

---

---

# THE PROHIBITION OF CHEMICAL WEAPONS: MOVING TOWARD *JUS COGENS* STATUS

CHARLES HYUN\*

## INTRODUCTION

While the use of chemical weapons during the Syrian Civil War has once again brought chemical weapons use to the forefront of public discourse, the prohibition of chemical weapons use goes as far back as 1685, when French and German armies agreed “that no side should use poisoned bullets.”<sup>1</sup> At the Hague Conferences of 1899 and 1907, Germany, France, England, the United States, and other nations formally agreed to regulate chemical weapons use by banning the use of poison gas.<sup>2</sup> Unfortunately, these agreements were not respected during World War I, and the use of chemical weapons caused 1.3 million casualties.<sup>3</sup> Since then, there have been several other notable uses of chemical weapons—Japan used poison gas against the Chinese in the 1930s, Mussolini used them in Abyssinia (now Ethiopia) during World War II, the Egyptian Air Force used them in Yemen in 1967, and the United States used Agent Orange during the Vietnam War.<sup>4</sup> Perhaps the most horrific use of chemical weapons occurred in 1988 when Iraqi President Saddam Hussein used

---

\* J.D., Class of 2015, University of Southern California Gould School of Law.

1. Margaret Sewell, *Freedom from Fear: Prosecuting the Iraqi Regime for the Use of Chemical Weapons*, 16 ST. THOMAS L. REV. 365, 378 (2004) (quoting Megan Eshbaugh, *The Chemical Weapons Convention: With Every Step Forward We Take Two Steps Back*, 18 ARIZ. J. INT’L & COMP. L. 209, 216 (2001)).

2. *Id.*

3. *Id.*

4. Frank Gardner, *Why Chemical Weapons Provoke Outrage*, BBC (Sept. 12, 2013), <http://www.bbc.co.uk/news/world-europe-24024788>.

mustard gas and nerve gas on a Kurdish town in northern Iraq, “killing 5,000 people almost immediately.”<sup>5</sup>

The desire to prohibit chemical weapons undoubtedly derives from their horrific nature—“chemical weapons hold a special horror, partly because poison gas is often invisible, partly because of the indiscriminate way it can seek out every hiding place, and partly because of the agonising death it can cause.”<sup>6</sup> While several international instruments explicitly prohibit chemical weapons use, Syria was not a signatory to several of these instruments at the time of the August 2013 Ghouta chemical attack, and many of these instruments only prohibit chemical weapons use in the context of international armed conflict.<sup>7</sup> Thus, the civil war in Syria—a noninternational armed conflict—does not fall under the purview of these instruments.<sup>8</sup>

The international community’s response to Syria’s chemical weapons use has been strong. The United States considered launching a punitive strike against Syria before Syria agreed to hand over its chemical weapons.<sup>9</sup> Russia, Syria’s closest ally, “urged Syria to put its chemical weapons under international control for subsequent destruction” and to join the Chemical Weapons Convention.<sup>10</sup> U.N. Secretary General Ban Ki-Moon denounced the attack, stating that the findings in the U.N. report on chemical weapons use in Syria were “beyond doubt and beyond the pale,” and that the attack was “a war crime and a grave violation of the 1925 Protocol and other rules of customary international law.”<sup>11</sup>

Given the international community’s vehement opposition to chemical weapons use, the multitude of international instruments that ban chemical weapons, and the international response to Syria’s chemical weapons use in the Syrian Civil War, an argument that the criminality of chemical weapons use rises to the level of *jus cogens* is plausible. The doctrine of *jus cogens* defies simple definition. While most scholars agree on the existence of the

---

5. *Id.*

6. *Id.*

7. Jillian Blake & Aqsa Mahmud, *A Legal “Red Line”?: Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA L. REV. DISCOURSE 244, 251–54 (2013).

8. *Id.*

9. *International Responses to Syria Crisis*, POLITICO (Sept. 2, 2013), <http://www.politico.com/story/2013/09/syria-international-response-96159.html>.

10. *Russia Urges Syria Hand Over Chemical Weapons to Intl Control to Avoid Strike*, RT (Sept. 9, 2013), <http://rt.com/news/lavrov-syria-chemical-weapons-handover-615>.

11. Martin Nesirky, *Highlights of the Press Briefing*, OFF. SPOKESPERSON FOR SECRETARY-GENERAL (Sept. 16, 2013), <http://www.un.org/sg/spokesperson/highlights/index.asp?HighD=9/16/2013>.

*jus cogens* doctrine, there is no clear consensus on the exact mechanisms behind it. Some scholars “stress its substance, some its procedural effect, and some its character of upholding world order.”<sup>12</sup> The term *jus cogens* means “compelling law.”<sup>13</sup> It is generally agreed that *jus cogens* refers to “peremptory norms from which no derogation is permitted, and [the doctrine] is ‘essentially a label placed on a principle whose perceived importance, based on certain values and interests, rises to a level that is acknowledged to be superior to another principle, norm or rule and thus overrides it.’”<sup>14</sup> *Jus cogens* norms represent the apex of the international legal hierarchy, taking precedence over other sources of international law. Furthermore, while *jus cogens* is generally accepted as a principle of international law, there is no definitive list of crimes that fall within the category.<sup>15</sup> Even so, the prohibition of genocide, crimes against humanity, war crimes, torture, aggression, piracy, slavery, and apartheid are generally accepted as *jus cogens* norms.<sup>16</sup> The horrors of chemical weapons are clear, and they are arguably just as deplorable as the aforementioned crimes; yet, does chemical weapons use rise to the level of *jus cogens*?

This Note will argue that while chemical weapons use may not rise to the level of *jus cogens* under the traditional formulation of the doctrine, chemical weapons use is treated as a peremptory norm by the international community and is thus functionally equivalent to a *jus cogens* crime. In other words, chemical weapons use might not be *jus cogens de jure*, but it is *jus cogens de facto*. This Note does not seek to comment on the Syrian Civil War or to discuss the conflict’s implications on international relations and foreign policy. Rather, it simply uses the Syrian Civil War, and more specifically the government’s use of chemical weapons, to illustrate how a crime crystallizes into *jus cogens*. As such, Part I of this Note will give a brief overview of the current conflict in Syria and the government’s alleged chemical weapons use to provide context. Part II will attempt to define *jus cogens* by examining the various *jus cogens* theories advocated by international lawyers and scholars. Part III will argue that chemical

---

12. Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411, 414 (1989).

13. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 67 (1996).

14. David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT’L L. 219, 228 (2005) (quoting M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 210 (1999)).

15. *Id.* at 231–32.

16. *Id.* at 232.

weapons use is on the cusp of crystalizing into a *jus cogens* crime and that the international community treats it as such.

### I. THE CURRENT CONFLICT IN SYRIA

The Syrian Civil War began in 2011, prompted by peaceful protests against the government earlier that year.<sup>17</sup> The Assad regime responded to these protests by targeting civilians, and opposition forces formed into an armed resistance, escalating the conflict into a “noninternational armed conflict.”<sup>18</sup> Although both sides of the conflict—the Syrian government on one, and the Free Syrian Army and the National Coalition of Syrian Revolutionary and Opposition Forces on the other—have committed acts in violation of international law, the government’s acts have been more heinous, including widespread chemical weapons use.<sup>19</sup>

In August 2012, President Obama warned the Assad regime and other players in the region that deployment of chemical weapons would cross a “red line” and be met with “enormous consequences.”<sup>20</sup> Subsequently, strong evidence of chemical weapons attacks arose, most notably in the town of Ghouta.<sup>21</sup> Estimates of the death toll in Ghouta ranged from 281 to 1,729 fatalities.<sup>22</sup> The U.N. Report investigating the Ghouta incident concluded that “chemical weapons have been used in the ongoing conflict between the parties in the Syrian Arab Republic, also against civilians, including children, on a relatively large scale” and that the chemical Sarin was used, leaving U.N. investigators “with the deepest concern.”<sup>23</sup> This concern was justified, given that Sarin gas is considered the “most toxic and rapid acting of chemical weapons,” and symptoms can appear on a

17. Blake & Mahmud, *supra* note 7, at 247.

18. *Id.* (“[B]y May 2012, the International Committee of the Red Cross (ICRC) declared that Syria was engaged in a noninternational armed conflict.”).

19. *Id.*

20. *Obama Warns Syria Not to Cross “Red Line,”* CNN, <http://www.cnn.com/2012/08/20/world/meast/syria-unrest> (last updated Aug., 21, 2012).

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

22. *France Says “At Least 281” Killed in Syria Chemical Attack,* DAILY STAR: LEB. (Sept. 2, 2013), <http://www.dailystar.com.lb/News/Middle-East/2013/Sep-02/229697-france-says-at-least-281-killed-in-syria-chemical-attack.ashx>; *Bodies Still Being Found After Alleged Syria Chemical Attack: Opposition,* DAILY STAR: LEB. (Aug. 22, 2013), <http://www.dailystar.com.lb/News/Middle-East/2013/Aug-22/228268-bodies-still-being-found-after-alleged-syria-chemical-attack-opposition.ashx>.

23. U.N. Secretary-General, *Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013*, ¶¶ 27, 30, U.N. Doc. A/67/997-S/2013/553 (Sept. 13, 2013).

person within a few seconds of exposure.<sup>24</sup> Sarin is odorless, making exposure and the need for medical treatment difficult to discover.<sup>25</sup> Symptoms can include overstimulation of muscles and glands, “eye pain, blurred vision, drooling and sweating, cough, chest tightness, rapid breathing, diarrhea, nausea, vomiting, . . . abdominal pain, increased urination, confusion, drowsiness, weakness, headache, slow or fast heartbeat, and low or high blood pressure.”<sup>26</sup>

The international community widely condemned Syria’s chemical weapons use. The United States, hoping to assist in the toppling of the Syrian government, announced plans to provide arms to Syrian rebels and also threatened missile strikes.<sup>27</sup> Ban Ki-Moon called the use of chemical weapons a “war crime and a grave violation . . . of rules of customary international law.”<sup>28</sup> France and the United Kingdom also warned of severe consequences in the event that Syria used chemical weapons, with France calling for armed intervention if the reports of chemical weapons use were confirmed.<sup>29</sup> Russia proposed that Syria join the Chemical Weapons Convention, to which the Syrian government eventually agreed.<sup>30</sup> Under pressure from the international community, “the United States and Russia announced a ‘Joint Framework on Destruction of Syrian Chemical Weapons’ that proposed a timeline for the elimination of equipment and material, as well as on-site inspections.”<sup>31</sup> Subsequently, the U.N. Security Council unanimously adopted Resolution 2118, “determin[ing] that the use of chemical weapons anywhere constituted a threat to international peace and security, and called for the full implementation of the . . . decision of the Organisation for the Prohibition of Chemical Weapons [“OPCW”]), which contains special procedures for the expeditious and verifiable destruction of Syria’s chemical weapons.”<sup>32</sup>

---

24. Amanda Taurino, *Chemical Weapons: The Physical Effects*, WORLD OUTLINE (Sept. 5, 2013), <http://theworldoutline.com/2013/09/chemical-weapons-impact>.

25. *Id.*

26. *Id.*

27. Blake & Mahmud, *supra* note 7, at 249–50.

28. Nesirky, *supra* note 11.

29. Julian Borger, *France Warns Syria of Forceful Response over Chemical Weapon Claims*, GUARDIAN (Aug. 22, 2013), <http://www.theguardian.com/world/2013/aug/22/france-warns-syria-response-chemical>.

30. Blake & Mahmud, *supra* note 7, at 250.

31. *Id.*

32. *Id.* (alterations in original) (quoting Press Release, Security Council, Security Council Requires Scheduled Destruction of Syria’s Chemical Weapons, Unanimously Adopting Resolution 2118, U.N. Press Release SC/11135 (Sept. 27, 2013), <http://www.un.org/press/en/2013/sc11135.doc.htm>).

Ultimately, high-level negotiations between the United States and Russia culminated in an agreement requiring Syria to destroy its chemical weapons stockpile and production facilities<sup>33</sup> under a plan approved by the OPCW.<sup>34</sup> The plan has been largely successful. By August 2014, Syria's declared chemical weapons stockpile had been completely destroyed,<sup>35</sup> and as of January 31, 2015, the first of twelve chemical weapons production facilities in Syria has been razed.<sup>36</sup>

## II. DEFINING *JUS COGENS*

The term *jus cogens* means “the compelling law.”<sup>37</sup> As such, *jus cogens* norms, also known as “peremptory norms,” hold “the highest hierarchical position among all other norms and principles” and are therefore non-derogable.<sup>38</sup> While the general consensus in the international legal community is to recognize the existence of *jus cogens* norms, scholars disagree as to what constitutes a *jus cogens* norm, how a given norm rises to that level, and how to identify such norms.<sup>39</sup> To illustrate, consider the various theories advanced by scholars to explain the doctrine.

Mary Ellen O'Connell, the Research Professor of International Dispute Resolution at the Kroc Institute for International Peace Studies, explains that while there are some international lawyers that reject the category all together, “[m]ost international lawyers recognize that the international legal system includes a category of higher ethical norms known as *jus cogens*.”<sup>40</sup> Of the lawyers that recognize *jus cogens* as a category, most look to natural law theory to explain it.<sup>41</sup> A smaller group “understand[s] *jus cogens* norms as ‘super customary international law

---

33. Michael R. Gordon, *U.S. and Russia Reach Deal to Destroy Syria's Chemical Arms*, N.Y. TIMES (Sept. 15, 2013), <http://www.nytimes.com/2013/09/15/world/middleeast/syria-talks.html>.

34. *OPCW Adopts Plan for Destruction of Syria's Chemical Weapons Programme in the First Half of 2014*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Nov. 15, 2013), <http://www.opcw.org/news/article/opcw-adopts-plan-for-destruction-of-syrias-chemical-weapons-programme-in-the-first-half-of-2014>.

35. Thomas Gibbons-Neff, *Declared Syrian Chemical Weapon Stockpile Now Completely Destroyed*, WASH. POST (Aug. 18, 2014), <http://www.washingtonpost.com/news/checkpoint/wp/2014/08/18/declared-syrian-chemical-weapon-stockpile-now-completely-destroyed>.

36. *First of 12 Chemical Weapon Production Facilities in Syria Destroyed*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (Feb. 3, 2015), <http://www.opcw.org/news/article/first-of-12-chemical-weapon-production-facilities-in-syria-destroyed>.

37. Bassiouni, *supra* note 13, at 67.

38. *Id.*

39. *Id.*

40. Mary Ellen O'Connell, *Jus Cogens: International Law's Higher Ethical Norms*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW 78, 78 (Donald Earl Childress III ed., 2012).

41. *Id.*

norms,”<sup>42</sup> that is, “on the basis of positivism.”<sup>43</sup> According to scholars Evan J. Criddle and Evan Fox-Decent,

The leading positivist theory of *jus cogens* conceives of peremptory norms as customary law that has attained peremptory status through state practice and *opinio juris*. The *Restatement* [(Third) of the Foreign Relations Law seems to] endorse[] this position, stating that *jus cogens* “is now widely accepted . . . as a principle of customary international law (albeit of higher status).”<sup>44</sup>

As a result of its universal character and non-derogability, *jus cogens* creates state responsibility *erga omnes*, or “flowing to all.”<sup>45</sup> In one case, the International Court of Justice (“ICJ”) stated:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State . . . . By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>46</sup>

Peremptory principles of *jus cogens* therefore impose responsibility “flowing to all” states toward the international community as a whole. This responsibility creates a duty not to allow impunity for such crimes and to prosecute or extradite alleged offenders.<sup>47</sup> For some peremptory rules—such as piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture—universal jurisdiction attaches, “enabl[ing] any state to arrest and prosecute those who have violated certain *jus cogens* norms . . . [,] restricted by neither territory nor nationality.”<sup>48</sup>

#### A. SOURCES OF INTERNATIONAL CRIMINAL LAW

The 1969 Vienna Convention on the Law of Treaties, drafted by the U.N. International Law Commission (“ILC”), provides perhaps the most

---

42. *Id.* at 78 n.3.

43. *Id.* at 78.

44. Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331, 339 (2009) (alteration in original) (footnote omitted).

45. Bassiouni, *supra* note 13, at 72.

46. *Id.* (quoting *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5)).

47. *Id.* at 65–66.

48. Mitchell, *supra* note 14, at 230–31 & n.35.

well-known description of *jus cogens*.<sup>49</sup> During the drafting of the Convention,

[M]embers of the . . . ILC suggested that a peremptory norm could be identified by the following objective indicia: (1) whether the norm is incorporated into norm-creating multilateral agreements and is prohibited from derogation in those instruments; (2) whether a large number of nations have perceived the norm to be essential to the international public order, whereby the norm is reflected in general custom and is perceived and acted upon as an obligatory rule of higher international standing; and (3) whether the norm has been recognized and applied by international tribunals, such that when violations occur, the norm is treated in practice as a *jus cogens* rule with appropriate consequences ensuing.<sup>50</sup>

Thus, to understand how *jus cogens* norms fit into the framework of the international legal system, it is useful to look at how *jus cogens* intertwines with the three primary sources of international law—treaties, customary law, and general principles of law. Article 38 of the Statute of the ICJ, “which most [international lawyers] agree is a definitive articulation of the primary sources of public international law,” sets forth a hierarchal set of sources that establish international law.<sup>51</sup> “Article 38 lists treaties, customary international law, and general principles of law as primary sources, and judiciary decisions and the writings of publicists as subsidiary sources.”<sup>52</sup> Functionally speaking, *jus cogens* norms would be at the top of the “source of law” hierarchy and nullify any conflicting lesser norms or treaties. For example, a treaty that violates a *jus cogens* norm would be considered void.<sup>53</sup>

Similarities exist between the doctrine of *jus cogens* and the norms created by customary international law, which often leads to *jus cogens* being described as a “super norm” or “super custom.” The Restatement defines customary international law as “a general and consistent practice of states followed by them from a sense of legal obligation.” As such, state practice “undertaken out of convenience or habit” alone is insufficient to establish a customary international law.<sup>54</sup> Rather, “[s]uch conduct [or inaction] must be carried out with the perception that it is . . . required by

---

49. O’Connell, *supra* note 40, at 81.

50. Mitchell, *supra* note 14, at 233–34.

51. RONALD C. SLYE & BETH VAN SCHAACK, INTERNATIONAL CRIMINAL LAW: THE ESSENTIALS 85–86 (2009).

52. *Id.* at 86.

53. O’Connell, *supra* note 40, at 81.

54. SLYE & VAN SCHAACK, *supra* note 51, at 95.

law.”<sup>55</sup> This reliance on state conduct “reflects the general international law principle of state consent.”<sup>56</sup> This principle allows a “persistent objector” state to “opt out” of a rule of customary international law rule “by making clear that it does not agree with an emerging rule of customary international law[, but m]ore than [mere] silence is required.”<sup>57</sup> Professors Ronald C. Slye and Beth Van Schaack suggest that *jus cogens* acts as an exception to the “persistent objector” rule, as states cannot “opt out” of a *jus cogens* rule.<sup>58</sup> Thus, according to Slye and Van Schaack, *jus cogens* norms “occupy an uneasy place in an international legal system that emphasizes positive law-making and state consent. They are the clearest manifestations of the natural law origins of international law.”<sup>59</sup>

In one case, the ICJ noted that a treaty provision could crystalize into a customary international law, reasoning that “even without the passage of any considerable period of time, a very widespread and representative participation in [a] convention might suffice of itself, provided it included that of States whose interests were specially affected.”<sup>60</sup> The court added,

[T]he passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law . . . , [but] an indispensable requirement would be that within the period in question, . . . State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.<sup>61</sup>

The European Court of Human Rights expounded on this idea, explaining that for this to occur,

[I]t is necessary for the provision concerned . . . to be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law; for there to be corresponding settled State practice; and for there to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.<sup>62</sup>

---

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 96.

59. *Id.*

60. North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 73 (Feb. 1969).

61. *Id.* ¶ 74.

62. *Van Anraat v. Netherlands*, EUR. CT. HUM. RTS. HUDOC 37–38 (July 6, 2010), <http://hudoc.echr.coe.int/eng?i=001-99990>.

Others suggest *jus cogens* and “general principles of law”—referring to “general principles found in the major legal systems of the world”<sup>63</sup>—overlap.<sup>64</sup> General principles are distinct from customary international law, although “evidence used to prove the one may also prove the other.”<sup>65</sup> Unlike customary international law, general principles of law do not require evidence of *opinio juris*—the undertaking of a law out of a sense of legal obligation.<sup>66</sup> Rather, general principles “consist of commonalities found in different legal systems that are not necessarily thought of by the states adopting or relying on them as international law.”<sup>67</sup> General principles may also consist of principles “inherent in legal systems and linked to the structure or operation of the system.”<sup>68</sup> When characterized in this manner, general principles cannot be overridden by treaty or newer rules.<sup>69</sup>

#### B. *JUS COGENS* AS A FORM OF INTERNATIONAL PUBLIC POLICY

With the publication of Alfred von Verdross’s 1937 article *Forbidden Treaties in International Law* came greater scholarly attention to the *jus cogens* doctrine, although Verdross did not use the specific term *jus cogens* until years later.<sup>70</sup> In his article, “Verdross argued that certain discrete rules of international custom had come to be recognized as having a compulsory character notwithstanding contrary state agreements.”<sup>71</sup> Because of this, Verdross reasoned that “courts must set aside international agreements in conflict with . . . *jus cogens*,”<sup>72</sup> much like how domestic courts are empowered to void contracts that conflict with public policy. To Verdross, peremptory norms acted as an “*ethical minimum* recognized by all the states of the international community.”<sup>73</sup> States thus “bore an imperative duty under international law to undertake certain ‘moral tasks,’ including the ‘maintenance of law and order within states, defense against external attacks, care for the bodily and spiritual welfare of citizens at home, [and]

---

63. SLYE & VAN SCHAACK, *supra* note 51, at 99.

64. O’Connell, *supra* note 40, at 83.

65. SLYE & VAN SCHAACK, *supra* note 51, at 100.

66. *Id.* at 95, 100.

67. *Id.* at 100.

68. O’Connell, *supra* note 40, at 83.

69. *Id.* at 84.

70. Criddle & Fox-Decent, *supra* note 44, at 335.

71. *Id.*

72. *Id.*

73. *Id.* (emphasis added).

protection of citizens abroad.”<sup>74</sup> Verdross’s vision of international *jus cogens* was initially met with strong resistance.<sup>75</sup> Legal positivists argued that “states could not be bound to international norms without their consent and questioned whether state practice reflected any unifying moral consensus rising to the level of international *jus cogens*.”<sup>76</sup> The *jus cogens* concept gained traction following World War II when it was used in the prosecution of Axis leaders in Nuremberg and Tokyo, preventing officials accused of crimes against humanity from invoking state sovereignty as a shield.<sup>77</sup> At the same time, international jurists began to acknowledge that “universal norms such as the prohibition against genocide would bind [all] states irrespective of state consent.”<sup>78</sup> Further, states were ratifying instruments such as the Universal Declaration of Human Rights, the U.N. Charter, and the International Covenant on Civil and Political Rights.<sup>79</sup>

Several scholars have expounded upon the idea of *jus cogens* as a form of international public policy first put forth by Verdross. Much like how a domestic judge may strike down a private contract because it violates public policy, according to Verdross, *jus cogens* can void a conflicting treaty or international law.<sup>80</sup> Under this view, international law recognizes peremptory norms as “hierarchically superior to ordinary conventional and customary law in order to promote the interests of the international community as a whole.”<sup>81</sup> Thus, peremptory norms “either safeguard the peaceful coexistence of states as a community or honor the international system’s core normative commitments.”<sup>82</sup> *Jus cogens* norms typically involve matters of international public order. Thus, all states have a legal interest in maintaining them.<sup>83</sup>

Verdross also wrote about *jus cogens* in response to the Vienna Law of Treaties. Verdross described *jus cogens* as “consist[ing] of general principles of morality or public policy ‘common to the juridical orders of

---

74. *Id.* (alteration in original) (quoting Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571, 574 (1937)).

75. *Id.*

76. *Id.* at 335–36.

77. *Id.*

78. *Id.*

79. *Id.*

80. O’Connell, *supra* note 40, at 81–82.

81. Criddle & Fox-Decent, *supra* note 44, at 344.

82. *Id.*

83. Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, in *MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOR OF ANTONIO CASSESE* 595, 617–18 (Lal Chand Vohrah et al. eds., 2003).

all civilized states.”<sup>84</sup> This description of *jus cogens* is reflected in Article 53 of the Convention, which states that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>85</sup>

Article 64 of the Convention further stipulates that “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”<sup>86</sup>

### C. *JUS COGENS* AS A FUNCTION OF HUMAN RIGHTS AND HUMANITARIAN LAW

Before discussing *jus cogens* in the context of human rights and humanitarian law, it is important to distinguish the two similar yet distinct theories. In his article *The Humanization of Humanitarian Law*, Theodor Meron notes that human rights and humanitarian law are often conflated.<sup>87</sup> Human rights law seeks to protect “human dignity in all circumstances” and usually applies to “relationships between unequal parties,” such as a government and its citizens.<sup>88</sup> For example, human rights law prohibits the “depriv[ation] of life except in pursuance of a judgment by a competent court.”<sup>89</sup>

On the other hand, humanitarian law regulates aspects of armed conflict and allows, or at least tolerates, the killing of human beings.<sup>90</sup> Recognizing that war and armed conflict are inevitable, humanitarian law is driven by the principle of reciprocity and seeks to limit the damage done by this necessary evil.<sup>91</sup> Noting that humanitarian law is derived from “the medieval tradition of chivalry [and] guarantees a modicum of fair play,”

---

84. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 298 (2006) (quoting Verdross, *supra* note 74, at 572).

85. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 344, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

86. *Id.* at 347.

87. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 240 (2000).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 243.

Meron analogizes the law of war to a boxing match: “As in a boxing match, pummeling the opponent’s upper body is fine; hitting below the belt is proscribed. As long as the rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death. This is a narrow, technical vision of legality.”<sup>92</sup>

Humanitarian law thus assumes that killing will occur and seeks to regulate such action, while human rights law prohibits killing outright. Thus, while both schools ultimately aim to protect human dignity and are similar in many aspects, humanitarian law is more relevant to the discussion of chemical weapons use and *jus cogens*, although human rights law still plays an important role.

As discussed above, most scholars explain *jus cogens* as an attribute of natural law. “Modern human rights law is based on the natural law tenet that human have rights by virtue of being human. The human rights instruments do not create rights, they merely recognize them.”<sup>93</sup> In contrast, “[s]ecular natural law . . . , the basis of many legal systems, is a universal standard based upon a common humanity that can be arrived at by reason and thought.”<sup>94</sup> At first blush, positivism seems hostile to *jus cogens*, but many scholars view positivist and natural theories as “increasingly complementary.”<sup>95</sup> Under this view, “[l]egal systems function under a positivist approach until confronted with an unjust law,” at which point, “[t]he natural law principle, especially one that is *jus cogens*, overrides the unjust law.”<sup>96</sup> Much of this development is due to “natural law concepts . . . transform[ing] into positive law through treaties and in part because of the development of customary international law.”<sup>97</sup>

O’Connell argues that *jus cogens* norms function exclusively as ethical or moral norms.<sup>98</sup> According to O’Connell, while “[i]nherent, structural, or other norms integral to the system of international law as a legal system . . . may not be overridden by treaties or customary rules and are explained by natural law, . . . they are not so much ‘higher’ norms as foundational norms.”<sup>99</sup> Because foundational norms “lack the quality of moral superiority that is true of *jus cogens* norms,” a separate category for

---

92. *Id.* at 240.

93. Parker & Neylon, *supra* note 12, at 422.

94. *Id.* at 420.

95. *Id.* at 423.

96. *Id.*

97. *Id.*

98. O’Connell, *supra* note 40, at 97.

99. *Id.* at 84.

*jus cogens* is appropriate.<sup>100</sup> The Restatement describes *jus cogens* as follows:

Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.<sup>101</sup>

The Restatement notes that “[t]here is general agreement that . . . prohibiting the use of force [is] *jus cogens*,” and suggests that “rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights, and perhaps attacks on diplomats” are also *jus cogens*.<sup>102</sup>

Leading international lawyer Ian Brownlie puts forth a similar list of *jus cogens* norms: “the prohibition of aggressive war, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.”<sup>103</sup> ICJ Judge Gerald Fitzmaurice provided another commonly accepted enumeration of *jus cogens* norms:

[R]ecognition of the rule against the use of force and non-recognition of situations brought about by the use of force[;] the rule that treaties imposed by force are void; rules prohibiting crimes against peace and humanity, including genocide, near-genocide, and acts in the nature of genocide; the rule that a plea of superior orders is *prima facie* no answer to a charge of crime against peace and humanity or of a war crime; the principle of the non-derogability of *jus cogens* rules; policies and actions of a state having negative consequences to the international community; and the duty to help other countries for the general welfare of themselves and the international community as a whole.<sup>104</sup>

*Jus cogens* has also been recognized by Judge Abner Mikva of the U.S. Federal Courts of Appeals.<sup>105</sup> In *Committee of U.S. Citizens Living in Nicaragua*, Judge Mikva noted that “[the] Restatement acknowledges two

---

100. *Id.*

101. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102 cmt. k (1986)).

102. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102 Reporter’s Notes para. 6 (1986).

103. Parker & Neylon, *supra* note 12, at 429 (quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (3d ed. 1979)).

104. *Id.*

105. O’Connell, *supra* note 40, at 89.

categories of such norms: ‘the principles of the United Nations Charter prohibiting the use of force,’ and fundamental human rights law that prohibits genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination.”<sup>106</sup> Judge Mikva posited that “[i]f Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law,” confirming that *jus cogens* norms are superior to both national law and other international laws.<sup>107</sup> The International Criminal Tribunal for the former Yugoslavia (“ICTY”) took a similar stance, stating that the “prohibition of torture is a *jus cogens* norm that ‘de-legitimise[s] any legislative, administrative or judicial act authorizing torture.’”<sup>108</sup>

Judge Kotaro Tanaka of the ICJ made a strong case for the whole of human rights law being *jus cogens*, stating:

If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum* . . . surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*. As an interpretation of Article 38, paragraph 1(c) [Statute of the ICJ], we consider that the concept of human rights and of their protection is included in the general principles mentioned in the Article [as a source of international law].<sup>109</sup>

Judge Fouad Ammoun of the ICJ “called the protection of human rights ‘an obligatory legal norm,’ and insisted that human rights principles appearing in the preamble of the United Nations Charter are *jus cogens*.”<sup>110</sup> Scholar Louis Sohn wrote that “the Charter’s basic human rights provisions constitute *jus cogens*.”<sup>111</sup> Other scholars “stress that the implementation of human rights is an international obligation, and that international human rights instruments are acquiring *jus cogens* status and becoming a ‘global bill of rights.’”<sup>112</sup>

---

106. Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988) (internal citations omitted).

107. *Id.*

108. *Id.* at 89–90 (quoting Prosecutor v. Furund`ija, Case No. IT-95-17/1-T, Trial Judgment, ¶ 155 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1988)).

109. Parker & Neylon, *supra* note 12, at 441–42 (alterations in original) (quoting South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.) 1966 I.C.J. 6, 298 (July 18) (Tanaka, J., dissenting)).

110. *Id.* at 442.

111. *Id.*

112. *Id.* at 442–43.

The ICJ has also made references to *jus cogens* and its relation to humanitarian law. In one case, the court stated that “[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”<sup>113</sup>

The Nuremburg Charter, which established the International Military Tribunal in Nuremburg to prosecute Nazis for war crimes, indirectly referred to *jus cogens* in Article 8: “[t]he fact that the defendant acted pursuant to an order of his government or a superior shall not free him from responsibility.”<sup>114</sup> In other words, defendants could not claim “that they were merely following official orders.”<sup>115</sup> Article 8 of the Nuremburg Charter was specifically written to rebut such defenses, and implies that *jus cogens* norms overrule any conflicting national law or order.<sup>116</sup>

### III. CHEMICAL WEAPONS USE AS A *JUS COGENS* CRIME

Viewing *jus cogens* through the lens of natural law theory, the doctrine serves to maintain public order and human rights law. Ultimately, there is much overlap in these two goals. Protecting human rights is instrumental in maintaining public order and vice versa. This view is illustrated by the claim that for a crime to be *jus cogens*, two elements must be present: “(1) it must threaten the peace and security of humankind; and (2) it must shock the conscience of humanity.”<sup>117</sup> *Jus cogens* differs from other forms of international law in that states cannot opt out of the rule, thus making state consent irrelevant to the *jus cogens* calculus—although widespread consent in the form of a multilateral treaty may be evidence of *jus cogens*. In analyzing whether chemical weapons use constitutes a *jus cogens* crime, this Note will adopt the criteria suggested by the ILC during the drafting of the Vienna Convention:

---

113. Nieto-Navia, *supra* note 83, at 618 (quoting Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 32 (Feb. 5)).

114. O’Connell, *supra* note 40, at 88 (quoting David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2351 (1992)).

115. *Id.* (quoting Luban et al., *supra* note 114, at 2351).

116. *Id.* (quoting Luban et al., *supra* note 114, at 2351).

117. Lisa Tabassi, *Impact of the CWC: Progressive Development of Customary International Law and Evolution of the Customary Norm Against Chemical Weapons*, CBW CONVENTIONS BULL., March 2004, at 3 (citing M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in INTERNATIONAL CRIMINAL LAW 3, 42 (M. Cherif Bassiouni ed., 2d ed. 1999)).

(1) [W]hether the norm is incorporated into norm-creating multilateral agreements and is prohibited from derogation in those instruments; (2) whether a large number of nations have perceived the norm to be essential to the international public order, whereby the norm is reflected in general custom and is perceived and acted upon as an obligatory rule of higher international standing; and (3) whether the norm has been recognized and applied by international tribunals, such that when violations occur, the norm is treated in practice as a *jus cogens* rule with appropriate consequences ensuing.<sup>118</sup>

Additionally, given the strong arguments for the whole of human rights law to be included in *jus cogens*, chemical weapons use can be viewed as a violation of human rights law, warranting its inclusion in the category of *jus cogens* regardless of whether it meets the ILC criteria.

#### A. JUS COGENS UNDER THE ILC CRITERIA

##### 1. International Conventions and Treaties

Several international treaties, including the Geneva Gas Protocol of 1925, the four Geneva Conventions of 1949, the Chemical Weapons Convention, and the Rome Statute of the International Criminal Court (“ICC”), address the criminality of chemical weapons.<sup>119</sup> However, most of these conventions ban chemical weapons use only in international armed conflict and not in a noninternational armed conflict, such as the Syrian Civil War.<sup>120</sup> For example, the Geneva Gas Protocol prohibits the “use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, material or devices,” but the parties to the treaty only agreed “to be bound [to the provisions] between themselves.”<sup>121</sup> Moreover, the Protocol is silent as to the production and stockpiling of chemical weapons.<sup>122</sup> Thus, Syria, a party to the Protocol, did not technically violate its terms by producing chemical weapons or deploying them on nonsignatories—in this case, Syrian rebels.<sup>123</sup> Although the four Geneva Conventions of 1949—to which Syria is party—apply mainly to international armed conflicts, Article 3, which is common to all four Conventions, does apply to noninternational

---

118. Mitchell, *supra* note 14, at 233–34.

119. Blake & Mahmud, *supra* note 7, at 251.

120. *Id.*

121. *Id.* (alteration in original) (quoting Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65).

122. *Id.*

123. *Id.*

armed conflicts.<sup>124</sup> However, the prohibition of chemical weapons was “intentionally excluded from [Article 3] protections . . . in light of states’ sovereignty concerns.”<sup>125</sup> Additional Protocol II, a supplement to the Conventions, also applies to noninternational conflicts—more specifically to “non-international armed conflicts between State armed forces and organized armed groups”<sup>126</sup>—but does not specifically prohibit chemical weapons use.<sup>127</sup> Furthermore, Syria is not a party to Additional Protocol II.<sup>128</sup> Thus, Syria’s chemical weapons use is not illegal under the Geneva Convention.<sup>129</sup>

The Chemical Weapons Convention (“CWC”) was implemented in 1997 to address this gap in international humanitarian law.<sup>130</sup> The OPCW, which implements the provisions of the CWC, was awarded the Nobel Peace Prize for 2013.<sup>131</sup> Part of the OPCW’s mission is:

[T]o implement the provisions of the Chemical Weapons Convention (CWC) in order to achieve . . . a world that is free of chemical weapons . . . , and [a world] in which cooperation in chemistry for peaceful uses for all is fostered. In doing this, our ultimate aim is to contribute to international security and stability, to general and complete disarmament, and to global economic development.<sup>132</sup>

Signatories to the CWC agree never:

- (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
- (b) To use chemical weapons;
- (c) To engage in any military preparations to use chemical weapons;
- (d) To assist, encourage or induce, in anyway, anyone to engage in any activity prohibited to a State Party under this Convention.<sup>133</sup>

As of September 2015, 191 states are party to the CWC.<sup>134</sup> The only states that have neither signed nor acceded to the Convention are Angola,

---

124. *Summary of the Geneva Conventions of 12 August 1949 and Their Additional Protocols*, INT’L COMM. RED CROSS (2012), <https://www.icrc.org/eng/assets/files/publications/icrc-002-0368.pdf>.

125. Blake & Mahmud, *supra* note 7, at 252.

126. *Summary of the Geneva Conventions of 12 August 1949 and Their Additional Protocols*, *supra* note 124.

127. Blake & Mahmud, *supra* note 7, at 252.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Nobel Peace Prize 2013*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <https://www.opcw.org/special-sections/nobel-peace-prize-2013> (last visited Sept. 12, 2015).

132. *OPCW Mission Statement*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <http://www.opcw.org/mission> (last visited Sept. 12, 2015).

133. Blake & Mahmud, *supra* note 7, at 252–53.

Egypt, North Korea, and South Sudan.<sup>135</sup> However, according to the OPCW, “Angola’s parliament recently opened the way to Angola joining upon deposit of an instrument of accession, and South Sudan has indicated its intention to succeed to the Convention.”<sup>136</sup> Syria only recently acceded to the CWC on September 14, 2013.<sup>137</sup> The CWC is applicable in noninternational armed conflicts, but Syria was not a signatory to the Convention when the alleged chemical weapons use occurred.

The Rome Statute—the establishing treaty of the ICC<sup>138</sup>—also prohibits chemical weapons use.<sup>139</sup> However, because Syria is not a party to the Rome Statute, crimes committed in Syria can only be prosecuted if referred to the court by the U.N. Security Council.<sup>140</sup> Even so, the Rome Statute only prohibits chemical weapons use in the context of international armed conflict.<sup>141</sup> In theory, chemical weapons use could be punished under the Rome Statute if used as a means to carry out genocide, crimes against humanity, or other war crimes, but only those crimes, and not the use of chemical weapons itself, could be prosecuted.<sup>142</sup>

In *Van Anraat v. Netherlands*, the European Court of Human Rights noted that “it is possible for a treaty provision to become customary international law.”<sup>143</sup> The court stated that there was no doubt that the 1925 Geneva Gas Protocol created a norm against chemical weapons use, as its Preamble states that the prohibition of any such future use should be

---

134. *Status, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-3&chapter=26&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-3&chapter=26&lang=en) (last visited Sept. 12, 2015).

135. See *OPCW Member States*, ORG. FOR PROHIBITION CHEMICAL WEAPONS, <http://www.opcw.org/about-opcw/non-member-states> (last visited Sept. 12, 2015).

136. *Myanmar Joins Chemical Weapons Convention*, ORG. FOR PROHIBITION CHEMICAL WEAPONS (July 9, 2015), <https://www.opcw.org/news/article/myanmar-joins-chemical-weapons-convention>.

137. U.N. Secretary-General, Depository Notification, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, U.N. Doc. C.N.592.2013.TREATIES-XXVI.3 (Sept. 14, 2013), <https://treaties.un.org/doc/Publication/CN/2013/CN.592.2013-Eng.pdf>.

138. Blake & Mahmud, *supra* note 7, at 253 (The ICC was established in 2002 “to prosecute individuals for war crimes, genocide, and crimes against humanity.”).

139. *Id.*

140. *Id.*

141. *Id.* at 253–54.

142. *Id.* at 254.

143. *Van Anraat v. Netherlands*, EUR. CT. HUM. RTS. HUDOC 37–38 (July 6, 2010), <http://hudoc.echr.coe.int/eng?i=001-99990>.

“universally accepted as a part of International Law, binding alike the conscience and the practice of nations.”<sup>144</sup> The court noted:

[F]rom 1972 onwards, many of the States that had ratified the 1925 Protocol subject to a reservation of no first use withdrew their reservations, thus expressing their consent henceforth to be bound unconditionally. Also in 1972 a new conventional instrument was laid open for signature, the Biological Weapons Convention, which explicitly reaffirms the prohibition contained in the 1925 Geneva Gas Protocol . . . . [T]hese developments [are] proof not only of State practice consistent with the norm created by the 1925 Protocol but also of *opinio juris*.<sup>145</sup>

The *Van Anraat* case was pre-CWC; thus, the promulgation of the CWC and its near-universal adoption only strengthen the argument for *opinio juris*.

Although the treaties and conventions banning chemical weapons use do not explicitly apply to Syria—either because Syria is a nonsignatory or because the treaty does not apply to noninternational armed conflict—the sheer number of instruments prohibiting chemical weapons use, the long duration of time to which states have adhered to the rule, and the sheer number of states adhering to the rule identify *opinio juris* supporting the prohibition against the use of chemical weapons. The prohibition of chemical weapons use in norm-creating multilateral agreements satisfies the first criteria of the ILC framework.

## 2. Customary International Law and General Principles

Chemical weapons use is also clearly prohibited by customary international law. The International Committee of the Red Cross (“ICRC”)—“an authoritative source on international humanitarian law”<sup>146</sup>—maintains a comprehensive list of rules of customary international humanitarian law.<sup>147</sup> Under ICRC Rule 74, chemicals weapons use is prohibited “as a norm of customary international law applicable in both international and non-international armed conflicts.”<sup>148</sup> As discussed above, customary international law requires two elements: state practice

---

144. *Id.* at 38.

145. *Id.*

146. Blake & Mahmud, *supra* note 7, at 255.

147. See *Customary International Humanitarian Law*, INT’L COMM. RED CROSS, <https://www.icrc.org/customary-ihl> (last visited Oct. 5, 2015).

148. *Rule 74. Chemical Weapons*, INT’L COMM. RED CROSS, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter24\\_rule74](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter24_rule74) (last visited Oct. 5, 2015).

and *opinio juris*.<sup>149</sup> While there is no definitive number that constitutes a customary international law, the fact that all but a handful of states have signed the CWC is strong evidence that the non-use of chemical weapons is a global state practice. Additionally, 137 state parties to the CWC have implemented national legislation criminalizing acts prohibited by the Convention,<sup>150</sup> indicating that the prohibition against chemical weapons is a “general principle” found throughout the major legal systems of the world. As noted above, silence in and of itself is not evidence of a state’s objection to a customary international law.<sup>151</sup> Thus, Syria’s initial refusal to sign the CWC does not prove that it opted out of the customary international law against chemical weapons use. As discussed above, the numerous treaties and conventions banning chemical weapons use is strong evidence of *opinio juris*.<sup>152</sup>

The difference between *jus cogens* norms and customary international law is non-derogation. States cannot opt out of a *jus cogens* norm, and no derogation from that rule is permitted.<sup>153</sup> Given the response from the United Nations and the international community in general, the non-derogation component of *jus cogens* has arguably been met. Syria’s actions were widely condemned, with the United States and France threatening military intervention,<sup>154</sup> and Syria’s strongest ally—Russia—persuading it to sign the CWC.<sup>155</sup> Whether these threats were justified and would actually have materialized is beyond the scope of this Note, but nonetheless, this heavy-handed response suggests that the international community treats chemical weapons as a *jus cogens* norm by not allowing states to derogate from the rule. Furthermore, given that nearly all nations have signed the CWC, the international community seems to agree that the non-use of chemical weapons is a rule from which no derogation is permitted. This evidence suggests that a large number of nations perceive the norm to be essential to the international public order and treat it as an obligatory rule of higher international standing, satisfying the second element of the ILC’s criteria.

---

149. See *supra* text accompanying note 66.

150. OPCW Conference of the States Parties, *Report of the OPCW on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction in 2011*, at 17, OPCW Doc. C-17/4 (Nov. 27, 2012), [https://www.opcw.org/fileadmin/OPCW/CSP/C-17/en/c1704\\_e\\_.pdf](https://www.opcw.org/fileadmin/OPCW/CSP/C-17/en/c1704_e_.pdf).

151. See *supra* text accompanying notes 58–59.

152. See *supra* Part III.A.1.

153. SLYE & VAN SCHAACK, *supra* note 51, at 96.

154. Borger, *supra* note 29.

155. *Russia Urges Syria Hand Over Chemical Weapons to Intl Control to Avoid Strike*, *supra* note 10.

### 3. Decisions of International and Regional Judicial Bodies

Due to the rarity of chemical weapons use, prosecution of chemical-weapons-related crimes is scarce. Two of the leading cases in this area stem from the Halabja chemical attack in Iraq on March 16, 1988. The attack killed between three thousand and five thousand people, injuring seven to ten thousand more.<sup>156</sup> Thousands more died of complications, diseases, and birth defects in the years following the attack.<sup>157</sup>

The first case was adjudicated at the regional level in the Netherlands.<sup>158</sup> The *Van Anraat* case is unique because “economic actors have been largely shielded from such criminal charges, even though their role with regard to gross violations of international human rights and humanitarian law has been raised repeatedly.”<sup>159</sup> The case involved the prosecution of Frans van Anraat, a Dutch businessman, for “complicity in war crimes and complicity in genocide . . . [and] supplying, to Iraqi State organisations, chemicals which were used to produce chemical weapons used by the former Iraqi regime to attack Iraqi Kurdistan and the Islamic Republic of Iran.”<sup>160</sup> Ultimately, the court ruled that while a genocide against the Kurdish population had indeed occurred, Van Anraat’s complicity in the genocide had not been proven.<sup>161</sup> The court did, however, find Van Anraat guilty of complicity in war crimes.<sup>162</sup> In general, genocide also constitutes a crime against humanity.<sup>163</sup> The distinction between the two is that genocide requires a specific “intent to destroy” a national, ethnic, racial, or religious group, in whole or in part, while crimes against humanity do not.<sup>164</sup> While the statutes defining crimes against humanity differ, in general they include only atrocities “committed as part of a

---

156. 1988: *Thousands Die in Halabja Gas Attack*, BBC NEWS (March 16, 1988), [http://news.bbc.co.uk/onthisday/hi/dates/stories/march/16/newsid\\_4304000/4304853.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/march/16/newsid_4304000/4304853.stm).

157. Dlawer Abdul Aziz Ala’Aldeen, *Death Clouds: Saddam Hussein’s Chemical War Against the Kurds 5/1/1991*, DLAWER’S POINT (Apr. 12, 2008), <http://www.dlawer.net/?q=node/79>.

158. *District Court of the Hague*, THE HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net/index.php?id=6410> (last visited Oct. 3, 2015).

159. L. Tabassi & E. van der Borgh, *Chemical Warfare as Genocide and Crimes Against Humanity*, 2 HAGUE JUST. J. 5, 8 (2007) (“The *Van Anraat* case has many similarities with the *Zyklon B* case in which German industrialists were charged, and convicted, for war crimes during World War II for the supply of poison gas, used for the extermination of allied nationals interned in concentration camps, knowing that the gas was to be used for that purpose.”).

160. *Id.*

161. *Id.* at 11–12.

162. *Id.* at 12.

163. *Id.* at 7.

164. *Id.*

widespread or systematic attack directed against any civilian population” without specific intent.<sup>165</sup>

Unable to find direct evidence of specific intent, the *Van Anraat* court inferred specific intent “from a number of facts,” relying on case law of the ICTY and International Criminal Tribunal for Rwanda.<sup>166</sup> One fact that weighed heavily in favor of finding specific intent was the use of chemical weapons, “which, *because of their nature and when used against villages, cannot discriminate between civilians and combatants*, and not only cause grievous suffering among the population, but also arouse considerable fear and subsequently cause the villages and cities to become uninhabitable for a long time.”<sup>167</sup>

This line of reasoning is narrow—it only applies to chemical weapon attacks on villages—and does not suggest that chemical weapons use rises to the level of *jus cogens*. The inherent nature of chemical weapons might be strong evidence of genocide if used on civilians, but what if they are used on a non-civilian target—say, for example, on an aircraft carrier? While this point is unclear, the *Van Anraat* court did highlight the indiscriminate nature of chemical weapons and the “grievous suffering” they cause.<sup>168</sup> While stopping short of equating chemical weapons use with genocide, the court seemed to suggest that genocidal intent can be inferred from their use, in certain circumstance, because of their inherent nature.<sup>169</sup>

The second leading case involved chemical weapons use in Iraq.<sup>170</sup> In the *Anfal* case, the Iraqi Special Tribunal found Ali Hassan al-Majid guilty of genocide attacks against the Kurds.<sup>171</sup> Al-Majid has been dubbed “Chemical Ali” by Iraqis for his use of chemical weapons in such attacks.<sup>172</sup> The court noted that the perpetrators were well aware of “the consequences of using chemical weapons which are considered as *indistinct weapons which do not differentiate between civilians and fighters*,” and considered this to be one of the “elements of proof [that]

---

165. *Id.*

166. *Id.* at 10.

167. Rechtbank’s-Gravenhage [District Court of the Hague] Dec. 23, 2005, *Van Anraat Sentence* at 27 (No. 09/751003-04) (Neth.), [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Netherlands/vanAnraat\\_Judgment\\_23-12-2005\\_EN.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Netherlands/vanAnraat_Judgment_23-12-2005_EN.pdf) (emphasis added).

168. *Id.*

169. *See id.*

170. *See supra* text accompanying note 5.

171. Iraqi High Tribunal, Second Criminal Court June 24, 2007, *Special Verdict* at 515 (Case No. 1/ C Second/2006) (Iraq).

172. *How the Mighty Are Falling*, *ECONOMIST* (July 5, 2007), <http://www.economist.com/node/9441341>.

emphasize the occurrence of murder as genocide.”<sup>173</sup> Thus, like the *Van Anraat* court, the *Anfal* court gave significant weight to chemical weapons use in determining that a genocidal act occurred,<sup>174</sup> but stopped short of equating chemical weapons use with genocide or elevating it to a *jus cogens* crime. However, in the *Tadić* case, the ICTY referenced the *Anfal* attacks, stating,

It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals—a matter on which this Chamber obviously cannot and does not express any opinion—there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in *internal* armed conflicts.<sup>175</sup>

The ICTY’s opinion is notable because most conventions and treaties prohibiting chemical weapons use are limited to international armed conflicts. The ICTY broadened the prohibition of chemical weapons to “internal armed conflicts,” such as the Syrian Civil War.<sup>176</sup>

Thus, at least two cases suggest that chemical weapons use is strong evidence of genocide, and the ICTY has declared that chemical weapons use, in any context, is outright prohibited. However, these judicial opinions fall short of satisfying the third ILC criteria. It would have been more useful if a court had declared that chemical weapons use is always an act of genocide—since genocide itself is universally accepted as a *jus cogens* crime—or, of course, if a court had declared chemical weapons prohibition to be a preemptory norm.

Having established that chemical weapons use meets the first two ILC criteria—incorporation into norm-creating treaties, and a large number of nations perceiving the norm to be of higher international standing—a judicial opinion declaring chemical weapons to be a violation of preemptory norms would certainly solidify chemical weapons use as a *jus cogens* crime.

---

173. Iraqi High Tribunal, Second Criminal Court June 24, 2007, Special Verdict at 750 (Case No. 1/ C Second/2006) (Iraq).

174. Compare *id.* with Rechtbank’s-Gravenhage [District Court of the Hague] Dec. 23, 2005, Van Anraat Sentence at 27 (No. 09/751003-04) (Neth.), [http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Netherlands/vanAnraat\\_Judgment\\_23-12-2005\\_EN.pdf](http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Netherlands/vanAnraat_Judgment_23-12-2005_EN.pdf).

175. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 124 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (emphasis added).

176. *Id.* ¶ 30.

Several articles in the Rome Statute of the ICC can be interpreted to criminalize the use of chemical weapons:

Article 8(2)(b)(xvii) makes it a war crime to employ “poison or poisoned weapons;” section xvii refers to “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and section xx makes it a war crime to employ “weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict.”<sup>177</sup>

Initially, Article 8(2)(b) applied only to international armed conflicts and not internal conflicts, such as the Syrian Civil War.<sup>178</sup> This limitation was corrected, however, at the Kampala Review Conference in 2010, where Article 8(2)(e) was amended to “extend[] the list of war crimes in non-international armed conflicts to include ‘employing poison or poisoned weapons’ and ‘employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices.’”<sup>179</sup> The difficulty in enforcing this provision against Syria is that it is not a party to the Rome Statute.<sup>180</sup> Thus, prosecuting a Syrian national under this statute would require a referral from the U.N. Security Council.<sup>181</sup> This is unlikely, however, considering that Russia and the United States resorted to diplomacy to resolve the chemical weapons problem in Syria. If the Security Council were to do this and the ICC expressed an opinion that chemical weapons use has the character of a *jus cogens* norm, the prohibition against chemical weapons would undoubtedly crystalize as *jus cogens*. Considering that most of the world already treats chemical weapons use as a *jus cogens* crime, this is the next logical step. Formalizing the chemical weapons ban into the *jus cogens* doctrine would provide universal jurisdiction to chemical weapons attacks, allowing any state to prosecute offenders for such crimes.

---

177. Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?*, EJIL: TALK! (Aug. 23, 2013), <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria> (quoting Rome Statute of the International Criminal Court art. 8(2)(b)(xvii)–(xx), July 17, 1988, 2187 U.N.T.S. 90).

178. *Id.*

179. *Id.* (quoting Review Conference of the Rome Statute, Kampala, Uganda, May 31–June 11, 2010, *Draft Resolution Amending Article 8 of the Rome Statute*, at 1, I.C.C. Doc. RC/WGOA/1/Rev. 2 (June 4, 2010)).

180. *Id.*

181. *Id.*

---

---

B. *JUS COGENS* AS AN EXTENSION OF HUMANITARIAN LAW

Stepping away from the ILC criteria discussed above, one can also look to the normative characteristics of *jus cogens* and humanitarian law to determine that chemical weapons are a peremptory norm. The purpose of humanitarian law is to preserve a measure of humanity even during conflicts. States adhere to principles of humanitarian law because they accept that war is inevitable and have chosen to make it more humane. The use of chemical weapons conflicts with these values and thus should be considered *jus cogens*. The purpose of *jus cogens* and humanitarian laws is to protect non-combatants. Given the nature of chemical weapons and their intended purpose, civilians will almost always be killed indiscriminately upon their implementation.

Oddly, nuclear weapons use is not universally recognized as a violation of *jus cogens*. Antonio Augusto Cançado Trindade, Judge and Former President of the Inter-American Court of Human Rights, argues that “nuclear weapons, being weapons of indiscriminate mass destruction, infringe International Humanitarian Law, which contain precepts of *jus cogens*, as recalled by successive resolutions of the U.N. General Assembly; those precepts are the *opinio juris* of the international community.”<sup>182</sup> These same arguments can be applied to other weapons of mass destruction, such as chemical weapons. Chemical weapons kill indiscriminately and cause mass destruction, similar to nuclear weapons, although not on the same scale.

In an advisory opinion on the legality of nuclear weapons, the ICJ referred to two “cardinal principles” of international humanitarian law: (1) the principle of distinction, and (2) the prohibition of the use of weapons that cause unnecessary suffering or superfluous injury.<sup>183</sup> The principle of distinction protects civilians by establishing “the distinction between combatants and non-combatants,” and prohibiting the use of indiscriminate weapons.<sup>184</sup> One judge called this prohibition “absolute” and another judge went as far as to describe this rule as *jus cogens*.<sup>185</sup> Indiscriminate “methods or means of combat” are defined in Additional Protocol I of 1977 as those “which cannot be directed at a specific military

---

182. Antônio Augusto Cançado Trindade, *The Illegality Under Contemporary International Law of All Weapons of Mass Destruction*, at 21, U.N. Doc. A/54/98/Annex (Dec. 20, 2004).

183. Angel Anastassov, *Are Nuclear Weapons Illegal? The Role of Public International Law and the International Court of Justice*, 15 J. CONFLICT & SECURITY L. 65, 75 (2009).

184. *Id.* at 76 (quoting Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8), <http://www.icj-cij.org/docket/files/95/7495.pdf>).

185. *Id.*

objective; or . . . the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of nature to strike military objectives and civilians or civilian objects without distinction.”<sup>186</sup> According to one scholar, “Arguably, the use of modern types of nuclear weapons, especially those known to be especially designed to destroy bunker targets, could be accurate enough to respond to the first criterion.”<sup>187</sup> Similarly, a chemical weapon aimed at a military bunker, military base, or aircraft carrier would avoid the first criterion.

As for the second “cardinal principle,” weapons causing “harm greater than that unavoidable to achieve legitimate military objectives” would constitute “unnecessary suffering or superfluous injury.”<sup>188</sup> However, the ICJ has not subjected nuclear weapons to this test, nor addressed “the fact that the effects of nuclear weapons are always unpredictable due to the incalculable behaviour of secondary radiation.”<sup>189</sup> Furthermore, the court did not rule out the possibility that nuclear weapons could be deployed as a “proportionate act of self-defense.”<sup>190</sup>

A study conducted in Halabja, Iraq of the long-term effects of chemical weapons exposure showed that “[t]hese chemicals seriously affected people’s eyes and respiratory and neurological systems . . . [and] children [were] dying . . . of leukemias and lymphomas.”<sup>191</sup> This study “indicates that chemical weapons exposure causes ‘long-term damage to the DNA’ and can affect the ability of an ethnic group to produce healthy off-spring.”<sup>192</sup> By affecting the ability of civilian populations to reproduce, chemical weapons use will arguably satisfy the specific intent criteria of genocide in every instance, thus making chemical weapons use a *jus cogens* crime. The superfluous suffering caused by chemical weapons also satisfies the second “cardinal principle” articulated by the ICJ. Chemical weapons cause unnecessary suffering not only to the immediate victims, but also to future generations.

The gruesome effects and unnecessary suffering caused by chemical weapons are exactly the kinds of outcomes that humanitarian law tries to

---

186. *Id.* (alteration in original).

187. *Id.*

188. *Id.*

189. *Id.* at 77.

190. *Id.* at 74.

191. Sewell, *supra* note 1, at 376 (quoting Christine Gosden, *Why I Went, What I Saw*, WASH. POST, Mar. 11, 1998, at A9).

192. Mea Sucato, *Enforcing the Ban on Chemical Weapons*, 6 SUSTAINABLE DEV. L. & POL’Y 57, 57 (2006) (quoting Gosden, *supra* note 191).

prevent. The implementation of human rights is an international obligation, forming a “global bill of rights,”<sup>193</sup> and as such, humanitarian law, and by extension the prohibition of chemical weapons, should be considered *jus cogens*. Without *jus cogens* status, humanitarian law becomes a line that is too easy to cross. As technology advances, weapons have the potential to become more savage, making indiscriminate killing easier. Establishing chemical weapons use as a *jus cogens* crime draws a line in the sand.

Recognizing chemical weapons use as a violation of humanitarian law and *jus cogens* would grant universal jurisdiction over such crimes. Universal jurisdiction provides every nation with the ability to prosecute certain crimes regardless of where the crime was committed or the perpetrator’s nationality.<sup>194</sup> For example, under this theory, any state could prosecute Assad if they suspected that he was responsible for the chemical weapons attacks in Syria. This is particularly useful in situations in which the state that would have traditional jurisdiction over an alleged crime is either unable or unwilling to prosecute a crime or alleged perpetrator. Universal jurisdiction was crucial following World War II and during the Nuremburg Trials, allowing states to prosecute and punish individuals for some of the most atrocious crimes in human history.<sup>195</sup> *Jus cogens* plays an important role in determining whether universal jurisdiction attaches to an individual.<sup>196</sup> For example, as discussed above, a state can opt out of a customary international norm if it persistently objects to said norm.<sup>197</sup> Similarly, a state can opt out of an international agreement or customary norm that establishes universal jurisdiction over a particular crime.<sup>198</sup> However, because states cannot opt out of *jus cogens*, and peremptory norms are binding on all states, even a persistent objector would have no avenue to violate a *jus cogens* norm without being subject to prosecution by universal jurisdiction.<sup>199</sup> Thus, although rarely exercised in practice, the right to prosecute perpetrators of crimes such as piracy, slave trading, war crimes, genocide, hijacking, terrorism, and torture is arguably binding on all states.<sup>200</sup>

---

193. Parker & Neylon, *supra* note 12, at 443.

194. Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U.-DCL J. INT’L L. 1, 3 (2000).

195. See Jodi Horowitz, Comment, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations*, 23 FORDHAM INT’L L.J. 489, 498–99 (1999).

196. Jordan, *supra* note 194, at 8.

197. See *supra* text accompanying note 57.

198. Jordan, *supra* note 194, at 8–9.

199. *Id.* at 9.

200. *Id.*

Universal jurisdiction also defeats the doctrine of sovereign immunity, which normally insulates sovereign states and heads of state from prosecution.<sup>201</sup> The doctrine of sovereign immunity “developed at a time when a state and its ruler were viewed as one entity.”<sup>202</sup> Its purpose is to “protect[] the sovereign’s ability to uphold the dignity of his nation, and satisf[y] the functional need for sovereigns to act in their nation’s best interest when travelling to another state without fear of being subject to adjudication.”<sup>203</sup> Scholars have advanced several theories as to why a sovereign is not immune from prosecution when he or she commits a *jus cogens* crime. First, a sovereign is not acting within his or her authority when committing a *jus cogens* crime and thus does not constitute a “sovereign act” that would normally be protected by sovereign immunity.<sup>204</sup> Second, a violation of a peremptory norm is “by definition null and void” and thus cannot be a source of legal privilege.<sup>205</sup> Finally, by committing a *jus cogens* crime, a sovereign abuses his or her right to immunity and should thus not be allowed to invoke its privilege.<sup>206</sup> However, “the ambiguous nature of *jus cogens* creates a risk that states will decide that certain offenses are *jus cogens* and strip a sovereign of his immunity, regardless of whether the offense is internationally recognized as *jus cogens*.”<sup>207</sup> This consideration illustrates why it is so crucial for the international community to solidify chemical weapons use as a *jus cogens* crime. Universally recognizing chemical weapons as *jus cogens* would allow any state to prosecute chemical weapons use and would eliminate any controversy or backlash for doing so.

### CONCLUSION

The chemical attack in Ghouta was clearly a violation of *jus cogens*, in that the targeting of civilians constitutes a crime against humanity, and, with additional evidence, could even rise to the level of genocide. However, the question of whether chemical weapons use itself is a *jus cogens* crime is unclear. For example, would the use of a chemical weapon on a military bunker be a *jus cogens* violation? Given the gruesome nature of such weapons and incorporation of human rights law into *jus cogens*, the answer seems to be yes.

---

201. See Horowitz, *supra* note 195, at 524–25.

202. *Id.* at 505.

203. *Id.* at 503.

204. *Id.* at 510–11.

205. *Id.* at 511.

206. *Id.*

207. *Id.* at 512.

The purpose of *jus cogens* law is to maintain public order and protect human rights. Given this purpose, it is logical for chemical weapons use to be included in the category of a *jus cogens* crime. The international community already treats chemical weapons as a *jus cogens* crime. Furthermore, chemical weapons use meets most of the criteria laid out by the ILC in determining what constitutes a *jus cogens* norm. The only element that is missing is a judicial opinion from an international tribunal declaring chemical weapons use to be a *jus cogens* crime. The ICC has an opportunity to accomplish this with the recent events in Syria, and in doing so would solidify chemical weapons as *jus cogens*. Categorizing chemical weapons use as a *jus cogens* violation of humanitarian law would attach universal jurisdiction to such crimes, allowing any state to hold accountable those responsible for the chemical weapons attacks in Syria.