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## Crossing the Red Line: The Role of U.S. Intelligence Information and Evidentiary Standards in the Inspection of Syria's Chemical Weapons

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**CROSSING THE RED LINE: THE ROLE OF U.S.  
INTELLIGENCE INFORMATION AND EVIDENTIARY  
STANDARDS IN THE INSPECTION OF SYRIA'S CHEMICAL  
WEAPONS**

*Leah Paisner\**

ABSTRACT

*In 2002, the Director of Central Intelligence (DCI) submitted an unclassified report to Congress, pursuant to § 721 of the FY 97 Intelligence Authorization Act, affirming the existence of Syria's chemical weapons stockpile and its continued pursuit of chemical weapons precursors. Other states have also acknowledged that the Syrian government acquired its chemical weapons arsenal prior to the August 21, 2013 chemical attack against civilians in the Ghouta agricultural belt. However, the full extent of the threat posed was unknown. Even after the attack, the U.S. government was reluctant to intervene militarily. Drawing on its experience in Iraq, the U.S. refused to take action until it had "clear and convincing evidence" that Syria had used chemical weapons against civilians, crossing the proverbial "red line." This article will analyze the role of U.S. intelligence information and evidentiary standards in determining whether the U.S. government has a reasonable basis for intervening in Syria in the event of a subsequent breach of the Chemical Weapons Convention.*

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## INTRODUCTION

In 2002, the Director of Central Intelligence (DCI) submitted an unclassified report to Congress, pursuant to § 721 of the FY 97 Intelligence Authorization Act, affirming the existence of Syria’s chemical weapons stockpile and its continued pursuit of chemical weapons precursors.<sup>1</sup> This report fell in line with similar assessments from other states acknowledging that the Syrian government acquired its chemical weapons arsenal prior to the August 21, 2013 chemical attack against civilians in the Ghouta agricultural belt.<sup>2</sup> However, the full extent of the threat posed was unknown. Even after the attack, the U.S. government was reluctant to intervene militarily.<sup>3</sup> Drawing on its experience in Iraq, the U.S. refused to take action until it had what it considered clear and convincing evidence that Syria had used chemical weapons against civilians, thereby crossing the proverbial “red line.”<sup>4</sup> This article will analyze the role of U.S. intelligence information and evidentiary standards in determining whether the U.S. government has a reasonable basis for intervening in Syria in the event of a subsequent breach of the Chemical Weapons Convention.

## I. BACKGROUND

What initially began as a people’s rebellion three years ago has transformed into a bloody civil conflict with upwards of 191,000 civilian casualties and a

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<sup>1</sup> DEPUTY DIRECTOR OF NATIONAL INTELLIGENCE FOR ANALYSIS, C.I.A., UNCLASSIFIED REPORT TO CONGRESS ON THE ACQUISITION OF TECHNOLOGY RELATING TO WEAPONS OF MASS DESTRUCTION AND ADVANCED CONVENTIONAL MUNITIONS, 1 JANUARY THROUGH 30 JUNE 2002, at 1, 8 (2003), *available at* [https://www.cia.gov/library/reports/archived-reports-1/721report\\_jan-june2002.pdf](https://www.cia.gov/library/reports/archived-reports-1/721report_jan-june2002.pdf).

<sup>2</sup> *See, e.g.*, Richard Engel et al., *Syria’s chemical weapons arsenal remains a menacing mystery*, NBC News (Sept. 5, 2013), <http://www.nbcnews.com/news/other/syrias-chemical-weapons-arsenal-remains-menacing-mystery-f8C11078068>.

<sup>3</sup> Sabrina Siddiqui & Michael McAuliff, *Obama’s Pitch To Congress On Syria Fails To Sway Senators*, HUFFINGTON POST (Sept. 10, 2013), [http://www.huffingtonpost.com/2013/09/10/obama-congress-syria\\_n\\_3902407.html](http://www.huffingtonpost.com/2013/09/10/obama-congress-syria_n_3902407.html).

<sup>4</sup> *See* Peter Baker et al., *Off-the-Cuff Obama Line Put U.S. in Bind on Syria*, N.Y. TIMES, May 5, 2013, at A1.

spillover of over two million refugees into neighboring states.<sup>5</sup> United States analysts, however, did not anticipate a conflict of this magnitude; instead, during the early stages of the fighting, many assessed that Syrian President Bashar al-Assad would be forced from power.<sup>6</sup> With military support from Hezbollah and material aid from Iran and Russia, regime forces have managed to make several tactical gains and counterattacks against rebel forces.<sup>7</sup> The success of the Syrian regime's counteroffensive strategy has been categorized by its aerial and artillery shelling of civilian neighborhoods where rebel forces are based, extrajudicial executions, the torture of activists and rebel fighters, and the use of sophisticated chemical weaponry.<sup>8</sup>

On August 30, 2013, the U.S. government announced that they had "high confidence" that the Syrian regime had conducted a massive chemical weapons assault a week prior against civilians living in the Ghouta agricultural belt (an area surrounding the eastern and southern suburbs of Damascus).<sup>9</sup> Based on unclassified U.S. and French intelligence reports, the regime forces had used surface-to-surface rockets to deliver a large-scale payload of sarin gas.<sup>10</sup> Sarin

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<sup>5</sup> JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: BACKGROUND AND U.S. RESPONSE 4 (2013), available at <http://fpc.state.gov/documents/organization/214423.pdf>; Laura Smith-Spark, *With more than 191,000 dead in Syria, U.N. rights chief slams global 'paralysis'*, CNN NEWS (Aug. 22, 2014), [http://edition.cnn.com/2014/08/22/world/meast/syria-conflict/index.html?hpt=imi\\_c2](http://edition.cnn.com/2014/08/22/world/meast/syria-conflict/index.html?hpt=imi_c2).

<sup>6</sup> *Summary* of JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: BACKGROUND AND U.S. RESPONSE 4 (2013), available at <http://fpc.state.gov/documents/organization/214423.pdf>.

<sup>7</sup> *See id.*

<sup>8</sup> *See id.* (observing that the Assad regime still holds a tactical advantage in regards to its aerial, artillery, and defensive capabilities); Hwaida Saad & Rick Gladstone, *Qaeda-Linked Insurgents Clash With Other Rebels in Syria, as Schism Grows*, N.Y. TIMES, Jan. 4, 2014, at A8 (reporting the killing and torturing of rebel activists and fighters).

<sup>9</sup> Press Release, U.S. Office of the Press Secretary, Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013 (Aug. 30, 2013) (on file with U.S. Office of the Press Secretary), available at <http://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21>; *Summary* of MARY BETH D. NIKITIN ET AL., CONG. RESEARCH SERV., R42848, SYRIA'S CHEMICAL WEAPONS: ISSUES FOR CONGRESS (2013), available at <http://fas.org/sfp/crs/nuke/R42848.pdf> (commenting that the attack occurred near rebel held areas, but was directed primarily at civilian populations).

<sup>10</sup> Press Release, Council on Foreign Relations, French Government's Declassified Intelligence Assessment on Chemical Weapons Attack in Syria (2013) (on file with the Council on Foreign Relations), available at <http://www.cfr.org/syria/french-governments-declassified-intelligence-assessment-chemical-weapons-attack-syria/p31335> (providing that the Syrian government has Scud C, Scud B, M600, and SS21 missiles, which are capable of delivering sarin and other chemical weapon payloads ranging anywhere between 70 to 500 kilometers in distance); Press Release, U.S. Office of the Press Secretary, Government Assessment of the Syrian Government's Use of Chemical Weapons on August 21, 2013 (Aug. 30, 2013) (on file with the U.S. Office of the Press Secretary), available at <http://www.whitehouse.gov/the-press->

is an extremely toxic nerve agent that causes muscle overstimulation in its victims, which, in turn, may result in irreparable neurological damage or even death.<sup>11</sup> The various intelligence communities have estimated that the death toll could range from anywhere between 350 to around 1500 fatalities, a substantial portion of whom were civilians.<sup>12</sup> The regime's deliberate actions crossed the U.S. government's proverbial "red line," the official threshold that would trigger direct intervention in the conflict.<sup>13</sup>

Chemical weapons are an easy type of catastrophic weaponry to build, and are completely indiscriminate in the scope of their destruction.<sup>14</sup> Most commonly termed the "poor man's atomic bomb," chemical weapons have a long, sordid history on the battlefield, originating from Germany's use of chlorine gas against British troops during World War I and leading up to the Iraqi government-led chemical attack on the Kurdish people in Halabja.<sup>15</sup> Yet, chemical weapons have more value as instruments of terror than tools of warfare.<sup>16</sup> Their intended function is to terrorize, subjugate, and annihilate unarmed populations without leaving a mark on the vital infrastructure in the

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office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21 (noting that the evidence for the August 21 attack was based on human intelligence (HUMINT), signals (SIGINT), social media documentation, and geospatial intelligence (GEOINT)).

<sup>11</sup> DANA A. SHEA, CONG. RESEARCH SERV., R42862, CHEMICAL WEAPONS: A SUMMARY REPORT OF CHARACTERISTICS AND EFFECTS, 3 (2013) (nerve agents, such as sarin, may enter the body either through inhalation or direct skin contact, but are far more deadly if inhaled).

<sup>12</sup> See NIKITIN ET AL., *supra* note 9, at 1, 15 (commenting that the French intelligence community's methodology for calculating the death toll are akin to similar models that put the number closer to a total of 1,500 casualties).

<sup>13</sup> See SHARP & BLANCHARD, *supra* note 5, at 16 (observing that the U.S. government has a national security interest in holding states accountable for their actions when they deliberately violate international norms on chemical weapons).

<sup>14</sup> LORD LYELL, NORTH ATLANTIC ASSEMBLY, CHEMICAL AND BIOLOGICAL WEAPONS: THE POOR MAN'S BOMB, (1996), <http://fas.org/irp/threat/an253stc.htm>; Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U.L. REV. 755, 762 (1994) (noting that while chemical weapons may be referred to as the "poor man's atomic bomb," they have seen more extensive use on the battlefield than nuclear weapons).

<sup>15</sup> See *id.* at 762–63 (describing chemical weapon use from World War I to Iraqi attack on the Kurdish people, and additionally pointing out that, despite their offensive capabilities against human populations, chemical weapons have little to no destructive power against military facilities or depots); Paul Schulte, *When chemical weapons killed 90,000*, CNN (July 9, 2014), <http://www.cnn.com/2014/07/09/opinion/schulte-chemical-weapons-world-war-i/> (describing Germany's use of chlorine gas against the British in World War I).

<sup>16</sup> See Kellman, *supra* note 14, at 762–63; see also LYELL, *supra* note 14 (noting that the first large-scale use of chemical weapons on the battlefield was in 1915 during the Battle of Langemarck, when the German army fired approximately 171 tons of chlorine gas on the Russian army, killing over 5,000 soldiers; yet, the strength of chemicals weapons developed after the Great War has increased exponentially, such that newer chemical agents, such as VX, can produce the same number of casualties at much smaller doses).

surrounding areas.<sup>17</sup> Thus, the universal prohibition of chemical weapons use is based on this principle, which, in turn, forms the foundation for all related international treaties and conventions.<sup>18</sup>

The Chemical Weapons Convention (CWC) is the primary legally binding, international document which aims to fully eliminate chemical weapons through regulating their development, production, stockpiling, and use by states.<sup>19</sup> International regulatory regimes, such as the Organization for the Prohibition of Chemical Weapons (OPCW), have the jurisdiction to evaluate state compliance with the CWC by conducting intrusive, systematic inspections of chemical facilities.<sup>20</sup> The Technical Secretariat of the OPCW also has the authority to order the installation of monitoring equipment or systems in declared chemical production facilities, and challenge states to verify their compliance with the CWC.<sup>21</sup> However, the OPCW faces a profoundly different set of challenges than its non-proliferation counterparts because the size of the global chemical and pharmaceutical industries hampers its efforts to regulate the flow of precursors.<sup>22</sup> As a consequence, the CWC's verification procedures must be exceptionally invasive and systematic, such that even state parties without weapons production facilities are required to undergo constant inspection for any evidence of clandestine activity.<sup>23</sup>

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<sup>17</sup> See Kellman, *supra* note 14, at 763 (noting that chemical weapons have a greater military utility than other catastrophic weapons because of their effectiveness in subduing a rebellious population without harming vital infrastructure); see also Colonel Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 493–94 (1999).

<sup>18</sup> See Roberts, *supra* note 17, at 535–36 (observing that the prohibition of chemical weapons use may be considered a non-derogable, international legal norm due to its near universal acceptance among states).

<sup>19</sup> The Convention on the Prohibition, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, pmbl., *opened for signature* Jan. 13, 1993, 32 I.L.M.800, 1974 U.N.T.S. 45 [*hereinafter* CWC] (providing that the elimination of chemical weapons may be achieved through the concerted effort of the international community in regulating the global trade of chemicals and deterring states from using and resuming chemical weapons production).

<sup>20</sup> See Kellman, *supra* note 14, at 812 (noting that the CWC facilitates the verification process by separating chemicals into three inspection schedules based on their potential military use and legitimate commercial applications; accordingly, key chemical precursors that could be converted for chemical weapons use are included in the same schedule as actual warfare agents).

<sup>21</sup> *Id.* at 813–14 (declaring that states under inspection have the legal obligation to make a good faith effort to demonstrate compliance with the CWC; if they are unable to do so, the OPCW will give the inspected state a twelve hour notice that an inspection team is on its way).

<sup>22</sup> See *id.* at 812 (noting that the types of chemical precursors that may be used in the production of weapons are so diverse that regulatory regimes' efforts to curb their use must be "more extensive and intrusive than those for nuclear weapons").

<sup>23</sup> See *id.* (observing that the CWC represents a two-pronged approach of regulating the flow of chemicals, and of verifying the non-production of chemical weapons).

The success of the CWC rides, however, not on vague assurances that its guidelines are being followed, but on the extent of international legal cooperation between state parties and the strength of export regulations.<sup>24</sup> Proliferators may escape the watchful eye of OPCW inspectors by segmenting the production of chemical weapons—in other words, distributing production operations across a number of facilities in multiple states.<sup>25</sup> Moreover, states with sophisticated chemical and pharmaceutical industries may easily divert legitimate civilian production facilities to manufacture agents of warfare.<sup>26</sup> To meet its main objective of subjugating a rebellious population, a proliferator state will also require a means of delivering the chemical payload.<sup>27</sup> Often, if the state's primary objective is to terrorize, technical requirements for controlling the delivery device's strength and precision will fall by the wayside.<sup>28</sup>

Effective export controls systems are vital in achieving the CWC's goals. In the United States, the Department of State's Directorate of Defense Trade Controls is the office responsible for implementing the CWC's aims in the form of the International Traffic in Arms Regulations (ITAR).<sup>29</sup> Under ITAR, the State Department reviews license applications on a case-by-case basis to weigh whether certain exports pose a risk to national security interests or may be used as a precursor in the production of chemical weaponry.<sup>30</sup> Simultaneously, the State Department regulates the export of dual-use exports, which may be converted to military use, by tracking their path, confronting the exporter state about their existence, or even cancelling the associated

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<sup>24</sup> See *id.* at 836–37 (arguing that since proliferators will always find ways to subvert OPCW inspections, state signatories should provide legal assistance and information to one another to ensure that states are complying with the CWC's verification procedures).

<sup>25</sup> See, e.g., Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 845 (2011) (observing that during the late 1990s, the U.S. National Intelligence Estimates (NIE) alleged on several occasions that Iraq could easily transform legitimate dual-use industrial plants into facilities for the clandestine manufacture of chemical weapons if it possessed a stockpile of certain chemical precursors).

<sup>26</sup> See LYELL, *supra* note 14 (noting that facilities for the manufacture of “fertilizers, pharmaceuticals, and petrochemicals” may all be easily diverted to the production of chemical weapons).

<sup>27</sup> See *id.* (delivery devices may take the form of traditional weaponry, such as artillery shells or missiles, but may also take more unconventional forms, such as the plastic containers used by the Aum Shinri Kyo during the 1995 Tokyo sarin gas attack).

<sup>28</sup> *Id.* (states that plan to use chemical weapons primarily for some military objective will place greater priority on designing delivery devices that “optimiz[e] payload size and the means of dispersing the agent”).

<sup>29</sup> See *Overview of the U.S. Export Control System*, A RESOURCE ON STRATEGIC TRADE MANAGEMENT AND EXPERT CONTROLS, <http://www.state.gov/strategictrade/overview/> (last visited July 22, 2014).

<sup>30</sup> *Id.*

transaction, thereby constraining their flow across the U.S. border.<sup>31</sup> Yet, unilateral and multilateral export control regimes rely on the effective exchange of information between state parties.<sup>32</sup> If the United States were to intervene into the Syrian conflict, it would need to demonstrate that its actions were justified by timely and credible intelligence about the existence of chemical weapons.<sup>33</sup>

Although export control regimes may unearth evidence that a state has breached its disarmament obligations, the international community will be unable to act in full confidence unless it has veritable intelligence reports on the size and location of the chemical weapons arsenal inside the state.<sup>34</sup> According to an unclassified report, Syria has been developing its chemical weapons arsenal “for many years;” yet, the origin and location of its stockpiles has long been a matter of contention.<sup>35</sup> In 1995, the intelligence community assessed that Syria had been developing a self-sustaining chemical weapons program since the mid-1980s; by 1997, however, the Department of Defense shifted gears and released a report stating the program traced back to the 1970s.<sup>36</sup> During this period, the Soviet Union and several private corporations in Europe helped fund Syria’s burgeoning chemical weapons program by supplying chemical precursors, delivery devices, equipment, and technical training.<sup>37</sup> By the 1990s, the intelligence community yet again changed its tone, reporting that Syria was working toward “independent chemical warfare capability.”<sup>38</sup>

As intelligence piled up, reports on the size of the stockpile became more specific: in 2012, the French intelligence community asserted that Syria had amassed over 1000 metric tons of chemical agents and precursors, including

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<sup>31</sup> *Id.*

<sup>32</sup> See Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT’L L. 1071, 1093–94 (2006) (U.S. intelligence agencies rely on an expansive network of allies for information, despite the intelligence apparatus’ immense size and breadth of resources).

<sup>33</sup> See Hannah Allam & Mark Seibel, *To some, US case for Syrian gas attack, strike has too many holes*, MCCATCHY DC (Sept. 2, 2013), <http://www.mcclatchydc.com/2013/09/02/201027/to-some-us-case-for-syrian-gas.html>.

<sup>34</sup> See, e.g., Bejesky, *supra* note 25, at 818–19 (explaining that the U.S. had no direct evidence of biological weapons in Iraq, yet “estimates generated perceptions of breach of disarmament resolutions, . . . while inability to verify intelligence reporting amid precautionary uncertainty begat a chasm between preexisting estimates and later evidentiary findings”).

<sup>35</sup> NIKITIN ET AL., *supra* note 9, at 3, 11.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.*

hundreds of metric tons of sarin, mustard agent, and VX.<sup>39</sup> This announcement came a few months after the U.S. Director of National Intelligence James Clapper declared to the Senate Armed Services Committee that Syria had developed a sophisticated network of chemical facilities across the state, but lacked independent chemical warfare capability.<sup>40</sup> Accordingly, Syria has remained reliant on foreign sources for key chemical precursors and equipment.<sup>41</sup> Even so, while the various intelligence communities agreed that Syria had developed a sophisticated chemical weapons program, they diverged over the full extent of its capabilities.<sup>42</sup>

In the decade leading up to the conflict in Syria, the State Department and the Office of the Director of National Intelligence (ODNI) offered conflicting accounts about the types of weapons delivery devices the regime possessed. Notably, a 2008 State Department report assessed that Syria had hundreds of Scud B, Scud C, Scud D, and SS-21 short-range ballistic missiles (SRBMs), which could deliver chemical payloads.<sup>43</sup> Subsequent reports in 2009 and 2013, however, contradicted these statements, and instead articulated that only Syria's Scud D and SS-21 SRBMs could be outfitted with chemical warheads.<sup>44</sup> Even after the August 21 attack on the Ghouta agricultural belt, intelligence about what types of SRBMs could have delivered the sarin used to carry out the attack was still sparse.<sup>45</sup> To compound matters further, the sarin could have been delivered by another type of tactical munitions, namely BM-21 multiple rocket launchers, which are better equipped for rapidly discharging nerve agents from a short range into a crowded area.<sup>46</sup>

Intelligence estimates also indicated that the exact composition of Syria's weapons stockpile is unknown due to uncertainty over the type of chemicals

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<sup>39</sup> See *id.* at 5 (Syria was reportedly developing a nerve agent with a higher toxicity level than sarin).

<sup>40</sup> See *id.* at 5–6 (providing that the Defense Intelligence Agency (DIA) Director Michael Flynn reiterated Director Clapper's assertions when testifying before Congress in April 2013).

<sup>41</sup> *Id.* at 5.

<sup>42</sup> See DEPUTY DIRECTOR OF NATIONAL INTELLIGENCE FOR ANALYSIS, *supra* note 1, at 7 (“We assess that Syria remains dependent on foreign sources for key elements of its [chemical weapons] program, including precursor chemicals.”).

<sup>43</sup> See NIKITIN ET AL., *supra* note 9, at 6.

<sup>44</sup> See NATIONAL AIR AND SPACE INTELLIGENCE CENTER, BALLISTIC AND CRUISE MISSILE THREAT 11, 13 (2009), available at <http://fas.org/irp/threat/missile/naic/NASIC2009.pdf> (Syria possesses fewer than 100 SS-21 and 435 Scud D SRBMs); NATIONAL AIR AND SPACE INTELLIGENCE CENTER, BALLISTIC AND CRUISE MISSILE THREAT 13 (2013), available at <http://www.afisr.af.mil/shared/media/document/AFD-130710-054.pdf> (approximately 100 road-mobile Scud D SRBMs with a maximum range of 700 kilometers).

<sup>45</sup> See NIKITIN ET AL., *supra* note 9, at 6.

<sup>46</sup> See *id.* at 7 (contrasting rocket launchers—which are better designed for battlefield use against rebel forces, with SRBMs—which are more intended for an attack on a neighboring state).

the country possesses.<sup>47</sup> Whether chemical weapons can be immediately deployed for military use is contingent on whether the nerve agents in the munitions are in unitary or binary form.<sup>48</sup> For instance, a 1991 National Intelligence Estimate announced that Syria had produced binary Scud warheads and aerial bombs, which could be deployed as soon as the remaining chemical precursors are combined in the munitions.<sup>49</sup> In contrast, if Syria possessed unitary weapons—in which the chemical agent is already prepared—estimates of the total size of its stockpile could be more imprecise.<sup>50</sup> Unitary munitions, however, are vastly more dangerous for the soldiers responsible for mixing and handling the chemical agents.<sup>51</sup>

As the head of state, Bashar al-Assad has the presidential authority to order the development of chemical weaponry, as well as to appoint members of the Syrian Scientific Studies and Research Center (SSRC)—the organization responsible for managing the state’s chemical weapons program.<sup>52</sup> Within the Center, Branch 450 has been identified as the unit tasked with preparing and securing chemical munitions used in the August 21 attack.<sup>53</sup> Although the Syrian government has been silent on whether it possesses chemical weapons for decades, by September 10, 2013, the government admitted that it possessed

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<sup>47</sup> See *id.* at 8.

<sup>48</sup> See *Breaking Down Chemical Weapons, One Fact at a Time*, NPR (Sept. 14, 2013), <http://www.npr.org/2013/09/14/222511299/breaking-down-chemical-weapons-one-fact-at-a-time> (although a chemist with limited materials could easily synthesize chemical weapons, only actors with access to a significant amount of resources can manufacture the amount necessary for military use).

<sup>49</sup> See DIRECTOR OF NATIONAL INTELLIGENCE, CIA, PROSPECTS FOR SPECIAL WEAPONS: PROLIFERATION AND CONTROL NO. NIE5-91C/11, at 6 (1991), in 2 DIRECTOR OF CENTRAL INTELLIGENCE, THE NATIONAL INTELLIGENCE ESTIMATE, ANNEXES (1991), available at <http://digitalarchive.wilsoncenter.org/document/116907>.

<sup>50</sup> See NIKITIN ET AL., *supra* note 9, at 8 (observing that unitary munitions may be stored in bulk or premixed, and are slower to deploy, since it may take a substantial amount of time to prepare “battlefield quantities” of unitary warheads).

<sup>51</sup> *Id.*

<sup>52</sup> Press Release, U.S. Office of the Press Secretary, Government Assessment of the Syrian Government’s Use of Chemical Weapons on August 21, 2013 (Aug. 30, 2013) (on file with U.S. Office of the Press Secretary), available at <http://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21> (the government had “high confidence” that Syrian President Bashar al-Assad directed the attack on the Ghouta countryside).

<sup>53</sup> Adam Entous et al., *Elite Syrian Unit Scatters Chemical Arms Stockpile*, WALL ST. J., Sept. 13, 2013, at A1, available at [http://online.wsj.com/news/articles/SB10001424127887324755104579071330713553794?mod=WSJ\\_hps\\_LEFTTopStories&mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887324755104579071330713553794.html%3Fmod%3DWSJ\\_hps\\_LEFTTopStories](http://online.wsj.com/news/articles/SB10001424127887324755104579071330713553794?mod=WSJ_hps_LEFTTopStories&mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887324755104579071330713553794.html%3Fmod%3DWSJ_hps_LEFTTopStories).

a chemical weapons stockpile.<sup>54</sup> Further, it agreed to sign the Chemical Weapons Convention, and invited international inspectors to come inspect the locations of the weapons sites.<sup>55</sup> However, the Syrian government's promises were far from assuring, as the intelligence community still is unable to determine the location of all munitions with full certainty.<sup>56</sup>

On December 5, 2013, the United Nations implicated the Syrian military for conducting four additional chemical attacks leading up to the August 21 attack on the Ghouta countryside—an allegation that the Syrian government had previously refuted.<sup>57</sup> Though the United Nations Mission had requested the government's permission to investigate Khan al-Assal—the location of an earlier, alleged attack—it was unable to enter the town due to ongoing clashes between insurgents and the government.<sup>58</sup> The Syrian government further frustrated weapons inspectors' attempts to carry out their mission by restricting their movement to Khan al-Assal, thereby calling the OPCW's ability into question.<sup>59</sup> And unless the intelligence community discovers clear, substantiated evidence of the Syrian government's continued use or maintenance of chemical weapons stockpiles, the international community's response will be ultimately restrained.<sup>60</sup>

## II. ANALYSIS

Drawing on lessons learned during the Iraq War, the U.S. government and the international community are hesitant to act on unsubstantiated reports without clear evidence that Syria possesses or employs chemical weapons.<sup>61</sup> After the intelligence fallout during the Iraq War, the former Director of the

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<sup>54</sup> See Anne Barnard, *In Shift, Syrian Official Admits Government Has Chemical Arms*, N.Y. TIMES, Sept. 11, 2013, at A10 (reporting that the Syrian Foreign Minister Walid Moallem admitted that the Syrian government possessed chemical weapons).

<sup>55</sup> See *id.*

<sup>56</sup> NIKITIN ET AL., *supra* note 9, at 11 (quoting statements made by the British Defense Secretary and the U.S. Deputy National Security Advisor on the suspected locations of munitions sites).

<sup>57</sup> Somini Sengupta and Rick Gladstone, *U.N. Reports Attacks Using Chemicals in Syria*, N.Y. TIMES, Dec. 13, 2013, at A12.

<sup>58</sup> See *id.* (explaining that insurgent fighters linked to Al-Qaeda seized the surrounding area, preventing weapons inspectors from gaining access).

<sup>59</sup> See Rick Gladstone, *Delay Foreseen in Removing Syrian Chemicals*, N.Y. TIMES, Dec. 10, 2013, at A8.

<sup>60</sup> See Bejesky, *supra* note 25, at 814 (referencing statements made by the Senate Select Committee on Intelligence about the evidence leading up to the Iraq War).

<sup>61</sup> See *60 Minutes: George Tenet: At the Center of the Storm*, (CBS television broadcast Apr. 29, 2007), available at <http://www.cbsnews.com/news/george-tenet-at-the-center-of-the-storm/> (interview on the intelligence fallout leading up to the Iraq War).

Central Intelligence Agency George Tenet was interviewed about the distinction between judicial opinions and national security determinations.<sup>62</sup> While national security estimates and judicial opinions resemble each other in how intelligence is used to analytically render decisions, their evidentiary thresholds are different.<sup>63</sup>

Judicial opinions rely on the strength of parties' evidence to present a compelling argument, which is then used to obtain a legal remedy for a specific harm.<sup>64</sup> Information is verified vis-à-vis the adversarial nature of proceedings, where the side that presents the most persuasive argument wins.<sup>65</sup> In contrast, national security estimates are not subject to the same minimum standards: the government has a substantially compelling interest in protecting national security, and so wields a broader brush in presenting its case.<sup>66</sup> Yet, the government cannot demonstrate the veracity of evidence in the same manner that parties do in court.<sup>67</sup>

Intelligence agencies are not required to authenticate classified information before the public, nor are witnesses liable for perjuring their accounts of facts.<sup>68</sup> Threats to national security are evaluated by a multitude of foreign government agencies that work with the U.S. in a intelligence sharing alliances—some of which act in concert, others unilaterally in accordance with internal operating procedures.<sup>69</sup> Since the government's case will inherently be weaker than those in court, it has a higher evidentiary threshold for verifying threats to national security.<sup>70</sup> Therefore, the government's reaction will be tempered by the public's willingness to accept the consequences of state action.<sup>71</sup>

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<sup>62</sup> *Id.* Specifically, Tenet refers to the difference between evidence that is sufficient to win a criminal case in court versus evidence sufficient to compile national security determinations. *Id.*

<sup>63</sup> See Bejesky, *supra* note 25, at 813–14 (distinguishing between the evidentiary standards for judicial decisions and national security estimates).

<sup>64</sup> *Id.* (“Executive enforcement protects the integrity of the courts’ prescriptive jurisdiction, including for decisions and processes that compel and verify information, such as with contempt orders and criminal punishment for perjury and falsifying information.”).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 813–14.

<sup>67</sup> *Id.* at 814.

<sup>68</sup> *Id.*

<sup>69</sup> See Chesterman, *supra* note 32, at 1093 (observing that intelligence sharing between agencies increased as intelligence has become more integral to foreign policy decisions rendered in times of peace, rather than war).

<sup>70</sup> See Bejesky, *supra* note 25, at 814 (noting that the government’s ability to cooperate with national security threats and at-risk witnesses may be limited, making intelligence estimates difficult to verify).

<sup>71</sup> *Id.* (noting the theoretical underpinnings of the precautionary principle).

Similarly, most Congress members are not privy to national security intelligence gathered by governmental agencies.<sup>72</sup> Such information is screened by the executive branch, whom is legally required to give “due regard for the protection from unauthorized disclosure of classified information . . . .”<sup>73</sup> Even then, congressional committees have limited access to specific intelligence that would justify military action.<sup>74</sup> Although Congress is constitutionally empowered to authorize the use of force, it lacks the authority to oversee clandestine operations and verify the quality of intelligence reports.<sup>75</sup> Thus, findings by the intelligence community will not meet the same evidentiary standards as findings in court.<sup>76</sup> Yet, as the result of intelligence failings during the Iraq War, the U.S. government has become more wary of unilaterally using force without clear and convincing evidence that a proliferator state has crossed the proverbial “red line,” and is in breach of its international obligations.<sup>77</sup>

In the case of Iraq, Congress gathered most of its information justifying the invasion from the Bush administration’s official statements and intelligence community estimates.<sup>78</sup> In mid-September 2002, Congress members requested that the CIA produce a National Intelligence Estimate (NIE) on the severity of the threat posed by Iraq’s weapons of mass destruction (WMDs).<sup>79</sup> The finalized NIE was kept confidential, but provided Congress with cursory

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<sup>72</sup> See Memorandum from Cong. Res. Serv. on Statutory Procedures Under Which Congress is to be Informed of U.S. Intelligence Activities, Including Covert Actions to Congressional Clients 9 (Jan. 18, 2006), available at <http://fas.org/sgp/crs/intel/m011806.pdf> (noting that most political actors are restricted from accessing confidential information so as to safeguard intelligence sources and methods).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (commenting that Congress understands that the executive branch may need to withhold extremely sensitive intelligence information and operations for the protection of national security).

<sup>75</sup> See Bejesky, *supra* note 25, at 815 (contrasting Congress’ limited access to national security information with its explicit power to declare war under the Constitution).

<sup>76</sup> *Id.* at 816 (noting the NIEs do not elaborate as to how intelligence is gathered, and instead, merely attest to the existence of the agencies’ sources and methods—similar to judicial opinions rendered during closed court proceedings).

<sup>77</sup> See *id.* at 817.

<sup>78</sup> See *id.* at 815 (referencing President Bush’s September 2002 speech to the United Nations General Assembly, arguing that Saddam Hussein posed a “grave and gathering danger” to international security).

<sup>79</sup> See *id.* (pointing out that the NIE was prepared in just three weeks, and was rushed to Congress before many of its findings could be challenged).

findings of fact alluding to the existence of WMDs.<sup>80</sup> Nevertheless, the origin of the intelligence remained classified to both Congress and the public.<sup>81</sup>

On October 7, 2002, President George W. Bush substantiated the intelligence in the NIE by declaring that the Iraqi government had commissioned high-strength aluminum tubes to be used in the manufacture of nuclear weapons.<sup>82</sup> Moreover, the President announced that Iraq was resurrecting its chemical and biological weapons programs, which could be used to later supply munitions to al-Qaeda insurgents within the state.<sup>83</sup> Relying on the accuracy of administration portrayals and the NIE declassified version, Congress voted to authorize the invasion of Iraq.<sup>84</sup>

By November 2002, United Nations weapons inspectors had arrived on the ground and began cooperating with Iraqi authorities in touring the alleged facilities.<sup>85</sup> While inspectors failed to uncover any incriminating evidence, they admitted that it was possible that the Iraqi government had concealed the weapons pursuant to an official “‘Denial and Deception’ program.”<sup>86</sup> After three months, the inspectors’ tones had changed: all physical inspection findings on WMDs repudiated pre-war intelligence.<sup>87</sup> Likewise, inspectors had no direct evidence that the Iraqi government was planning to resurrect its

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<sup>80</sup> See Zachary D. Streit, *Investigative Journalism and National Security: Secret Evidence and the Courts in the Age of National Security*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 75, 87 (2006) (pointing out that fewer than 10 congressmen actually viewed the NIE before authorizing the use of force in Iraq on those grounds).

<sup>81</sup> See *id.* (noting that there is no congressional research service dedicated to publishing public versions of classified intelligence reports, and that those congressmen who enjoy privileged access to the intelligence must refrain from disclosing it to other members).

<sup>82</sup> Press Release, U.S. Office of the Press Secretary, President Bush Outlines Iraqi Threat (Oct. 7, 2002) (on file with the U.S. Office of the Press Secretary), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB80/new/doc%2012/President%20Bush%20Outlines%20Iraqi%20Threat.htm> (declaring that the Iraqi government and al-Qaeda operatives have maintained contact for over a decade and have cooperated in planning explosive and chemical attacks).

<sup>83</sup> See *id.* (arguing that previous attempts at weapons inspections during the early 1990s were met with “systematic deception,” in which the Iraqi government engaged in duplicitous tactics—destroying evidence, wiretapping investigators’ offices, and developing mobile munitions plants—to prevent the international community from accessing the state’s illegal weapons stockpiles).

<sup>84</sup> See Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. (2002).

<sup>85</sup> See Bejesky, *supra* note 25, at 817 (explaining that the inspection teams submitted biweekly reports on their progress to the Security Council over the course of four months).

<sup>86</sup> See *id.* (noting that the Bush administration maintained its stance that the Iraqi government possessed WMDs, which were covertly moved prior to weapons inspections).

<sup>87</sup> See Joel Roberts, *Blix: U.S. was Certainty Suspect*, CBS NEWS (Jun. 25, 2003), <http://www.cbsnews.com/news/blix-us-certainty-was-suspect/> (quoting the United Nations Chief Weapons Inspector Hans Blix as saying that the U.S. and British governments had “100 percent certainty about the weapons of mass destruction’s existence, and zero certainty about where they are”).

chemical weapons program, and instead determined that it had actually destroyed its chemical weapons stockpile in 1991.<sup>88</sup> As a result of the lack of incriminating evidence, the inspection teams could not prove that the Iraqi government possessed or had the intention to possess WMDs,<sup>89</sup> nor could they unequivocally demonstrate that Iraq breached its disarmament resolutions.<sup>90</sup>

Over the course of time, the NIE transformed from a “high confidence” intelligence report to an unsubstantiated, evidentially weak document, containing assertions that held no water.<sup>91</sup> Unsubstantiated reports that the Iraqi government attempted to procure dual-use equipment were woven into stories of active WMD facilities, whose existence threatened the very fabric of international order.<sup>92</sup> The only evidence that corroborated the claim that Iraq tried to obtain aluminum tubes for WMD production was a proposal for a uranium enrichment plant, whose design was based on fifty-year-old lab report results.<sup>93</sup> Likewise, though it would take Iraq over ten years to enrich fissile material for a WMD, falsified reports about a nonexistent Iraq-Niger raw uranium deal made the threat seem imminent.<sup>94</sup>

Iraq’s chemical and biological weapon stockpiles, if still in existence, would likely have decomposed sometime between the end of the Gulf War and the date that the NIE was released.<sup>95</sup> Even if the inspection teams in the early 1990s had not detected the chemical and biological stocks, only mustard agents would have been able to survive for that long of a period.<sup>96</sup> Although scientists and other experts could have easily repudiated this allegation, it remained in

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<sup>88</sup> See Bejesky, *supra* note 25, at 818–19.

<sup>89</sup> See SPECIAL ADVISOR TO THE DIRECTOR OF CENTRAL INTELLIGENCE, CIA, COMPREHENSIVE REPORT OF THE SPECIAL ADVISOR TO THE DCI ON IRAQ’S WMD: IRAQ’S CHEMICAL WARFARE PROGRAM 1 (2004), available at [http://www.foia.cia.gov/sites/default/files/document\\_conversions/89801/DOC\\_0001156478.pdf](http://www.foia.cia.gov/sites/default/files/document_conversions/89801/DOC_0001156478.pdf) (stating that although the inspection teams found that the Iraqi government possessed the capability to produce nerve agents within a two-year period, it had no evidence that it planned to obtain the essential chemical precursors through its “existing procurement networks for sanctioned items”).

<sup>90</sup> See Bejesky, *supra* note 25, at 818–19 (noting that any desire that the Iraqi government may have had to manufacture WMDs was stifled by harsh sanctions and the specter of international condemnation).

<sup>91</sup> See *id.* at 845–46 (pointing out that prior to 1999, the NIE was regarded as the “most comprehensive” assessment of Iraq’s chemical weapons stockpile).

<sup>92</sup> *Id.*

<sup>93</sup> See DAVID ALBRIGHT, ISIS, IRAQ’S ALUMINUM TUBES, SEPARATING FACT FROM FICTION 10 (2003), available at <http://www.isis-online.org/publications/iraq/IraqAluminumTubes12-5-03.pdf> (drawing on similarities between aluminum tubes allegedly procured by Iraq and Zippe-type centrifuges manufactured in the early 1950s).

<sup>94</sup> See Bejesky, *supra* note 25 at 835.

<sup>95</sup> *Id.* at 846–47 (many scientists and experts attested that the majority of chemical and biological agents would have decomposed within a five-year span).

<sup>96</sup> *Id.* at 846.

the NIE as a credible piece of intelligence.<sup>97</sup> Similarly, indistinct satellite photographs of a tanker truck were repeatedly purported to be evidence of “decontamination vehicles” used in the transport of chemical weapons.<sup>98</sup> Thus, the images were held up as evidence that the Iraqi government was still manufacturing chemical weapons.<sup>99</sup>

Human intelligence was equally lacking: a single witness supplied information on mobile biological weapons facilities for 112 different intelligence reports,<sup>100</sup> even though none of his stories were verified by U.S. intelligence officials.<sup>101</sup> Although witnesses undergo cross-examination so the court may extract the truth from their conflicting testimonies, here, the human intelligence was both classified and uncorroborated.<sup>102</sup> The sensitive nature of intelligence inherently prevents actors from determining the authenticity of information.<sup>103</sup> Each assertion is regarded as unassailable, because it was gathered in the name of national security.<sup>104</sup> Yet, the lack of applicable evidentiary standards allowed senior administration officials to misuse exaggerated intelligence estimates to justify a costly military incursion.<sup>105</sup> If intelligence is considered probative without first being thoroughly scrutinized, the government may use classified reports to justify policy initiatives, while avoiding the public’s critical eyes.<sup>106</sup>

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<sup>97</sup> *Id.* at 847.

<sup>98</sup> See U.S. INTELLIGENCE COMMUNITY’S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301, at 200–01 (2004), available at <http://www.intelligence.senate.gov/108301.pdf> (providing the sole evidence of alleged chemical weapons transports across Iraq).

<sup>99</sup> *Id.* at 201. However, the report also notes that several CIA analysts and UN inspectors pointed out that the alleged decontamination vehicles could have been water trucks with legitimate civilian functions. *Id.*

<sup>100</sup> Bejesky, *supra* note 25, at 876.

<sup>101</sup> S. Rep. No. 108-301, *supra* note 98, at 188 (providing that the NIE overstated the intelligence on the Iraqi government’s alleged mobile biological weapons facilities).

<sup>102</sup> See Bejesky, *supra* note 25, at 876.

<sup>103</sup> See *id.* at 877 (declaring that senior administration officials rationalized the dearth of credible evidence as the result of the Iraqi government’s alleged “denial and deception” policy).

<sup>104</sup> *Id.* (explaining that unsubstantiated reports treated as evidence of dire security threats effectively coerced the American public and international community to act).

<sup>105</sup> See *id.* (“The Administration exploited [its] declassification authority in the lead up to the war and disclosed intelligence at a time and in a manner of its choosing with impunity, knowing that others attempting to disclose additional details that might provide balance or improve accuracy would be prevented from doing so under the threat of prosecution.”).

<sup>106</sup> See *id.* at 881.

### CONCLUSION

As the result of lessons learned during the Iraq War, the U.S. government has become more hesitant to unilaterally use force against a proliferator state without verified intelligence that the state has crossed the “red line.” The U.S. government is presently employing a higher evidentiary standard for determining whether Syria is in breach of its international obligations under the CWC, with greater reliance on evidence gathered from multilateral export control arrangements and the OPCW. However, intelligence gathering by U.S. agencies still remains a largely opaque process, even in developing the case for the use of force in Syria. While increased congressional oversight may be difficult to administer, the U.S. government may need to consider ways to improve intelligence verification processes to avoid its mistakes of the past. To defend international security abroad, the U.S. government must first protect the integrity of intelligence agencies at home. Otherwise, the case for future action in Syria may be built on unstable, evidentiary grounds.