

RED LINES AND GAME CHANGERS—THE LEGALITY OF UNILATERAL OR COLLECTIVE USE OF FORCE IN SYRIA

Drawn from Michael G. Karnavas's Seminar at the Brown University International Organization (BRIO) February 27, 2014

I. INTRODUCTION

On February 27, 2014 I held a seminar on Syria at Brown University in Providence, Rhode Island, sponsored by the Brown University International Organization (BRIO): “*Red Lines and Game Changers—The Legality of Unilateral or Collective Use of Force in Syria.*” This seminar was intended to guide Brown University students through the legal framework surrounding the potential, and controversial, use of force in Syria by the United States in response to the use of chemical weapons.

To briefly introduce the Syrian conflict, the Human Rights Council has described the situation in Syria by the following words: “The Syrian Arab Republic is a battlefield. Its cities and towns suffer relentless shelling and sieges. . . . Government and pro-government forces have continued to conduct widespread attacks on the civilian population.”¹ Further underlying the exigencies of the situation, United Nations Secretary-General, Ban Ki-moon found that chemical weapons were used on a relatively large scale, resulting in numerous casualties, particularly among civilians, including many children.² The seriousness of these allegations has sparked a number of responses from governments and officials.

In response to the use of chemical weapons in Syria—a clear violation of international law—the Obama Administration has offered numerous justifications for the use of military force in Syria. By contrast, the United Kingdom has offered its justification for the use of force based on humanitarian intervention. Just how legal or legitimate would these actions be? Would armed intervention by the United States in response to the Syrian violations be lawful under present international law, either as self-defense, humanitarian intervention, or legal reprisal? Syria has

¹ Human Rights Council, Rep. of the Indep. Int’l Comm. of Inquiry on the Syrian Arab Republic, 24th Sess., U.N. Doc. A/HRC/24/46 (Aug. 16, 2013).

² U.N. Secretary General, Rep. of the U.N. 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, U.N. Doc. A/67/997-S/2013/553 (Sept. 16, 2013).

been seen as a game changer which may “crystallize” the legality or legitimacy of the use of force outside the United Nations collective security system. Where are we today?

On September 27, 2013 the UN Security Council passed Resolution 2118³ requiring Syria to disclose its chemical weapons sites, and to allow the Organization for the Prohibition of Chemical Weapons (“OPCW”) to destroy Syria’s chemical weapons. In the event of non-compliance, the Security Council has threatened to “impose measures under Chapter VII of the UN Charter.”⁴ Resolution 2118 does not contain the stimulative language found in the UN Security Council Resolution concerning Libya (SC Res 1973) on the use of Chapter VII measures: “to take all necessary measures,”⁵ thus requiring Security Council authorization for military action to be lawful under the UN Charter.⁶ Resolution 2118 also makes no referral to the International Criminal Court (ICC). Understandable. It would be rather challenging to expect Syria to be forthright with identifying its chemical weapons sites if at the same time there are ICC investigators on the ground gathering evidence to support an indictment for the use of the very same chemical weapons that are being identified for collection and destruction.

As a point of reference for the discussion, I walked the students through comments made in the media by the White House and others, setting out the reasons and justifications for the United States’ potential use of force in Syria. I also covered briefly the United Kingdom’s nuanced position based on the principle of humanitarian intervention. I then touched on the applicable legal principles to provide the students with the general contours of the law—keeping in mind how the law is interpreted—and how it can be applied to justify the various legal positions. After establishing this framework, I then began to discuss these concepts with the students to determine whether it is in fact possible, under some scenario, to intervene militarily without UN Security Council authorization. I did not intend this seminar to be an academic lecture, but rather a lively discussion, seeing my role as more of a facilitator so the students could draw their own conclusions.

³ S.C. Res. 2118, U.N. Doc. SC/RES/2118 (Sept. 27, 2013).

⁴ *Id.*, para. 21.

⁵ S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011), para. 4.

⁶ See *infra* part III(1) (discussing use of force under the UN Charter).

II. LEGAL POSITIONS AND JUSTIFICATIONS

1. The US Position

In the diplomatic and media flurry surrounding the Syrian conflict, the Obama Administration gave a number of justifications for the potential use of force in Syria. As international attention began to focus on the Syrian conflict, President Obama stated that he was concerned about: “chemical or biological weapons . . . falling into the hands of the wrong people.”⁷ He continued, setting the first “red line”: “We have been very clear to the Assad regime but also to other players on the ground that a red line for us is, we start seeing a whole bunch of weapons moving around or being utilized.”⁸ A few days later in an interview with CNN, President Obama stated that the use of chemical weapons in Syria would affect the “core national interests that the United States . . . making sure that weapons of mass destruction are not proliferating, as well as needing to protect our allies.”⁹ These statements allude to a few of the United States’ justifications for the potential use of force in Syria: to punish the Assad regime for the use of chemical weapons—for crossing the “red line”—and self-defense or anticipatory self-defense (a variation on the Bush Doctrine) either unilaterally or in the collective.

As the Syrian conflict continued unabated, the United States began to explicitly contemplate military action. A few days prior to the adoption of Security Council Resolution 2118, President Obama made clear in his White House speech his intent to use targeted military force in order to deter and degrade the Assad regime’s ability to use chemical weapons:

This is not a world we should accept. This what’s at stake. And that is why, after careful deliberation, I determined that it is in the national security interests of the United States to respond to the Assad regime’s use of Chemical weapons through a targeted military strike. The purpose of this strike is to deter Assad from using

⁷ WHITE HOUSE OFFICE OF THE PRESS SECRETARY, Remarks by the President to the White House Press Corps, (Aug. 20, 2012), <http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>.

⁸ *Id.*

⁹ Barack Obama Interview with CNN, *President Obama Gives Exclusive Interview to CNN on Major Issues at Home and Abroad*, CNN, Aug. 23, 2013, <http://newday.blogs.cnn.com/2013/08/23/president-obama-gives-exclusive-interview-to-cnn-on-major-issues-at-home-and-abroad/>.

chemical weapons, to degrade his regime's ability to use them, and to make clear to the world that we will not tolerate their use.¹⁰

President Obama's speech to the UN General Assembly, just a few weeks after his White House speech, struck a slightly different note, more in line with the need to collectively for humanitarian reasons:

Different nations will not agree on the need for action in every instance, and the principle of sovereignty is at the center of our international order. But sovereignty cannot be a shield for tyrants to commit wanton murder, or an excuse for the international community to turn a blind eye to slaughter. While we need to be modest in our belief that we can remedy every evil, and we need to be mindful that the world is full of unintended consequences, should we really accept the notion that the world is powerless in the face of a Rwanda or Srebrenica? If that's the world that people want to live in, then they should say so, and reckon with the cold logic of mass graves.... I believe we can embrace a different future.¹¹

In his General Assembly speech, President Obama seemed to appeal more to a humanitarian / victim-centered motivation. Yet, to his domestic audience, President Obama embraced other justifications such as degrading and deterring, self-defense, and punishment or reprisal. Domestically, it is clear that the justifications offered have focused more on punishing, deterring, and degrading rather than a humanitarian approach—yet no single approach or justification was formally adopted.

The Senate Foreign Relations Committee passed a resolution regarding Syria, stating that the "President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in a limited and tailored manner against legitimate military targets in Syria," only to: (1) respond to the use of weapons of mass destruction by the Syrian government in the conflict in Syria; (2) deter Syria's use of such weapons in order to protect the national security interests of the US and to protect our allies and partners against the use of such weapons; and (3) degrade Syria's capacity to use such weapons in the future.¹² During this hearing, Secretary of State John Kerry acknowledged the Security Council deadlock and pushed

¹⁰WHITE HOUSE, Remarks by the President in Address to the Nation on Syria, President Obama Addresses the Nation on Syria, (Sept. 10, 2013), <http://www.whitehouse.gov/photos-and-video/video/2013/09/10/president-obama-addresses-nation-syria#transcript>.

¹¹ WHITE HOUSE OFFICE OF THE PRESS SECRETARY, Remarks by President Obama in Address to the United Nations General Assembly, (Sept. 24, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/24/remarks-president-obama-address-united-nations-general-assembly>.

¹² Wall Street Journal Staff, Full text: Syria Joint Resolution for Markup, WALL ST. J., Sept. 3, 2013, *available at* <http://blogs.wsj.com/washwire/2013/09/03/full-text-senate-foreign-relations-committee-resolution-on-syria/>.

for action. Secretary Kerry stated: “The president's -- the president's asking for a limited authority to degrade his current capacity and to deter him from using it again. ... So we have no illusions. Yes, is the UN Security Council having difficulties at this moment performing its functions? Yes. ... And if the multilateral institution's set up to do it, the Security Council is being blocked and won't do it, that doesn't mean we should turn our backs and say there's nothing we can do. That's not the case. And we did it in Bosnia and made a difference; we saved countless numbers of lives. And I believe, Mr. -- the president of the United States believes we can do that now.”¹³

The White House Press Secretary described the goal of the intervention: “To punish the Assad regime for using chemical weapons, both as a deterrent against using them again and as a warning to any future military leaders that they'd better not use them, either.”¹⁴ Senator Tom Udall of New Mexico proposed that attention and outrage should be focused on the supporters of the Assad regime—namely Russia and China—who were standing to block any authorization for the use of force in the Security Council,¹⁵ while Senators John McCain and Lindsay Graham were opposed to any authorization for intervention that was not aimed at regime change.¹⁶

White House Counsel Kathy Ruemmler acknowledged that the use of force in the Syria situation would likely not be lawful under present international law, but might be justified and legitimate.¹⁷ Somehow seeking to legitimize the use of force in Syria, Ruemmler suggested that the fact that President Obama sought Congressional approval would enhance “legitimacy both domestically and internationally.”¹⁸ This seems to have been the extent of a legal basis offered for the justification of the use of force without UN Security Council authorization.

¹³ Washington Post Staff, *Kerry, Hagel and Dempsey testify at Senate Foreign Relations Committee hearing on Syria*, WASH. POST, Sept. 3, 2013, available at http://www.washingtonpost.com/politics/running-transcript-senate-foreign-services-committee-hearing-on-syria/2013/09/03/35ae1048-14ca-11e3-b182-1b3bb2eb474c_story.html.

¹⁴ Max Fischer, *Obama wants to punish Assad, not win the Syrian civil war*, WASH. POST, Aug. 26, 2013, available at <http://www.washingtonpost.com/blogs/worldviews/wp/2013/08/26/obama-wants-to-punish-assad-not-win-the-syrian-civil-war/>.

¹⁵ Tom Udall, *Udall Expresses Skepticism about Proposed Strikes on Syria*, TOMUDALL.SENATE.GOV (Sept. 3, 2013), http://www.tomudall.senate.gov/?p=press_release&id=1405.

¹⁶ PressTV, *McCain, Graham call for regime change in Syria*, PRESSTV, Aug. 31, 2013, <http://www.presstv.com/detail/2013/08/31/321488/mccain-lindsey-syria-strikes-not-enough/>.

¹⁷ Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES, Sept. 8, 2013, available at http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html?pagewanted=2&_r=0&pagewanted=all.

¹⁸ *Id.*

From these statements it is rather clear that the US was fixing to use force in Syria. Yet, the exact legal authority or justification remained unclear. President Obama and other US officials gave widely varying—sometimes even conflicting—justifications. To sum up the various US positions, the message seems to be that use of force in Syria would be justified, whether lawful or not, for the purposes of deterring, degrading, punishing (as a legal reprisal), self-defense, and possibly for humanitarian reasons.

2. The UK Legal Position

By contrast, the UK government adopted a more nuanced official legal position regarding the use of military force in Syria—one that seeks to intervene for a humanitarian purpose.¹⁹ Actually, the UK position was taken straight out of its Kosovo/NATO intervention playbook, with just as little, if any, legal reasoning offered in 1998.

First, the UK qualified the use of chemical weapons by the Assad regime as a “serious crime of international concern,” and a breach of the customary international law prohibition on the use of chemical weapons.²⁰ Such use, in the UK’s opinion, amounts to a war crime and crime against humanity.²¹ Because of these factors, the UK adopted the position that the legal basis for military action in Syria would be humanitarian intervention. The aim of such intervention would be to “relieve humanitarian suffering by disrupting the further use of chemical weapons.”²² Second, the UK stated that it was currently seeking a Security Council Resolution under Chapter VII of the UN Charter which would (1) demand that the Syrian authorities observe their international law obligations, and cease the use of chemical weapons; (2) authorize member states to take “all necessary measures” to protect civilians in Syria from the use of chemical weapons and to prevent future use or stockpiling; and (3) refer the situation to the International Criminal Court.²³ Third, logically following (the very real likelihood of) a Security Council deadlock, the UK announced that it would be permitted under international law to take *exceptional measures* in

¹⁹ UK PRIME MINISTER’S OFFICE, Chemical weapon use by Syrian regime: UK government legal position, (Aug. 29, 2013) *available at* <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version>.

²⁰ *Id.*, para. 2.

²¹ *Id.*

²² *Id.*

²³ *Id.*, para. 3.

order to alleviate the scale of the humanitarian disaster by deterring and disrupting the further use of chemical weapons.²⁴ Rather than seeking to justify the use of force based on punishment or reprisal, the UK's justification was victim-centric—focusing on alleviating the level of human suffering endured by the Syrian population. The UK proclaimed that intervention was permissible for humanitarian purposes under international law since three prerequisites had been met:

(i) there was convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;

(ii) objectively it was clear that there is no practicable alternative to the use of force if lives were to be saved; and

(iii) the proposed use of force was necessary and proportionate to the aim of relief of humanitarian need, provided it would be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).

3. International Crisis Group Statement

In the midst of the various government discussions on Syria, the International Crisis Group (“ICG”)—a “heavy hitter” non-governmental organization—released the following statement:

Debate over a possible strike—its wisdom, preferred scope and legitimacy in the absence of UN Security Council approval—has obscured and distracted from what ought to be the overriding international preoccupation: how to revitalize the search for a political settlement. Discussions about its legality aside, any contemplated military action should be judged based on whether it advances that goal or further postpones it.²⁵

The ICG regarded all these varying concerns on the legality or legitimacy of the use of force to have distracted from the main issue. According to the ICG, the focus should be on how to reach a political settlement. The use of force would be justified if it advanced this goal. Put differently: *even if not legal, might is right when the cause is just and the goal is achieved.*

²⁴ *Id.*, para. 4.

²⁵ International Crisis Group, Syria Statement (Sept. 1, 2013), *available at* <http://www.crisisgroup.org/en/publication-type/media-releases/2013/mena/syria-statement.aspx>.

III. LEGAL FRAMEWORK

With the context of the Syrian conflict in mind, I then discussed the legal framework which governs the use of force in this scenario. There are many legal provisions in the UN scheme as well as treaty and customary law which govern the use of force. I briefly took the students through these legal provisions in order to engage them in an analytical process so they could reach their conclusions—or at least cause them to look beyond any preconceptions they may have had coming into the seminar.

As a result of diplomatic negotiations, Syria agreed to join the OPCW, and subsequently ratified the Chemical Weapons Convention on October 14, 2013.²⁶ Under the Chemical Weapons Convention, each member state agrees never, under any circumstances:

- (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 any way, anyone to engage in any activity prohibited to a State Party under this Convention.²⁷

Additionally, each state party must destroy all of its chemical weapons stockpiles, abandoned weapons, production facilities, and must not use riot control agents as a method of warfare.²⁸ Shortly after Syria signed the Chemical Weapons Convention, the Security Council passed Resolution 2118²⁹ which, as discussed above, requires Syria to destroy its chemical weapons stockpiles. In the event of non-compliance, the Security Council has threatened to “impose measures under Chapter VII of the UN Charter.”³⁰

The Chemical Weapons Convention and Resolution 2118 set out Syria’s obligations in regard to the use of chemical weapons but makes no mention as to the potential use of force as an

²⁶ Organization for the Prohibition of Chemical Weapons, OPCW Member States, <http://www.opcw.org/about-opcw/member-states/> (last visited Mar. 4, 2014).

²⁷ Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317, art. 1.

²⁸ *Id.*, art. 1, paras. 2–5.

²⁹ S.C. Res. 2118, U.N. Doc. SC/RES/2118 (Sept. 27, 2013).

³⁰ *Id.*, para. 21.

enforcement mechanism. Similarly left out is any note of referral to the International Criminal Court. As discussed above, the UK government proposed a resolution that would involve military intervention. However, any action in the Security Council regarding the use of force has been halted by two P-5 members, Russia and China.³¹ In responding to Syria's use of chemical weapons by military force, would the United States violate international law, absent Security Council authorization? Would armed intervention in response to the violations have a lawful basis under international law, either as self-defense, humanitarian intervention or military reprisal?

To begin the legal analysis, I started with central tenets of the United Nations Charter.

1. UN Charter

It is widely recognized that the central tenet in the UN Charter is the prohibition on the use of force codified in Article 2(4), which is also reflective of customary international law.³² Under Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."³³ This does not mean that all use of force is prohibited. The UN Charter explicitly provides for two clearly defined exceptions to this general prohibition: (1) self-defense and (2) Security Council authorization.

Article 51 of the UN Charter affirms as customary international law the "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations," but only until the Security Council has taken its necessary measures to maintain international peace and security.³⁴ The "trigger" for legal use of force in self-defense is the occurrence of an "armed attack." If Syria's breach would allow chemical weapons to fall into the

³¹ Al-Jazeera, *UN deadlocked on Syria resolution*, AL-JAZEERA, Aug. 28, 2013, available at <http://www.aljazeera.com/news/middleeast/2013/08/201382818144594213.html>.

³² *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 73 (June 27). The International Court of Justice confirmed the customary international law nature of the principle of the prohibition of the use of force expressed in Article 2(4) of the UN Charter.

³³ U.N. Charter art. 2(4).

³⁴ U.N. Charter art. 51.

hands of dangerous people, as suggested by President Obama, would this trigger a broad theory of anticipatory self-defense? There is an argument that pre-emptive (as distinguished from anticipatory) self-defense is lawful under the customary international law stemming from the *Caroline affair*.³⁵ Under this type of self-defense, the use of force can only be justified if it is necessary to avert an imminent attack, and use of force is proportional to that necessity.³⁶ Today, there is no recognized right of preventive or anticipatory self-defense where it would be permissible to use force in order to prevent an armed attack, where an armed attack is not imminent.³⁷ In the most extended form of self-defense, the armed attack must be imminent.

Outside of self-defense under Article 51 or customary international law, it seems that other potential uses of force must be channeled through the Security Council. Article 24(1) of the Charter gives the Security Council the “primary responsibility for the maintenance of peace and security.”³⁸ Under Article 39 of the Charter, the Security Council may impose binding measures under Chapter VII.³⁹ The triggering language for these measures is the determination that there has been a “threat to peace, breach of the peace, or act of aggression.”⁴⁰ Chapter VII measures explicitly include the use of military force as authorized by the Security Council under Article 42.⁴¹ Presently, there is no legal framework to cover situations of Security Council deadlock.

One of the main purposes of the UN is to regulate the use of force in the maintenance of international peace and security.⁴² It appears that under the UN collective security scheme

³⁵ See Donald R. Rothwell, *Anticipatory Self Defence in the Age of Terrorism*, 24 U. QUEENSLAND L.J. 337, 339 (2005). In 1837 the British seized the *Caroline* which had been used by American rebels for armed raids on Canadian territory. The ship was set on fire and sent over Niagara Falls, resulting in the death of two US nationals. It was asserted by the US Secretary of State that Britain would need to show “a necessity for self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” The second element would be that the use of force in self-defense must not be excessive, and “must be limited by that necessity and kept clearly within it.”
³⁶ *Id.*; see also United Kingdom, Parliamentary Papers Vol. LXI (1843); United Kingdom, British and Foreign State Papers Vol. 30 (193).

³⁷ See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, para. 92 (June 27). Although anticipatory self-defense was not discussed in the case, the International Court of Justice did not extend the right of self-defense under Article 51 of the Charter, a claim advanced by the United States, to enable the US to provide assistance to rebels in a non-international armed conflict.

³⁸ U.N. Charter art. 24(1), although primary does not mean exclusive. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 148, para. 26 (July 9).

³⁹ U.N. Charter art. 39.

⁴⁰ *Id.*

⁴¹ U.N. Charter art. 42.

⁴² U.N. Charter art. 1(1).

outlined in the Charter, the Security Council has the monopoly on the use of force. However, in determining the legality of the use of force for the purpose of intervention, an analysis that only relies on Article 2(4) and the corresponding exceptions may be overly simplistic.⁴³ The maintenance of international peace and security is only one of the purposes of the UN. One other purpose, of a more humanitarian nature, is stated in the preamble: “to save succeeding generations from the scourge of war . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person. . . .”⁴⁴

An analysis of the above legal provisions of the Charter shows conflicting principles. There are clear prohibitions on the use of force with just two exceptions. The Charter contains elements of human rights and humanitarian principles. However, there is no explicit right of intervention for humanitarian purposes. In a strict legal application of the UN Charter, there seems to be no explicit justification for the use of force outside the self-defense model or Security Council authorization. If the Security Council is deadlocked by the veto of another P-5 member, are there other justifications for the use of force? Could collective intervention by a coalition of the willing be lawful?

2. Reprisals and Countermeasures

The rhetoric coming from the US (Obama administration and others) justified the use of force based on punishment in the form of a reprisal or countermeasure. Since Syria was in breach of the international law norm of the prohibition of the use of chemical weapons, could the US take action in the form of a countermeasure or reprisal? The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (“Draft Articles on State Responsibility”), is non-binding but reflective of customary international law. It precludes

⁴³ See Sir Daniel Bethlehem, *Stepping Back a Moment—The Legal Basis in Favour of a Principle of Humanitarian Intervention*, Blog of the European Journal of International Law, EJIL: TALK! (Sept. 12, 2013), <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>.

⁴⁴ U.N. Charter Preamble.

wrongfulness in respect to countermeasures taken in response to an internationally wrongful act.⁴⁵ However, countermeasures involving use of force are generally prohibited:

Countermeasures shall not affect:

- (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
- (b) obligations for the protection of fundamental human rights;
- (c) obligations of a humanitarian character prohibiting reprisals;
- (d) other obligations under peremptory norms of general international law.⁴⁶

This prohibition on armed reprisal is codified in both the Draft Articles on State Responsibility as well as the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁴⁷ However, the Draft Articles on State Responsibility may provide other leeway for force as they also preclude wrongfulness for measures taken in distress—if there is no other reasonable way, in a situation of distress, of saving lives—or necessity: if it is the only way for a state to safeguard an essential interest against a grave and imminent peril.⁴⁸

In the humanitarian law context, the International Committee of the Red Cross (“ICRC”) has outlined reprisals in its 2005 Customary International Humanitarian Law Rules.⁴⁹ Rule 145 states that “where not prohibited by international law, belligerent reprisals are subject to stringent conditions.”⁵⁰ According to the ICRC, state practice has established this rule as a norm of customary international law applicable in *international armed conflicts* subject to stringent conditions:⁵¹

⁴⁵ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10, A/56/10, (2001) (“Draft Articles on State Responsibility”), art. 22.

⁴⁶ *Id.*, art. 50; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), A/8082, (Oct. 24, 1970), Principle 1.

⁴⁷ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), A/8082, (Oct. 24, 1970), Principle 1.

⁴⁸ Draft Articles on State Responsibility, arts. 24, 25.

⁴⁹ JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES, INTERNATIONAL COMMITTEE OF THE RED CROSS, 513 (Cambridge 2005). (“Customary International Humanitarian Law Rules”).

⁵⁰ *Id.*, Rule 145.

⁵¹ *Id.* at 513.

(i) Purpose of reprisals: Reprisals may only be taken in reaction to a prior serious violation of international humanitarian law, and only for the purpose of inducing the adversary to comply with the law....

(ii) Measure of last resort: Reprisals may only be carried out as a measure of last resort, when no other lawful measures are available to induce the adversary to respect the law....

(iii) Proportionality: Reprisal action must be proportionate to the violation it aims to stop....

(iv) Decision at the highest level of government: The decision to resort to reprisals must be taken at the highest level of government....

(v) Termination: Reprisal action must cease as soon as the adversary complies with the law.⁵²

Although the ICRC allows for reprisals taken in reaction to a serious violation of international humanitarian law, the applicability of this rule is limited to international armed conflicts. The Syrian conflict, although it has involved insurgents from outside groups, most likely does not qualify as an international armed conflict but rather a non-international armed conflict. Additionally, neither the US nor the UK has been subject to an armed attack by Syria. It is fairly clear then that an armed intervention with the intent of punishing a regime for a breach of an international norm would be unlawful.

3. Aggression

If the use of force outside the UN collective security framework is unlawful, military intervention would constitute a breach of the international obligation for states to refrain from the use of force.⁵³ Further, it may even constitute an international crime—the crime of aggression, even though it could not be charged at the ICC until 1 January 2017, at the earliest.⁵⁴ At the

⁵² *Id.* At 515-18.

⁵³ Draft Articles on State Responsibility, art. 1.

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.

⁵⁴ See Article 15 *bis*5(3): The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority”of States Parties as is required for the adoption of an amendment to the Statute.

2010 Kampala Review Conference, the Rome Statute of the International Criminal Court was amended to include the crime of aggression.⁵⁵ Under the new Article 8bis of the Rome Statute, the crime of aggression is defined as:

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.⁵⁶

Unlawful military force may constitute an act of aggression as defined by the Kampala amendments:

An “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.⁵⁷

Acts which constitute aggression include the invasion or attack by the armed forces, military occupation, annexation by the use of force, bombardment, blockades, and attacks by armed groups under the control of a state.⁵⁸

After looking at all these various provisions, it seems that neither humanitarian intervention, nor armed reprisals or countermeasures are lawful under present international law. However, the law is constantly evolving, and legal discussions have focused on whether it would be permissible to act outside the law, or if customary international law has indeed produced a new norm permitting armed intervention to relieve humanitarian crises.

IV. DISCUSSION

After going through all the various legal provisions, I touched on the evolution of the legal theory in practice. The law is not static, and this is not the first time we have seen this type of scenario. The situation in Kosovo in the 1990s involved intervention by a coalition of the willing

⁵⁵ ICC Assembly of States Parties, The Crime of Aggression, RC/Res.6 (June 11, 2010) (“Kampala Resolution”), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

⁵⁶ *Id.*, Annex I. para. 2.

⁵⁷ *Id.*

⁵⁸ *Id.*, paras. 2(a)–(f).

outside the legal framework. A somewhat progressive legal doctrine “Responsibility to Protect”—“R2P” for short—was adopted shortly after NATO’s intervention in the former Yugoslavia, in order to develop some of the legal framework in regard to the use of force. However, today, we can see that R2P falls short of legalizing intervention outside of the UN framework. Perhaps this is the price paid for acting without UN Security authorization, when examining the evolution of R2P.

1. Humanitarian Intervention in Kosovo

In the late nineties, there was considerable recognition that the conduct of the Yugoslav and Serbian authorities in Kosovo created an intolerable humanitarian crisis which was morally and legally unacceptable.⁵⁹ As attempts to reach a negotiated solution failed, NATO Secretary-General, Dr. Javier Solana, announced that he had given authority to begin air strikes intended to “end excessive and disproportionate use of force in Kosovo, and to support the political aims of the international community.”⁶⁰ Significant for the Syria discussion is that a “red line” was set by the UN in regard to Kosovo. Security Council resolutions had been imposed on the Federal Republic of Yugoslavia (“FRY”), requiring withdrawal of Serbian security forces from Kosovo.⁶¹ The FRY had failed to comply with its obligations under these resolutions.⁶² The NATO action was designed to compel compliance with these obligations. However, no Security Council authorization for the use of force was given before NATO commenced its air campaign against the FRY on March 24, 1999.⁶³ If NATO had sought authorization for the action from the Security Council, it would have been subject to deadlock—a very similar situation to what we have in Syria today.

As a prelude to the NATO airstrikes, in October 1998, the UK Foreign and Commonwealth office released a report outlining the UK’s view on the legal bases for the use of force in

⁵⁹ Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, FINNISH YEARBOOK OF INT’L L. 141, 143 (2002).

⁶⁰ *Id.* at 151.

⁶¹ See S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

⁶² Greenwood, *supra* note 62 at 156.

⁶³ *Id.* at 151.

Kosovo.⁶⁴ In the report, the UK stated that Security Council authorization to use force for humanitarian purposes was widely accepted.⁶⁵ The UK submitted that Security Council authorization would give a clear legal basis for the NATO action, and would be politically desirable.⁶⁶ However, the UK reported that use of force can be justified on the grounds of overwhelming humanitarian necessity without Security Council approval, and set out explicit rules governing the use of force:

- (a) that there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (b) that it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved;
- (c) that the proposed use of force is necessary and proportionate to the aim (the relief of humanitarian need) and is strictly limited in time and scope to this aim—i.e. it is the minimum necessary to achieve that end. It would also be necessary at the appropriate stage to assess the targets against this criterion.⁶⁷

After the NATO airstrikes, no formal condemnation was issued by the UN. Security Council Resolution 1244, which was passed a few months after the airstrikes, determined that “the situation in the region continues to constitute a threat to international peace and security.”⁶⁸ No authorization for the use of force was given, yet no formal condemnation for NATO’s intervention was heard. This is significant because although the use of force may not have been legal, under international law, it may have been legitimate based on the beneficial consequences in light of the overwhelming humanitarian crisis. The Independent International Commission on Kosovo concluded that:

[T]he NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted because the intervention had

⁶⁴ FOREIGN & COMMONWEALTH OFFICE, FRY/KOSOVO: THE WAY AHEAD; UK LEGAL VIEW ON THE BASE FOR USE OF FORCE (Oct. 7, 1998) reprinted in Adam Roberts, *NATO’s ‘Humanitarian War’ over Kosovo*, Institute for Strategic Studies, 41 SURVIVAL 102, 106 (1999).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

the effect of liberating a majority of population of Kosovo from a long period of oppression under Serbian rule.⁶⁹

Interestingly, Richard Falk, a member on the Kosovo Commission, reported that members of the Commission were confused about whether to acknowledge the use of force absent Security Council authorization as a violation of international law.⁷⁰ According to Falk, respected scholars had approached the issues in diverging ways.⁷¹ Positivists and Legalists argued that the recourse to force directly violated the core norm of the UN Charter which prohibits the use of force outside of self-defense and Security Council authorization.⁷² Critics of American foreign policy doubted the humanitarian intentions of the NATO military operation.⁷³ Others argued that the prior UN Security Council resolutions had described the situation in Kosovo as constituting a threat to international peace and security, within the meaning of Chapter VII, which paved the way for subsequent authorization of force.⁷⁴ Noting these differences in opinion among the Commission members, Falk stated:

The Kosovo Commission was aware of these various lines of response relating to the use of force, and accepted the contention that the apprehension of Serb 'ethnic cleansing' in Kosovo was imminent and that the seeming impact of the use of force, despite some criticism of tactics, did have a net positive effect by securing de facto independence for Kosovo, by earning clear expressions of approval from the overwhelming majority of the Kosovar population, and by inducing almost all of the refugees who had left Kosovo to return. In other words, the Commission was seeking an acceptable way to explain its overall view that international law had been violated, but that, despite this, the outcome was definitely beneficial and to be affirmed, and should not be condemned despite its evident illegality.⁷⁵

Falk goes on to say that a legitimizing factor was the view that the NATO governments, particularly the US, had done their best to find a diplomatic solution, and only sought force as a measure of last resort.⁷⁶ Second, there was also a particular view that, under the circumstances,

⁶⁹ Independent International Commission on Kosovo, *The Kosovo Report, Conflict, International Response, Lessons Learned*, 4 (Oxford 2000).

⁷⁰ Richard Falk, *Legality and Legitimacy: Creative Tension and/or Geopolitical Gambit*, OCCASIONAL PAPERS OF THE SUBALTERN-POPULAR WORKSHOP (posted May 21, 2007), at 6–8, <http://www.ihc.ucsb.edu/subaltern/citation/papers.html>.

⁷¹ *Id.* at 6.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Falk, *supra* note 73 at 7.

⁷⁶ *Id.*

the Security Council should have acted, and that it was only prevented by the “irresponsible geopolitics of Russia and China that made it appear to the pro-intervention side that it was worse than useless to seek Security Council approval because there was near certainty of a veto.”⁷⁷ Given this context, Falk reported, it seemed unreasonable to the Commission to condemn the intervention because it was *technically* a violation of international law and the UN Charter.⁷⁸ However, Falk was aware of the potential danger of this precedent setting moment:

Of course, such conceptual acrobatics do not really overcome the dark side of the precedent, namely, that leading members of the United Nations went to war under conditions that were neither self-defense nor based on Security Council authorization. The repudiation of legal guidelines in favor of contradictory moral and political imperatives is problematic, given the existence and role of political actors of great inequality when it comes to power.⁷⁹

Falk notes that, to avoid this hazardous “slippery slope,” the Commission did its best to confine the authority of the precedent in three ways: (1) it urged the P-5 members of the Security Council by formal action or informal agreement to suspend uses of veto in situations of humanitarian emergency; (2) it made clear that Kosovo was a narrow exception to the prohibition on non-defensive force; and (3) it set forth a framework of guidelines that were supposed to ensure that any use of force in a future Kosovo-like situation would be human in execution and humanitarian in motivation and effects.⁸⁰

The NATO attacks received no condemnation from the UN; however, this proposition that the air strikes were legal or legitimate was not shared by all states. Three days into the NATO airstrikes, Russia brought a draft resolution to the Security Council which condemned the attacks and called for “an immediate cessation of the use of force against the Federal Republic of Yugoslavia.”⁸¹ Only three states voted in favor of the resolution: Russia, China, and Namibia.⁸² Slovenia, which was among the states opposing the resolution, made a key point that the Security Council should not have the monopoly on decision-making regarding the use of force, and that it

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ U.N. Doc. S/1998/328 (Mar. 26, 1999).

⁸² Press Release, Security Council, Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia, U.N. Press Release SC/6659 (Mar. 26, 1999).

has the “primary, but not exclusive responsibility for maintaining international peace and security.”⁸³

In 2000, China and the “Group of 77”, 77 developing UN Member States who are parties to the Joint Declaration of the Seventy-Seven Developing Countries, explicitly rejected the “right” of intervention, and declared that it has no legal basis in the UN Charter or in the general principles of international law:

We stress the need to maintain a clear distinction between humanitarian assistance and other activities of the United Nations. We reject the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law. In this context, we request the Chairman of the Group of 77, in conjunction with the Chairman of the Non-Aligned Movement (NAM), through the Joint Coordinating Committee, (JCC), to coordinate consideration of the concept of humanitarian intervention and other related matters as contained in the 1999 Report of the United Nations Secretary-General on the work of the Organization. We further stress the need for scrupulously respecting the guiding principles of humanitarian assistance, adopted by the General Assembly in its resolution 46/182, and emphasize that these principles are valid, time-tested and must continue to be fully observed. Furthermore, we stress that humanitarian assistance should be conducted in full respect of the sovereignty, territorial integrity, and political independence of host countries, and should be initiated in response to a request or with the approval of these States.⁸⁴

2. Responsibility to Protect “R2P”

Kosovo can be seen as a precedent setting event. If the Security Council is deadlocked, Kosovo tells us that the use of force may be legitimate in the absence of legal authority if used for humanitarian purposes, and if no condemnation is subsequently issued by the UN. This leaves open a peculiar issue: *will it open “Pandora’s box” to states seeking to use armed intervention when one of the P-5 members would block a Security Council authorization?* One clear example comes from the recent instabilities in Ukraine. After the overthrow of Ukrainian President Viktor Yanukovich in February 2014, Russia sent military troops to the Crimea region of Ukraine in

⁸³ *Id.*

⁸⁴ Group of 77 South Summit, Declaration of the South Summit (Apr. 2000), para. 54, *available at* http://www.g77.org/summit/Declaration_G77Summit.htm.

order to protect ethnic Russians, as Russian President Vladimir Putin believed that the Ukrainian president had been overthrown in a coup.⁸⁵ Was President Putin justified in deploying troops to protect Russians in Ukraine? Can a state unilaterally make its own determination about whether international law has been violated, and subsequently act on that determination?

An attempt to formalize and constrain the Kosovo precedent was made in the development of the doctrine of “Responsibility to Protect.” The International Commission on Intervention and State Sovereignty (“ICISS”) issued its report “Responsibility to Protect” in 2001, shortly after the NATO air campaign. ICISS considered that: “if the Security Council fails to discharge its responsibilities in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations.”⁸⁶

Under R2P, sovereign states have a “responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation.⁸⁷ If states are unwilling or unable to protect their own citizens (for example using chemical weapons against their own population), that responsibility must be borne by the broader community of states. The principles of R2P have several restrictions. *First*, there is a “just cause” threshold—serious and irreparable harm to human beings must be imminent and likely to occur.⁸⁸ *Second*, there are “precautionary principles.”⁸⁹ The author of the use of force must have the right intention—to avert or halt human suffering and military intervention may only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been extinguished.⁹⁰ Additionally, the attack must be proportional in scale, duration and intensity, and must have a reasonable prospect of success.⁹¹ *Third*, the use of force must have a legal basis—authorization from the Security

⁸⁵ Michael Kelly, *PUTIN: What Happened In Kiev Was An Unconstitutional Overthrow And Yanukovych Is Still President*, BUS. INSIDER, Mar. 4, 2014, available at <http://www.businessinsider.com/putin-what-happened-in-kiev-was-an-unconstitutional-overthrow-and-yanukovych-is-still-president-2014-3#ixzz2v0xUMUU3>.

⁸⁶ ICISS, Report of the International Commission on Intervention and State Sovereignty, Responsibility to Protect VIII (Dec. 2001) (“ICISS R2P Report”).

⁸⁷ *Id.*

⁸⁸ *Id.* at XII.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Council.⁹² Back to square one: R2P effectively offers nothing other than what the UN Charter guarantees in the first place, including UN Security Council restrictions on the use of force. What was meant as a fix to P-5 gridlock during extreme humanitarian crises when there is an imminent need to use force to protect innocent civilian lives, has turned into a meaningless construct—at least from the legal standpoint.

The R2P doctrine was formally adopted by the United Nations General Assembly in Resolution 60/1 following the 2005 world summit.⁹³ Paragraphs 138 and 139 of the Resolution outline the adoption of this approach:

138: Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.⁹⁴

⁹² ICISS R2P Report at XII.

⁹³ G.A. Res. 60/1, U.N. Doc. A/RES/60/1 “2005 World Summit Outcome” (Oct. 24, 2005).

⁹⁴ *Id.*, paras. 138, 139.

Libya was one particular instance where R2P was put into practice. Amidst the conflict in Libya as a result of the Arab Spring, the Security Council passed Resolution 1973 which considered that the widespread and systematic attacks that took place in Libya against the civilian population may have amounted to crimes against humanity and “authorize[d] member states . . . to take all necessary measures . . . to protect civilians and populated areas under attack in Libya.”⁹⁵ This is R2P in its purest form. The Libyan government failed to protect its own citizens, and thus the responsibility was borne by the international community. Force was authorized through the Security Council and aimed to protect the civilian population.

However, R2P does not solve the issue of Security Council deadlock. If the use of force in Libya had grabbed the attention of national interests of any of the P-5 members, the application of R2P would have fallen short of making intervention permissible. R2P clearly requires Security Council approval. And so the question to answer in the Syrian conflict is whether there are a set of circumstances that would permit a nation to use or threaten force absent a Security Council Resolution. It depends. If R2P is viewed as a legal norm, the answer is no. If viewed as a principle reflecting what is morally right—legitimate as opposed to legal—then perhaps, under some discrete set of circumstances such as those identified by the UK, the answer could be yes. But who gets to decide which humanitarian crisis merits the use of armed intervention absent UN Security Council authorization? Listen closely to Vladimir Putin and it would appear that part of his justification for his action in Ukraine is because the Russian nationals in the Crimea are under an imminent threat requiring armed intervention. Anticipatory self-defense also seems to loom large as part of his justification; the need to protect Russia’s national and military interests. A bit reminiscent of the Bush/Obama doctrine on anticipatory self-defense.

3. Discussion on Syria—is there a legal basis or justification outside the Security Council?

The United States’ positions discussed seem to provide a justification for the use of force based on punitive reprisals and anticipatory self-defense. However, President Obama gave mixed

⁹⁵ S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

messages. The US seems to be scoping out all the possible justifications for the use of force. An analysis of the legal rules governing countermeasures and reprisals, armed force in reaction to a breach of an international law norm is generally prohibited.⁹⁶ Similarly, the use of force in anticipatory self-defense is not regarded as lawful. It goes beyond the *Caroline* precedent as an armed attack from Syria on the US or UK is not imminent. A strict application of the UN Charter to determine the legality of the use of force under Articles 2(4), 39 and 42 leaves us with the proposition that any intervention outside the Security Council, apart from self-defense, would be unlawful. In regard to the UK position, R2P leaves us at square one—as it requires Security Council authorization. R2P does not solve any of the issues when there is Security Council deadlock.

However, the law is a dynamic process. Customary international law evolves according to state practice and *opinio juris*. In a thoughtful article, Ezequiel Heffes and Brian Frenkel remind us that Rosalyn Higgins, former President of the International Court of Justice proposes that “international law is a legal decision-making process, i.e., it is a continuing process of authoritative decisions.”⁹⁷ Higgins proposes that international law is created by the actors, and that it is a continuous dynamic process of decisions.⁹⁸ So can we conclude that States may use intervention in Syria as a precedence setting “game changer” which would fundamentally change the legal norms in relation to the use of force concerning humanitarian intervention?

Sir Daniel Bethlehem, former principal Legal Adviser of the UK Foreign & Commonwealth Office, has suggested that there may be two distinct justifications for the use of force as humanitarian intervention outside the Security Council system: (1) the weaving threads of law and practice may demonstrate the legality of force outside the Security Council system; or (2) through a claim that a new norm of customary international law in favor of a principle of humanitarian intervention has rapidly crystalized.⁹⁹

⁹⁶ See *supra*, Section III(2).

⁹⁷ Ezequiel Heffes and Brian Frenkel, *Syria Insta-Symposium: Ezequiel Heffes and Brian E. Frenkel—The Decision-Making Process of the R2P Doctrine: Towards New (Old) Paths in the Use of Force in International Law*, OPINIO JURIS (Sept. 2, 2013, 3:30 PM), <http://opiniojuris.org/2013/09/02/syria-insta-symposium-ezequiel-heffes-brian-frenkel-decision-making-process-r2p-doctrine-towards-new-old-paths-use-force-international-law/>

⁹⁸ *Id.*

⁹⁹ Bethlehem, *supra* note 43.

Bethlehem takes a holistic approach in making his case, similar to what Christopher Greenwood did in advancing a legal justification for the UK/*coalition of the willing* Kosovo intervention.¹⁰⁰ Bethlehem argues that an analysis that relies on Article 2(4) and its exceptions is overly simplistic and that the UN Charter should be read as a whole.¹⁰¹ This includes the human rights principles in the preamble: to “save succeeding generations from the scourge of war” and “reaffirm faith in fundamental human rights.”¹⁰² The exceptions to Article 2(4) (Security Council authorization and self-defense under Article 51) show that the prohibition on the use of force in Article 2(4) is not absolute—the Charter expressly accepts these customary international law exceptions. While no express exception exists for the use of force for humanitarian intervention, an exception could be carved out that permits use of force against another state when persistent deadlock obstructs the UN’s capacity to achieve its humanitarian purposes.¹⁰³ The United Nations Charter is based on the development of customary international law. The principles of international law, as well as the Charter do not draw exclusively from principles of state sovereignty and non-intervention but also from human rights and humanitarian law.¹⁰⁴ Arguably—and preferably—preventing and responding to mass atrocities would do more to further the principles of international law, including the UN system, than a rigid application of the Charter and treaty texts. While the Draft Articles on State Responsibility do not permit armed reprisals or countermeasures nor provide a basis for humanitarian intervention, they do give some leeway to use some sort of action in response to an unlawful act.¹⁰⁵ Thus, according to Bethlehem, the law permits some limited responses; no condemnation for military action should follow when used as a last resort measure to address extreme exigencies.¹⁰⁶

But it is also important to look to state practice. In the Kosovo situation, the legal basis relied on by NATO was humanitarian intervention. Seventeen NATO members individually satisfied themselves of the legality of their participation in the operations. Although there were efforts in the UN to condemn the air strikes, no condemnation was made. The Kosovo commission report found that although NATO’s military intervention was illegal, it was nonetheless legitimate in

¹⁰⁰ See Greenwood, *supra* note 62.

¹⁰¹ *Id.*

¹⁰² U.N. Charter Preamble.

¹⁰³ Bethlehem, *supra* note 43.

¹⁰⁴ Greenwood, *supra* note 62 at 161.

¹⁰⁵ See Draft Articles on State Responsibility arts. 22, 25, 24 (circumstances which preclude wrongfulness).

¹⁰⁶ Bethlehem, *supra* note 43.

light of the overwhelming humanitarian crisis in Kosovo. This supposedly demonstrates that where states have intervened on humanitarian grounds without Security Council approval—where there were clear exigencies—their actions have been accepted by the majority of states, and at least tacitly approved by the Security Council.¹⁰⁷ Lou Henkin, a Columbia University Law Professor who is widely considered one of the most influential contemporary scholars of international law, enumerated four factors which support the legality of NATO action in Kosovo without Security Council authorization: “(1) extreme gravity of the human rights situation; (2) collective humanitarian action; (3) prior Security Council unavailability; and (4) subsequent Council monitoring.”¹⁰⁸

From this perspective, if you look at all the legal provisions accompanied by state practice, arguably, there may be some sort of legal leeway for the permissible use of force in humanitarian intervention in Syria. If not explicitly legal under the rules, it may be considered legitimate as seen in practice in Kosovo. Further, perhaps R2P could be regarded as a set of principles, rather than law as such, permitting the use of force outside the Security Council. As for Syria, Bethlehem suggests the legal issues to be considered should include:

(a) the legal effect of the Security Council’s failure to act, (b) the legal effect that attaches to the use of chemical weapons, as distinct from other massive humanitarian violations that have occurred previously; (c) the legal effect of resolutions of the Arab League; (d) the legal effect of the opposition of Russia, China, Iran and others to the suggestion of intervention.¹⁰⁹

Bethlehem also suggests other practical considerations should be considered, such as the massive cross-border refugee flow into Syria’s neighbors.¹¹⁰ This may not be an altruistic consideration. States have a self-interest in developing other countries in order to save their own taxpayers from the economic burden of refugees. Additionally, the provision of aid and assistance to both sides in a civil war provides an additional practical consideration. Providing aid to rebels fighting against a government regime could be a violation of that state’s sovereignty. It can hardly be argued that providing aid to the rebel forces in Syria would be akin to sending aid to a

¹⁰⁷ Greenwood, *supra* note 62 at 169.

¹⁰⁸ Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention* (Part II: International Law and the Way Forward), JUST SECURITY, (Oct. 2, 2013, 9:00 AM), <http://justsecurity.org/2013/10/02/koh-syria-part2/>.

¹⁰⁹ Bethlehem, *supra* note 43.

¹¹⁰ *Id.*

government. There is no monolithic group in “the opposition,” but rather groups of fighters against the Assad regime. States would have to recognize a rebel group, or collective of groups, as the rightful government. It’s doubtful that the rebel movement meets the *Montevideo* criteria for recognition.¹¹¹ The opposition has included Syrian as well as outside fighters, including the Islamic State in Iraq and the Levant (ISIS), an Al-Qaeda affiliate organization from Iraq.¹¹² Additionally, Syria could possibly turn into a regional conflict.

If, under this analysis, international law can be shown to be permissive of humanitarian interventions, there are a number of distinguishing factors which would contribute to the legitimacy of the use of force in Syria. This would include an assessment of the catastrophic humanitarian situation—not only the use of chemical weapons on civilians, but also other widespread human rights violations, the likelihood of future atrocities, the severity of already committed atrocities which may constitute international crimes, and the growing likelihood of regional security. If, as Bethlehem suggests, all the Charter provisions, international legal principles, and state practice are taken together, this may legitimize the use of force in Syria. Even if not seemingly permissible under all the legal provisions read as a whole, and taken into account with state practice, a new norm permissive of humanitarian intervention could rapidly crystallize in customary international law. The US and its allies could treat Syria as a “game changing” moment, in order to solidify a limited, and narrowly tailored, concept of humanitarian intervention, which is capable of operating outside the veto-stranglehold in the Security Council in extreme circumstances.

VI. CLOSING THOUGHTS

In wrapping up the seminar, I discussed the implications of the various positions that are out there. To strike or not to strike. Operate outside the international legal framework, or operate as

¹¹¹ See Montevideo Convention on the Rights and Duties of States, 165 LNTS 19; 49 Stat 3097 (1934). Although a regional treaty, the following criteria are regarded as customary international law on the sovereignty of states: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

¹¹² BBC Middle East, *Profile: Islamic State in Iraq and the Levant (ISIS)*, BBC NEWS (last updated January 6, 2014), <http://www.bbc.com/news/world-middle-east-24179084>.

if within the international legal framework (as suggested by the UK) or alternatively with the view of recalibrating (redefining) the law on the use of force?

Military strikes against Syria without UN Security Council approval are almost certainly a violation of international law. Building a coalition of the willing that operates outside the UN would not make it any more legal, though, as in Kosovo, it could be viewed as legitimate or morally right. Punishment is not a legal justification. International law does not seem to provide a right of states to respond with force to serious violations of international law—even when that law prohibits the use of chemical weapons.

The principle of humanitarian intervention, despite the UK's expressed position, does not provide a legal basis to use force absent Security Council authorization. R2P is clear: the use of force outside the UN Charter is not sanctioned. Were Syria to fail in its obligations under Resolution 2118, and were the Security Council be deadlocked in using force under Chapter VII, the US would have a hard choice to make: follow the law by acting inside the UN Charter, meaning do nothing, or act outside the UN Charter by justifying the military strikes as morally legitimate and seemingly necessary as part of a law making moment. Perhaps customary international law has evolved to the extent that under certain circumstances, it trumps the UN Charter—at least in so far as the use of force for extreme humanitarian situations where the P-5 are unwilling to abide by their obligations in ensuring the fundamental precepts of the UN Charter as expressed in its Preamble. Perhaps. But where there may be good humanitarian intention for unilateral/collective use of force absent P5 consent, other agendas – such as regime change – seem to lurk in the background, giving rise to questions as to the real purpose of the use of force. Just take a look at how Michael Ignatieff put the case forward for the US to use force in Syria, in an Op Ed piece in the New York Times, coincidentally, the day before the seminar, which, exquisitely, fit into our discussions:

The trouble is that the conventional wisdom may be fatalism parading as realism and resignation masquerading as prudence. [...] Given the near certainty that Russia would veto any United Nations Security Council authorization of air power, and that the United States Congress, if asked to authorize force, would likely turn President Obama down, stopping the war in Syria will stretch domestic and international legality. But if legality is not stretched, the killing will

go on indefinitely. [...] Above all, using force would make the president 'own' the Syrian tragedy. So far he has tried to pretend he doesn't have to. The fact is he owns it already. American inaction has strengthened Russia, Hezbollah and Iran. It has turned Syria into the next front in the war with Islamic extremism. And it has put in jeopardy the stability of Jordan, Lebanon, Iraq and Turkey and risks leaving a failed state next door to Israel. If the president already owns the deadly consequences of inaction, it is only prudent now to back diplomacy with force so that the consequences do not become deadlier still.¹¹³

From the rhetoric coming out of the White House and Congress, the Obama administration seemed intent on acting outside the UN Charter while offering no credible legal justification. The R2P doctrine—such as it is—provides no viable solution. As for the application of the humanitarian intervention as articulated by the UK, it too is fraught with risks of abuse. States could justify the use of force as a pretext of humanitarian intervention.

With the Ukraine situation on the horizon, I concluded by asking, perhaps presciently, it now seems: *Is there international law, or is there only power?*

¹¹³ Michael Ignatieff, *With Syria, Diplomacy Needs Force*, N.Y. TIMES, Feb. 25, 2014, available at <http://nyti.ms/1cl99qW>.