

# *The Syrian intervention: assessing the possible international law justifications*

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Schmitt, M. N. ORCID: <https://orcid.org/0000-0002-7373-9557>  
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## The Syrian Intervention: Assessing the Possible International Law Justifications

*Michael N. Schmitt*

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## The Syrian Intervention: Assessing the Possible International Law Justifications

*Michael N. Schmitt\**

### I. INTRODUCTION

The seemingly tangential nature of international law to the debate regarding strikes on Syria is both remarkable and disheartening.<sup>1</sup> With war clouds looming, the Administration has yet to fully present its legal justification for military action. Instead, President Obama has merely signaled his willingness to go “forward without the approval of a United Nations Security Council that, so far, has been completely paralyzed and unwilling to hold

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\* Stockton Professor and Chairman, International Law Department, United States Naval War College; Professor of Public International Law, University of Exeter. The views expressed in this article are those of the author in his personal capacity and do not necessarily represent those of the United States government.

1. The U.S. operations would be in response to alleged, repeated use by the Assad regime of chemical weapons. On the chemical attacks, see Chairman, United Kingdom Joint Intelligence Committee, Syria: Reporting Chemical Weapons Use, Aug. 29, 2013, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235094/Jp\\_115\\_JD\\_PM\\_Syria\\_Reported\\_Chemical\\_Weapon\\_Use\\_with\\_annex.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235094/Jp_115_JD_PM_Syria_Reported_Chemical_Weapon_Use_with_annex.pdf). The most significant event occurred on August, 21, 2013. U.S. estimates are that over 1000 people died in that attack, whereas the British estimate is approximately 350. Contrast The White House, Statement by the President on Syria, Aug. 31, 2013, <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>, with Joint Intelligence Organisation, Assessment on Reported Chemical Weapons Use in Damascus, Aug. 27, 2013, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235094/Jp\\_115\\_JD\\_PM\\_Syria\\_Reported\\_Chemical\\_Weapon\\_Use\\_with\\_annex.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235094/Jp_115_JD_PM_Syria_Reported_Chemical_Weapon_Use_with_annex.pdf).

Assad accountable.” He explains that the most recent and severe chemical weapons attack on 21 August 2013

... is an assault on human dignity. It also presents a serious danger to our national security. It risks making a mockery of the global prohibition on the use of chemical weapons. It endangers our friends and our partners along Syria’s borders, including Israel, Jordan, Turkey, Lebanon and Iraq. It could lead to escalating use of chemical weapons, or their proliferation to terrorist groups who would do our people harm.<sup>2</sup>

Use of armed force by one State against another has two legal consequences. First, military operations at the level currently contemplated with respect to Syria initiate an “international armed conflict” in which the *jus in bello* (international humanitarian law) governs how the ensuing hostilities may be conducted.<sup>3</sup> The objectives of the attacking State are irrelevant to the existence of an armed conflict, which is an entirely fact-based legal status. Similarly, although disagreement exists over whether low levels of violence qualify as armed conflict,<sup>4</sup> there is no question that operations involving cruise missiles or other aerial strikes reach this threshold.<sup>5</sup> In lay terms, the launch of military operations by the United States and its partners against Syria would mean those countries were “at war” as a matter of international law.

Second, the resort to military force by a State constitutes a “use of force” under the *jus ad bellum*. The *jus ad bellum* addresses the issue of when

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2. Statement by the President, *supra* note 1.

3. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

4. See, e.g., Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 57 (Dieter Fleck ed., 2d ed. 2008).

5. “Any difference arising between two States and leading to the intervention of armed forces is an armed conflict [qualifies as an armed conflict] . . . . It makes no difference how long the conflict lasts or how much slaughter takes place.” COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean Pictet ed., 1952); COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA 28 (Jean Pictet ed., 1960); COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF AUGUST 12, 1949 23 (Jean Pictet ed., 1960); COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20 (Jean Pictet ed., 1958).

States may use force as an instrument of their national policies. Its most fundamental norm is the prohibition found in customary law and set forth in Article 2(4) of the U.N. Charter: “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.”<sup>6</sup> Absent an applicable exception to this proscription, U.S. military operations against Syria will arguably violate international law.

This inaugural contribution to the “Current Developments” section of *International Law Studies* explores the possible legal justifications for using armed force against Syria. The analysis draws solely on international law; no effort is made to examine Presidential authority to order strikes under U.S. law. The article concludes that there is no unassailable legal basis for the operations. Therefore, it is imperative that the Administration provide its legal justification in order to inform the ongoing debate and before ordering U.S. forces into harm’s way.

## II. POSSIBLE LEGAL JUSTIFICATIONS

### *A. Security Council Authorization*

The U.N. Charter contains two express exceptions to the prohibition on the use of force.<sup>7</sup> Security Council authorization pursuant to Articles 39 and 42 is the first. By those articles, the Council is authorized to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and decide upon measures, including the use of force, necessary “to maintain or restore international peace and security.” There is no question that a Security Council Resolution authorizing “all necessary means” (U.N. shorthand for “force”) to respond to Syria’s use of chemical weapons, or to more broadly address the humanitarian disaster in the country, would be lawful. Indeed, the Security Council has authorized forceful

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6. U.N. Charter art. 2(4). On its customary law nature, see *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 188–90 (June 27) [hereinafter *Nicaragua*].

7. The U.N. Secretary General has asserted that these are the only bases for the use of force. See U.N. Secretary General, Press Encounter on Syria, Sept. 3, 2013, <http://www.un.org/sg/offthecuff/index.asp?nid=2967>.

humanitarian interventions on a number of occasions, most recently during the Libyan conflict.<sup>8</sup>

However, every indication is that Russia and/or China would exercise their veto power as Permanent members of the Council to block an all necessary means resolution. Although it is sometimes suggested that the General Assembly may act when the Security Council is deadlocked and therefore unable to respond to a serious threat to, or breach of, international peace and security,<sup>9</sup> the existence of such a mechanism is legally questionable. More to the point, in the case at hand the United States would be unlikely to muster the necessary votes in the General Assembly.

### *B. Self-Defense*

In the absence of Security Council authorization, the sole remaining textual basis for using force set forth in the Charter is self-defense pursuant to Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." This treaty right reflects customary law.<sup>10</sup> States subjected to an armed attack may respond individually or seek the assistance of other States in collective self-defense. In the latter case, a State may provide assistance only once the victim State has requested it.<sup>11</sup>

Syria has not attacked the United States or any other State, nor is there any evidence that it intends to do so in the near future. On the contrary, such an action would be irrational given its internal turmoil. Thus, there is no basis for immediate or anticipatory self or collective defense against a paradigmatic armed attack. It is true that the situation in Syria is destabilizing the region, particularly with respect to refugee flows into Turkey and other neighboring countries. However, contagious instability does not rise to the level of an armed attack such that the affected States may employ force in self-defense (or seek the help of other States in collective de-

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8. S.C. Res. 1973 (Mar. 17, 2011). *See also*, S.C. Res. 794 (Dec. 3, 1992); S.C. Res. 814 (Mar. 26, 1993).

9. See discussion in Christina Binder, *Uniting for Peace Resolution (1950)*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2006), <http://opil.ouplaw.com/home/EPIL>.

10. Nicaragua, *supra* note 6, ¶ 176.

11. *Id.*, ¶ 199.

fense) to stabilize the situation. And, in any event, those States have not made an official request for collective defense assistance.

The only colorable self-defense argument is that the United States may use force to preclude the possibility of chemical weapons falling into the hands of transnational terrorist groups that might use them against either the United States or its allies. Anticipatory self-defense is limited to situations in which an armed attack is “imminent.” The imminency criterion had traditionally been understood as requiring temporal proximity between the impending armed attack and the forceful defensive action taken to prevent it. This is no longer the case. In light of the risk inherent in attacks involving weapons of mass destruction launched without warning,<sup>12</sup> an interpretation of self-defense that has gained favor allows a State to use force anticipatorily when facing an attacker who has the capability and intent to mount an armed attack once failure to act would deprive that State of an ability to defend itself.<sup>13</sup> In other words, the potential victim State may take forceful action if the “window of opportunity” to mount an effective defense is about to close.<sup>14</sup>

Applied to the Syrian situation, this threshold has not been crossed. There is no evidence that Syria intends to transfer chemical weapons to transnational terrorist groups targeting the United States or other countries. Nor has the Assad regime lost control of the country to the point where it is probable that the weapons will fall into the hands of terrorist groups. Should the latter situation occur, military operations in Syria would be permissible against the weapons and the terrorist groups in anticipatory self-defense, but not against regime targets.

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12. This risk was first highlighted in THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 15 (Nov. 2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>.

13. See discussion in Michael N. Schmitt, *Responding to Transnational Terrorism under the Jus ad Bellum: A Normative Framework*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 157 (Michael N. Schmitt & Jelena Pejic eds., 2007).

14. The last window of opportunity approach was first set forth in Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICHIGAN JOURNAL OF INTERNATIONAL LAW 524, 534–36 (2002–2003). The U.S. government has since adopted the standard. See, e.g., Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force*, Draft, 7 (Nov. 8, 2011), [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf); Eric Holder, Attorney General, Remarks at Northwestern University School of Law, (Mar. 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.



*C. Violation of the Ban on Chemical Weapon.*

The Administration has repeatedly suggested that it may act to ensure accountability for Syria's unlawful use of chemical weapons. For instance, Secretary of State Kerry has argued, "all peoples and all nations who believe in the cause of our common humanity must stand up to assure that there is accountability for the use of chemical weapons so that it never happens again."<sup>15</sup> The question is whether Syria's chemical attacks have normative significance—is the use of chemical weapons prohibited during non-international armed conflicts, and, if so, does this justify the use force by the United States?

Treaties promulgated as early as 1899 and 1925 banned the use of chemical weapons for parties thereto.<sup>16</sup> However, these earlier treaties did not extend to non-international armed conflicts. The 1993 Convention on Chemical Weapons prohibits chemical weapons use "under any circumstances,"<sup>17</sup> but Syria is not party to that instrument. During negotiations over the Statute of the International Criminal Court (ICC), the issue of whether to address chemical weapons use proved extremely contentious.<sup>18</sup> The final Statute, adopted in Rome in 1998, lists their use as a war crime during international armed conflict alone.<sup>19</sup>

Despite these facts, any doubt as to the existence of a norm prohibiting the use of chemical weapons in non-international armed conflict would be misplaced. The adoption of an amendment at the 2010 Kampala Review Conference filled the void in the ICC Statute by including (for States ratify-

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15. John Kerry, Sec'y of State, Remarks on Syria (Aug. 26, 2013) <http://www.state.gov/secretary/remarks/2013/08/213503.htm>.

16. Hague Declaration (IV, 2) Concerning the Prohibition of the Use of Projectiles Diffusing Asphyxiating Gases, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 998, 187 Consol. T.S. 453; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 94 L.N.T.S. 65.

17. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, art I.1, Jan. 13, 1993, 1974 U.N.T.S. 45.

18. Neither the United States nor Syria is Party to the Statute. However, the Statute is generally considered a reliable restatement of those acts that constitute war crimes under customary international law; hence, its reference in the instant context.

19. Rome Statute of the International Criminal Court art. 8(2)(b)(xiii), July 17, 1998, 2187 U.N.T.S. 90. On the Rome Statute and chemical weapons, see Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?* EJIL: TALK! (Aug. 23, 2013), <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>.

ing it) the “[employment of] asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” in the category of “serious violations of the laws and customs applicable in armed conflicts not of an international character.”<sup>20</sup> Additionally, the International Criminal Tribunal for the former Yugoslavia has held that use of chemical weapons is unlawful during a non-international armed conflict.<sup>21</sup> Most importantly, the prohibition on the use of chemical weapons has undeniably crystallized into a norm of customary international law applicable in all armed conflicts. The ICRC reached this conclusion in the *Customary International Humanitarian Law* study; its characterization has not been seriously questioned.<sup>22</sup> And, of course, even in the absence of an express prohibition on the employment of chemical weapons, their use against the civilian population would, as with the use of any other weapon, amount to a war crime.<sup>23</sup> “[W]hen committed as part of a widespread or systematic attack directed against any civilian population,” it would also constitute a crime against humanity.<sup>24</sup> The Assad regime’s use of chemical weapons is indisputably a conspicuous and egregious breach of international law.

International law, however, generally provides no mechanism by which individual States may “punish” other States for violating international norms, including the prohibition on the use of chemical weapons. To some extent, that is a good thing because it limits the opportunity for subterfuge when claiming a right to use force and precludes destabilizing international vigilantism. Instead, States may only respond to an unlawful act with unfriendly but lawful measures (retorsion),<sup>25</sup> countermeasures not involving the use of force when they are the victim of the violation,<sup>26</sup> and self-

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20. Amendment to Rome Statute, Art. 8(2)(e)(xiv), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.5-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf).

21. See *Tadić*, Decision on Defence Motion, *supra* note 3, ¶¶ 120–22, 124.

22. I INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, r.74 and accompanying commentary (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter Customary IHL]. See also MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY ¶ 2.2.2.c (2006); *Tadić*, Decision on Defence Motion, *supra* note 3, ¶¶ 120–22, 124.

23. Rome Statute, *supra* note 19, arts. 8(2)(c)(i) & 8(2)(e).

24. *Id.*, art. 7(1).

25. See discussion in Thomas Giegerich, *Retorsion*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2001), <http://opil.ouplaw.com/home/EPIL>.

26. International Law Commission, Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 annex, arts. 22, 49–54, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

defense when the violation of international law qualifies as an armed attack. Beyond these circumstances, only the Security Council wields the power to punish States for misconduct. By the terms of Article 39 of the Charter, the Council may do so whenever necessary to “maintain or restore international peace and security.” In the Syrian case, robust remedies for the unlawful use of chemical weapons are therefore limited to Security Council action and to prosecution of those individuals who committed, or are otherwise responsible for, the war crimes and crimes against humanity.<sup>27</sup> A U.S. attack on Syria designed to hold that State accountable for its breach of international law would itself constitute an armed attack to which Syria (and other States engaging in collective self-defense at Syria’s request) could respond forcefully.

#### *D. Assistance to the Syrian Rebels*

It is well accepted that during a non-international armed conflict, external States may lawfully provide military assistance to the government, although not to rebel forces.<sup>28</sup> But might strikes against the Assad regime be justified on the basis that the rebel forces have become the government of Syria? This is precisely the situation that prevailed once the international community recognized Karzai’s government as the lawful Afghan government following the ouster of the Taliban.<sup>29</sup>

In November 2012, the National Coalition for Syrian Revolutionary and Opposition Forces (Syrian Opposition Council, SOC) was established. A number of States soon recognized the entity as the “legitimate representative” of the Syrian people.<sup>30</sup> The same month, a State Department spokesperson also labeled the SOC as the “legitimate representative of the Syrian people,” a characterization repeated in December at the Friends of

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27. In that Syria is not Party to the Rome Statute, prosecution before that court would require referral by the Security Council. Rome Statute, *supra* note 19, ¶ 13(b). However, the offenses are subject to universal jurisdiction, thereby affording all States the right under international law to prosecute the offenders.

28. Nicaragua, *supra* note 6, ¶ 246.

29. S.C. Res. 1419 (June 26, 2002).

30. Agreement on the Formation of the National Coalition of Syrian Revolutionary and Opposition Forces, Nov. 11, 2012. On recognition as the legitimate representative, see, e.g., E.U. Council Conclusions on Syria, 16392/12, ¶ 2, Nov. 19, 2012, <http://register.consilium.europa.eu/pdf/en/12/st16/st16392.en12.pdf>.

the Syrian People meeting.<sup>31</sup> However, in its 2012 *Digest of U.S. Practice in International Law*, the State Department explained that despite these pronouncements “the United States does not recognize the SOC as the government of Syria.”<sup>32</sup> Having taken this stance, the Administration has closed the door to the possibility of styling military operations against Assad’s forces as lawful assistance to the new government of Syria. On the contrary, and as recognized by the American Law Institute’s *Restatement (3d) of Foreign Relations*, U.S. military support to a “rebellious regime . . . may violate Article 2(4) of the United Nations Charter as a use or threat of force against the political independence of the other state.”<sup>33</sup>

#### *E. Humanitarian Intervention*

In the attendant circumstances, the sole viable legal basis for attacking Syria is humanitarian intervention.<sup>34</sup> The death toll since the conflict began two years ago now exceeds 100,000. Although the threshold at which the doctrine of humanitarian intervention applies is imprecise, it would seem apparent that once deaths begin to be measured in the hundreds of thousands, the line has been crossed. In this respect, the use of chemical weapons is a bit of a red herring since the number of deaths attributable to them represents a fraction of the total. Therefore, at least in the humanitarian intervention context, Syria’s possession of, and demonstrated willingness to use, chemical weapons bears primarily on the issue of the likely extent of future deaths.

A legal right of humanitarian intervention is not widely accepted. Instead, States generally tend to cite a “Responsibility to Protect” (R2P).<sup>35</sup> By

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31. Press Briefing, U.S. Department of State Deputy Spokesperson David Toner (Nov. 13, 2012), <http://www.state.gov/r/pa/prs/dpb/2012/11/200477.htm#SYRIA>; Office of the Legal Adviser, Dept. of State, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 281 (CarrieLyn D. Guymon ed., 2012), <http://www.state.gov/documents/organization/211955.pdf>.

32. *Id.*

33. *Restatement of the Law Third: The Foreign Relations Law of the United States* § 203 (1987).

34. On the subject, see Dapo Akande, *The Legality of Military Action in Syria: Humanitarian Intervention and the Responsibility to Protect*, EJIL: TALK! (Aug. 28, 2013), <http://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/>.

35. Report of the International Commission on Intervention and State Sovereignty, *THE RESPONSIBILITY TO PROTECT* (Dec. 2001), <http://responsibilitytoprotect.org/ICISS>

R2P, States are said to bear the responsibility to protect their own nationals from harm. When they fail to do so, other States have a commensurate responsibility to take necessary measures to protect those individuals. It must be emphasized that R2P is a political mechanism and moral imperative, not a legal obligation or right. In other words, the concept provides no independent legal basis for using force to intervene in another State; to the extent the responsibility involves the use of force, that force may only be authorized through the Security Council.<sup>36</sup> R2P is an approach that the United States supports.<sup>37</sup>

By contrast, humanitarian intervention is a legal concept, albeit one that does not appear in any treaty. If the doctrine exists at all, it does so only as a matter of customary international law. States have been reticent to openly embrace the doctrine for fear that other States will misuse it in order to interfere in the affairs of their neighbors.

Despite such concerns, it can be fairly argued that the right has crystallized into customary law over the past decades. Key way points along the path of this development include international condemnation for failure to intervene in Rwanda,<sup>38</sup> apparent acceptance of ECOWAS interventions in Africa without Security Council authorization,<sup>39</sup> the NATO intervention in the Federal Republic of Yugoslavia over Kosovo, and criticism over the failure of the international community to intervene in a meaningful way in Darfur.<sup>40</sup> Such an argument is, of course, tenuous in light of apparent op-

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%20Report.pdf. See also Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFFAIRS, Nov.–Dec. 2002, at 99.

36. Report of the Secretary General, Responsibility to Protect: Timely and Decisive Response, ¶¶ 138–39, UN Doc. A/66/874–S/2012/578 (July 25, 2012).

37. As set forth in the Outcome Document of the 2005 U.N. World Summit, U.N. Doc. A/RES/60/1, at ¶¶ 138–40; DIGEST OF UNITED STATES PRACTICE, *supra* note 31, at 570. See also United States Mission to the United Nations, Remarks by the United States at an Informal Discussion on “Responsibility while Protecting”, Feb. 21, 2012, <http://usun.state.gov/briefing/statements/184487.htm>.

38. See, e.g., Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, Dec. 15, 1999, annexed to Letter Dated 15 December 1999 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/1999/1257 (Dec. 16, 1999).

39. U.N. Doc. S/22133 (Jan. 22, 1991); S.C. Res. 866 (Sept. 22, 1993); U.N. Doc. S/6481 (Feb. 26, 1998); S.C. Res. 1260 (Aug. 20, 1999).

40. The U.N. Security Council approved deployment of a peace force (United Nations Mission in Darfur—UNAMID) in 2007, but only following the signing of the Darfur Peace Agreement. S.C. Res. 1769 (July 31, 2007).

position to the doctrine by key States such as Russia and China; but it is not unreasonable.<sup>41</sup>

To date, the United States has not expressly acknowledged a right of humanitarian intervention. Indeed, in the case of Syria, the Administration appears to be talking around the issue. This approach stands in distinction to that adopted by our closest ally. The United Kingdom's government under Prime Minister David Cameron has officially embraced the doctrine of humanitarian intervention as providing a legal ground for operations against Syria.<sup>42</sup> Its position can only be based on a legal conclusion that sufficient State practice and *opinio juris* has now accumulated for a customary norm permitting humanitarian intervention to have fully matured.<sup>43</sup>

The U.K. has not only accepted the legal doctrine, but has articulated three conditions precedent for taking action on that basis:

- (i) 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;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).<sup>44</sup>

It would be difficult to legally justify any humanitarian intervention not meeting these criteria. Arguably, a fourth criterion also applies. There must be some prospect of success, that is, the intervention must be likely to significantly alleviate the suffering to a degree not possible through non-

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41. Only the United Kingdom and Belgium asserted the right of humanitarian intervention in the *Legality of the Use of Force* cases before the International Court of Justice over the Kosovo intervention. Documents on the cases are available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3>.

42. UK Prime Minister, Chemical Weapon Use by Syrian Regime: UK Government Legal Position, Aug. 29, 2013, <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>.

43. North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).

44. UK Government Legal Position, *supra* note 42.

forceful measures. This is a particularly relevant point in the Syrian context because President Obama has indicated that there will be no “boots on the ground” and Congress is discussing time limitations on the operations. If the conditions and restrictions ultimately imposed are so stringent that the success of the operation is drawn into question, the operation cannot qualify as a lawful humanitarian intervention.

Fulfillment of these criteria in the Syria case is a question of fact about which reasonable people may differ. However, the conclusion by Prime Minister Cameron’s government that they have been met is judicious. The United States could adopt a similar legal rationale for its pending strikes against Syria.

### III. CONCLUDING THOUGHTS

Absent a significant change in circumstances, there is only one possible legal basis upon which to justify military operations against Syria—humanitarian intervention.<sup>45</sup> Yet, the very existence of such a right in international law is highly controversial. Moreover, the United States has never explicitly accepted the doctrine *de jure*, despite invoking it *de facto* as an exceptional measure during the 1999 Kosovo intervention.

This places the United States on the horns of a dilemma. On the one hand, any avowed right of humanitarian intervention will represent key *opinio juris* that will measurably strengthen arguments that a third legal ground for using force exists in customary law. The United States should be concerned that other States might then take advantage of the doctrine for purposes that run contrary to its national interests. On the other hand, as a nation committed to the rule of law, the United States should only engage in operations consistent with international law. When legal ambiguity exists, as it does in this case, the Administration must transparently set forth its interpretation of the law justifying the use of force against other States.

In this regard, and although the U.K. Parliament rejected participation in strikes against Syria, the British government must be commended for

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45. For an excellent summary of the issues discussed in this article, see Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapon Attacks* 17 ASIL INSIGHTS (Aug. 30, 2013), <http://www.asil.org/insights130830.cfm>. On the related subject of the legality of providing arms to the Syrian rebels, see *Legitimacy Versus Legality Redux: Arming the Syrian Rebels*, 7 JOURNAL OF NATIONAL SECURITY LAW AND POLICY \_\_ (forthcoming 2013).

taking a principled stance that its operations have to be consistent with international law, and then setting forth a reasoned interpretation of the law upon which those operations could have been based. The United States would be well served to follow suit before ordering its armed forces into action.