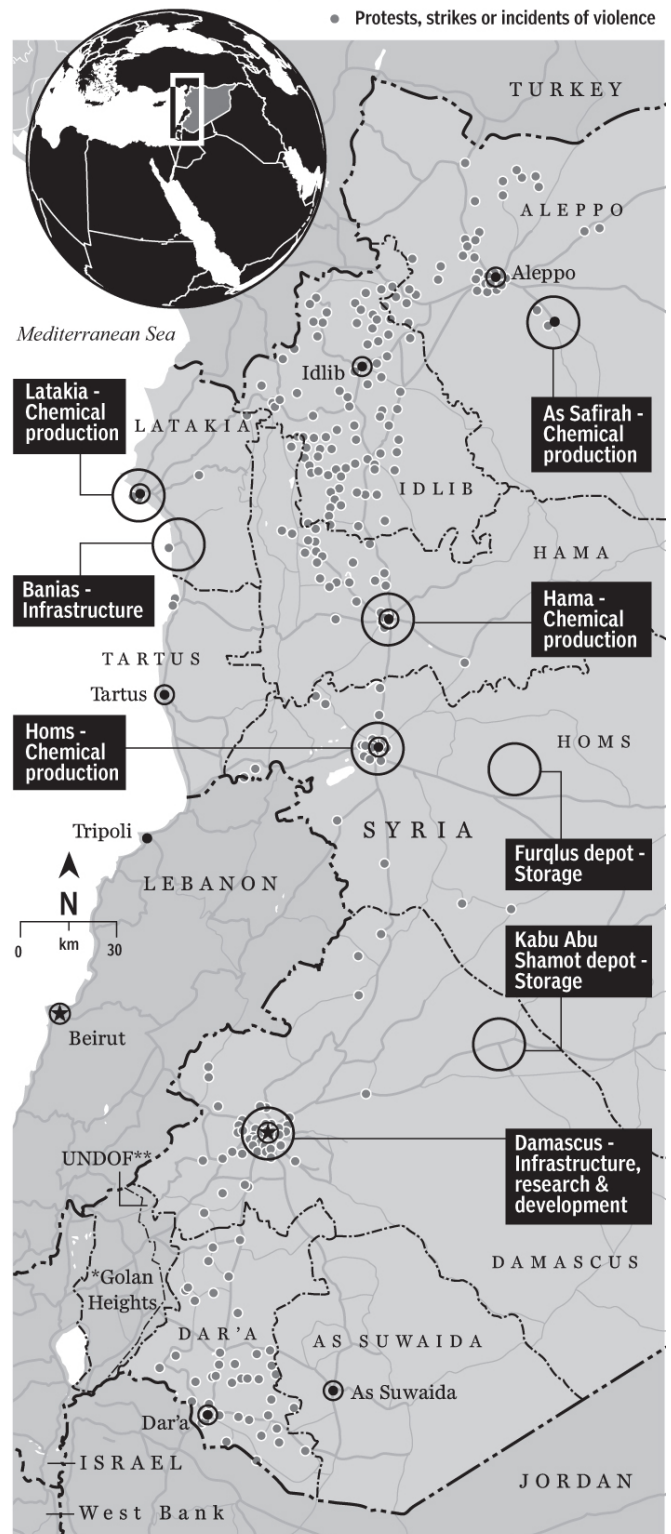
Contingency Planning and Warnings

As a response, the US and its allies, including in the region, began as early as in May to prepare contingency plans for action in case the Assad regime lost control over its stockpiles of chemical weapons scattered in some 20 locations. A joint military exercise in Jordan was attended by 12,000 troops from 19 countries last May, and included scenarios of operations by special forces. Both the US and Israel did not hide that they were closely monitoring the weapon sites in Syria. The US contingency planning includes the possibility of sending ground troops to secure sites. But sceptical commentators noted that such a mission would require between 50,000 and 75,000 troops which are nowhere near of being deployed. Israel also let it be known that it was preparing to conduct a military operation in case chemical weapons and their delivery means were smuggled to Hezbollah or an Al-Qaeda-affiliated group.

As a result of the 23 July Syrian statement, several Western leaders sent clear signals that any transfer or use of chemical weapons by the Syrian regime would amount to crossing red lines. For President Barack Obama, "seeing [such] weapons moving around or being utilized" would "change [his] calculus, [his] equation" and entail "enormous consequences". UK Prime Minister David Cameron agreed with the US President that "the use - or threat - of chemical weapons was completely unacceptable and would force [the US and the UK] to revisit their approach so far." For his part, French President François Hollande stated, "With our partners we remain very vigilant regarding preventing the use of chemical weapons, which for the international community would be a legitimate reason for direct intervention." French Foreign Minister Laurent Fabius added, "If Syria uses such weapons, our response [...] would be massive and blistering." He also confirmed that Western countries were monitoring the movement of the weapons in Syria in order to be ready to "step in" if necessary. According to UK Foreign Secretary William Hague, in case of use of chemical weapons, France and the UK would call on the UN Secretary-General to make sure that the United Nations (UN) investigation mechanism for allegations of the use of such weapons could readily be deployed. The Organisation for the Prohibition of Chemical Weapons also stated its readiness to assist in the investigation of any alleged use.

A CHEMICAL POWDER KEG

Syria is suspected of producing hundreds of tonnes of chemical weapons — like mustard blister agent, sarin nerve agent and possibly VX nerve agent — for use inside medium-range Soviet-built Scud-B and C ballistic missiles, as well as bombs and artillery shells. Many of the storage and development locations correspond with recent violence.



*Israeli Occupied Syria **United Nations Disengagement Observer Force
SOURCE: NUCLEAR THREAT INITIATIVE RICHARD JOHNSON / NATIONAL POST

Although Russia is still strongly opposed to any external military intervention in Syria, especially without authorization from the UN Security Council, it also made it known that its Deputy Foreign Minister Mikhail Bogdanov, in a meeting with the Syrian Ambassador to Moscow,

4 "Syrian Regime 'Will Deploy Chemical Weapons as Last Resort'", *The Telegraph*, 19 September 2012.

“laid out in an extremely clear form Russia’s position on the inadmissibility of any threats of the use of chemical weapons.” Later, a Russian official stated that Moscow was given “strong assurances” by the Syrian authorities that “strict control is being exercised over the safety of [chemical] weapons, and that there is no threat to them currently or the situation could get out of control. Guarantees were also given that the chemical weapons will reliably remain in their current place.”

Legal Obligations: No Use Under Any Circumstances

The Syrian programme of acquisition of chemical weapons began in the early 1970s. Prior to the 1973 war, Egypt transferred chemical precursors and munitions to Syria. Syria began its domestic production, with the voluntary or involuntary assistance of West European companies, as well as assistance from the Soviet Union and then Russia, Iran and North Korea, although the strength of evidence supporting such allegations is disputed. In any case, it is significant that, shortly after the 1967 Six-Day War, on 17 December 1968, Syria acceded to the 1925 Geneva Protocol prohibiting “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices” as well as “the use of bacteriological methods of warfare.” Like many other states parties to this instrument of international humanitarian law, Syria introduced a reservation upon its accession. However, unlike the majority of states having formulated reservations, it did not reserve the right to use such methods of warfare in the case that it were attacked with the same weapons (retaliation in kind) or by non-states parties. The Syrian reservation only stated that its accession and ratification did “not in any case imply the recognition of Israel or lead to the establishment of relations with the latter concerning the provisions laid down in the Protocol.” In other words, Syria accepted to be bound by the prohibition of the use of chemical weapons in war under any circumstances.

When the Chemical Weapons Convention was opened for signature in January 1993, and consistently since then, Syria refused to sign it, claiming that it reserved its right to acquire chemical weapons for as long as Israel possessed nuclear weapons. It is interesting to compare the position of Syria and its legal obligations regarding the Geneva Protocol and its 23 July statement, albeit later qualified. The Geneva Protocol prohibited this method of warfare because it “ha[d] been justly condemned by the general opinion of the civilized world” after World War I. It reaffirmed prohibitions contained in the 1899 Hague Declaration on the use of projectiles for the diffusion of asphyxiating or deleterious gases, in the 1907 Hague Convention on the use of poison or poisonous weapons as well as in the 1922 Washington Treaty on the use of noxious gases in warfare. In 1969, the UN General Assembly adopted Resolution 2603 (XXIV) considering the Geneva Protocol as applicable to all chemical and biological agents irrespective of any technological developments. Thus this prohibition applies in particular to the hundreds of tons of VX (nerve agent), sarin (nerve agent), and mustard gas (blister agent) stockpiled by Syria.⁵

5 M. Elleman, D. Esfandiary and E. Hokayem, “Syria’s Proliferation Challenge and the European Union’s Response”, *Non-Proliferation Papers*, No.20, July 2012.

Table: Intelligence Estimates of Syrian Chemical Weapon Stockpiles

Item	Estimated Quantity
Mustard Gas (Blister Agent)	Hundreds of tonnes
Sarin (Nerve Agent)	Hundreds of tonnes
VX (Nerve Agent)	Large stocks
Chemical Warheads for Scud Missiles	200
Free-fall Bombs	Thousands
Artillery Shells	Thousands

(Source: *The Economist*, 28 July 2012)

One of the weaknesses of the Geneva Protocol is that it is in principle applicable only in situations of “war”, meaning between enemy states, which would leave, strictly speaking, the possibility of use of chemical weapons by or against non-state actors in an internal conflict or a civil war such as the one currently being fought in Syria. Paradoxically, the 23 July Syrian declaration envisages just the opposite: possible use as a response to “external aggression”, while internal use “against Syrian people or civilians” is excluded. In fact, both cases would be covered by the prohibition.

In the case of a conflict between Syria and other states (even not considering themselves formally in a state of war or having issued a formal declaration of war), Syria would be prevented from using chemical weapons by its ratification of the Geneva Protocol and its absence of reservation on retaliation in kind or against non-parties. In addition, the International Committee of the Red Cross (ICRC) considers that, in an international armed conflict, the prohibition of use of chemical weapons results from customary law. Moreover, Syria could not invoke Article 51 of the UN Charter and the right of self-defence because one of the main principles of the laws of war is precisely that “in any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited.”

In the case of a civil war, Syria’s 23 July statement excludes any use of chemical weapons against “the Syrian people or civilians”. It was unnecessary to state this since, although the Geneva Protocol does not strictly speaking apply to internal conflicts, other rules of international humanitarian law prohibit the deliberate targeting of civilians and protect non-combatants. More specifically, the International Criminal Tribunal for the former Yugoslavia recalled in the Tadic case in 1995 that “there undisputedly emerged a general consensus in the international community on the principle that the use of [chemical] weapons is also prohibited in internal armed conflicts.” The prohibition of use of chemical weapons is indeed derived from customary law according to the ICRC, also in such internal conflicts, and binds not only the regular armed forces but all “parties” to the conflict, including non-state actors.

If the Syrian regime did use chemical weapons against armed rebels, it could attempt to argue that among those combatants were “foreign terrorists armed by some

states" (as it has been stressing in the past few months), thus engaged in an "external aggression", while its self-restraint applied only to "Syrian people or civilians". In any case, evidence of attribution of acts of "foreign terrorists" to foreign states would need to be provided. Such a use of chemical weapons would nevertheless be clearly contrary to international law, in particular the Hague Declaration, the Geneva Protocol, and the Statute of the International Criminal Court (ICC) (Article 8(2)(b)(xviii) considering such use as a war crime). Indeed, compared with the time when Syria acceded to the Geneva Protocol, international law enforcement has now made dramatic progress with the entry into force of the Rome Statute of the ICC.

Syria has signed but not ratified the Rome Statute. As a consequence, although it has not formally accepted the jurisdiction of the ICC, it is bound, according to Article 18 of the 1969 Vienna Convention on the Law of Treaties, by the obligation not to defeat the object and purpose of the Rome Statute. Considering the massive violations of international humanitarian law already perpetrated by Syrian forces since the beginning of the conflict, the UN High Commissioner for Human Rights has said she believed that the UN Security Council had enough reliable information to warrant referring Syria to the ICC. Any use of chemical weapons would certainly aggravate the case of Syria and convince all Permanent Members of the Security Council to vote in favour of a referral of Syria to the Court. Then, not only might the highest political and military leaders face prosecution but also lower-ranking commanders who executed their orders. Such a threat should play a powerful role as a deterrent.

Worst-case Scenarios

If Syria does not feel bound by the force of international law, it may be tempted to apply the law of force and resort to chemical weapons in a desperate attempt to defeat internal resistance fighters or external military intervention. Until recently, most experts believed that the Syrian arsenal was primarily designed as a deterrent and an "equalizer" vis-à-vis the Israeli nuclear capability and conventional superiority. Moreover, it is assumed that, despite its volume, the quality and effectiveness of the Syrian chemical stockpile has been reduced by its degradation. Additionally, if ballistic missiles are used as a means of delivery, because

they are fairly inaccurate and can carry only small quantities of agents, they can hardly serve any military purpose, especially when troops are equipped with protective gear. Even a barrage of artillery-fired chemical shells would not cause mass casualties.

However, the risk remains high that chemical weapons would be used as weapons of terror against populated areas or meant to complicate the action of foreign military forces by creating panic and uncertainty. Some weapons could also be transferred to regional allies such as Hezbollah to enrich its arsenal against Israel. Needless to say, such scenarios would entail the "enormous consequences" mentioned by President Obama in terms of military and civilian losses and escalation of violence into a regional conflict.

The Syrian leadership and its allies must be convinced that such a development would not be in their interest, and that it would definitely render a political solution less likely than a military one. This is a daunting challenge for the international community, especially when the Permanent Members of the UN Security Council are divided on the proper response to the current conflict. It can only be hoped that the clear signals given by Russia to its ally about not using chemical weapons and securing control over their storage sites will continue to be heard by the Syrian leaders and military command. The strong warnings issued by Western countries and Israel regarding possible intervention if the 'red lines' are crossed may also play a dissuasive role although, at this stage, they seem more rhetorical than based on actual preparations. Indeed, none of these states appears willing and ready to "step in" and deploy military forces into the conflict zone. But when threats of prosecution for war crimes or crimes against humanity become more concrete on the part of the UN and the international community, individual leaders and military commanders may think twice before succumbing to that worst-case solution, even as a "last resort". In case of regime collapse, no doubt one of the priorities of the international community should be to secure the control of chemical weapons stockpiles and avoid any diversion into the "wrong hands".

September 2012

NB: This paper is solely the opinion of the author and does not necessarily reflect the official view of the GCSP.

About the author

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