The Use of Force against Syria in Response to Alleged Use of Chemical Weapons by Syria: A Return to Humanitarian Intervention?

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Abstract

On 13.4.2018, France, the United Kingdom (UK) and the United States (US) initiated air strikes on Syria in response to the alleged use of chemical weapons by the government on Syrian nationals. The justifications offered by these states for these strikes resuscitated the debate as to whether, under *jus ad bellum*, there is a humanitarian intervention exception in respect of the prohibition on the use of force. This article adopts a doctrinal approach in considering whether the recent action against Syria affected the state of the law on the use of force in this regard. It thus considers whether a state, or a group of states, can intervene militarily in another state in order to protect the population of the latter state. This enquiry includes a discussion on the current state of the law on the use of force, humanitarian intervention and the Responsibility to Protect.

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I. Introduction

On 13.4.2018, France, the United Kingdom and the United States initiated air strikes on three targets in Syria allegedly related to Syria's chemical weapons programme: a research centre, a chemical weapons and equipment storage facility and a command post.[1] While the US declared the strikes "a victory",[2] workers at the Barzah Scientific Research Centre which was destroyed by the attacks denied that the facility produced chemical weapons, stating that the facility in fact ran tests on chemical products used in making food, medicine and children's toys and developed cancer medicines and anti-venom serums.[3] Furthermore, *Saeed Saeed*, the head of the Centre's Institute for the Development of Pharmaceutical and Chemical Industries, said the Organisation for the Prohibition of Chemical Weapons had visited the site in Barzeh in recent years and had declared it free of any toxic weapons.[4] None of the states responsible for the airstrikes against Syria has raised, as a justification for the use of force, self-defence or a United Nations (UN) Security Council authorisation – the two generally accepted exceptions to the

[1] *A. Ward*, The US Bombing of Syria, Explained in 400 Words: A Short Guide to America's Limited Military Response in Syria, 4.4.2016, <https://www.vox.com>.

[2] *C. Morello/A. Gearan/M. Ryan*, President Trump Declares Victory as Pentagon Details U.S.-Led Strikes in Syria, The Washington Post, 4.4.2014, <https://www.washingtonpost.com>.

[3] Workers at Syria Lab Destroyed by Missiles Deny Producing Chemical Weapons, South China Morning Post, 15.4.2018, <www.scmp.com>.

[4] See Syrian Scientific Institution Denies Possession of Chemical Weapons after Destroyed by U.S. Strike, Xinguanet, 15.4.2018, <http://www.xinhuanet.com>. Russia also stated at the UNSC debate which took place after the Syrian airstrikes that the research institute was free of chemical weapons: See 8233th Meeting of the UNSC, Threats to International Peace and Security, 14.4.2018/S/PV8233, 26: "There have been two recent OPCW inspections there with unrestricted access to their entire premises. The specialists found no trace of activities that would contravene the Chemical Weapons Convention. Syria's scientific research institutions are used for strictly peaceful activities aimed at improving the efficiency of the national economy." See further Remarks by Russia's Permanent Representative to the Organisation for the Prohibition of Chemical Weapons, *A. Shulgin* at a briefing at the OPCW attended by residents of Douma (SAR), The Hague, 26.4.2018 <www.mid.ru/>, arguing that the OPCW should have been allowed to complete their work: "Common sense suggested that OPCW professionals should have a chance to give an authoritative voice, to check reports on the incident in Douma. However, the United States, Great Britain and France, without waiting even for the start of the OPCW inspectors' work, claimed offhand that everything was clear to them – Bashar al-Assad government's guilt was beyond doubt […] The United States, Great Britain and France pretend to be guardians of the holy principles of international law whereas in fact they ignore international standards and show disrespect for the OPCW." See further presentation by *A. Mezyaev*, Current Relationship between Russia and the West: Political & Legal Aspects, University of the Witwatersrand, 15.6.2018 (on file with authors).

rule prohibiting the use of force.[5] Rather have these states advanced, as justification for the strikes, the fact that the Syrian government has used chemicals weapons against the civilian population in Syria.[6]

The justification of these states for the use of force in Syria in response to an alleged atrocity committed by the Syrian government against Syrian nationals in Syria has resuscitated an old debate as to whether, under *jus ad bellum,* there is an exception to the prohibition on the use of force on the basis of humanitarian considerations – the so-called humanitarian intervention exception. Various normative arguments have been raised in favour of using force based on humanitarian intervention. *Tesón* argues that a major purpose of states and governments is to protect and secure human rights, and actions by governments and those in power which seriously violate human rights should not be protected by international law.[7] The basis of humanitarian intervention is therefore that if a state allows the wanton disregard and violation of human rights, another state or states may intervene to put an end to such violations.[8] By extension this would then permit a third state to intervene where a state violates, in a gross manner, the human rights of its population.

Already in 1977, *Walzer* expressed the view that states have a right to intervene in cases of mass atrocities and, in his view, the fact that the legalist paradigm rules this out only suggests that the paradigm does not account

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[5] *A. C. Arend*, International Law and the Preemptive Use of Military Force, Washington Quarterly 26 (2003), 91 et seq.; *C. Gray*, International Law and the Use of Force, 4th ed. 2018, 124 et seq.; *D. Tladi*, The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12, AJIL 107 (2013), 570 et seq.

[6] See President *Trump* on Syria Strikes: Full Transcript and Video, the New York Times, 13.4.2018, <https://www.nytimes.com>. In his address to the nation following the airstrikes on Syria, *Trump* stated "We are prepared to sustain this response until the Syrian regime stops its use of prohibited chemical agents." See further Full Text: British Prime Minister *May* on military strike against Syria, Reuters, 14.4.2018, <www.reuters.com>. Prime Minister *May* stated that "[…] there is no practicable alternative to the use of force to degrade and deter the use of chemical weapons by the Syrian Regime." See further Statements by *Theresa May* and *Emmanuel Macron* on the Syria Strike, New York Times, 13.4.2018, <https://www.nytimes.com>. Mr *Macron* issued a statement that he had ordered the French forces to intervene "as part of an international operation with the United States of America and the United Kingdom, directed against the hidden chemical arsenal of the Syrian regime".

[7] *F. R. Tesón*, The Liberal Case for Humanitarian Intervention, FSU College of Law, Public Law Research Paper No. 39, November 2001, <http://dx.doi.org>.

[8] *K. Jayakumar*, Humanitarian Intervention: A Legal Analysis, 6.2.2012, <http://www.e-ir.info>; *F. R. Tesón*, Humanitarian Intervention: An Inquiry Into Law and Morality, 1988, 5, where *Tesón* states that: "Because the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well."

for the "moral realities of military intervention".[9] State sovereignty and the principle of non-intervention should not be allowed to shield gross human rights violations and the right to assist victims of atrocities should be unaffected by national borders.[10] Seen from this perspective, the limits to the use of force in the UN Charter, coupled with the lack of an efficient response by the international community, has led to humanitarian catastrophes.[11] The view in favour of humanitarian intervention is important because it reveals a tension between legal doctrine and the moral imperatives of preventing atrocities. Complicating matters more is that the legal doctrine itself is based on moral imperatives, namely the prevention of the escalation of a conflict leading to war.[12] It was this tension between moral and legal considerations that led to the description "illegal but legitimate" war. These normative debates about the right to use of force for humanitarian purposes are further reflective of an ongoing "battle for the soul of international law".

Whatever the merits of these moral considerations are – and whatever role they may play in the development of the legal rules – this article adopts a doctrinal approach to the assessment of the airstrikes by France, the UK and the US on 13.4.2018, namely whether a state, or a group of states, can intervene militarily in another state in order to protect the population of the latter state under international law *as it currently stands*. To pose this question in a different way, can the doctrine of humanitarian intervention justify these strikes? Alternatively, can the airstrikes be seen as a legitimate and legal application of the Responsibility to Protect?

In the next section we begin by briefly sketching the current state of the law governing the use of force. This sketch of the legal framework will also include the place of the two concepts that have been advanced in support of the airstrikes, namely humanitarian intervention and the Responsibility to

9 *M. Walzer*, Just and Unjust Wars: A Moral Argument with Historical Illustrations, 5th ed. 1997, 107 et seq.

10 See *F. R. Tesón*, Collective Humanitarian Intervention, Mich J. Int'l L 17 (1996), 330, who states that "the proposition that human rights are no longer a matter of exclusive domestic jurisdiction is indisputable, independently of the legal grounds for the obligation of states to respect human rights".

11 *P. Arrocha*, The Never-Ending Dilemma: Is The Unilateral Use of Force by States Legal in the Context of Humanitarian Intervention?, 11, <http://www.scielo.org>.

12 See, for example, *W. C. Banks/E. J. Criddle*, Customary Constraints on the Use of Force, LJIL 29 (2016), 71, explaining the restrictive view, namely that "military intervention without either the territorial state's consent or state responsibility for a prior attack would undermine international peace and security by increasing the likelihood of armed conflict between the two states. The state where dangerous non-state actors reside might view foreign intervention within its borders (rightly or wrongly) as 'armed attack' justifying a military response."

Protect, in that legal framework. In the following section, the article will consider whether the airstrikes by France, the UK and the US are consistent with current international law or whether they have had an influence on the evolution of the law.

II. The Legal Framework for the Use of Force and Humanitarian Consideration

The prohibition of the use of inter-state force is often described as a cornerstone of modern international law and widely accepted to be a peremptory norm of general international law (*jus cogens*).[13] The prohibition has also been confirmed in numerous UN General Assembly (UNGA) resolutions[14] and regional treaties.[15] It serves as the primary tool to achieve the

[13] Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*) by *Dire Tladi*, Special Rapporteur, A/CN.4/727, 2019, paras. 62-68; *A. C. de Beer,* Peremptory Norms of General International Law (*Jus Cogens*) and the Prohibition of Terrorism, 2018; Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, adopted by the ILC at its 53rd session, 2001, ILCYB (Part Two), para. 5 of the Commentary to Art. 26. See further *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Merits, ICJ Reports 2005, 148 ("The prohibition against the use of force is a cornerstone of the United Nations Charter."); *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. U.S.*), Judgment on the Merits, ICJ Reports 1986, 14, 153 (separate opinion of President *Singh* referring to the prohibition of the use of force as "the very cornerstone of the human effort to promote peace in a world torn by strife"); *Oil Platforms* (*Islamic Republic of Iran v. U.S.*), Merits, ICJ Reports 2003, 161 (dissenting opinion of Judge *Elaraby*), 291 ("The principle of the prohibition of the use of force in international relations […] is, no doubt, the most important principle in contemporary international law to govern inter-state conduct; it is indeed the cornerstone of the Charter"); *Islamic Republic of Iran v. U.S.* (note 13), separate opinion of Judge *Simma*, 328; *C. Joyner,* International Law for the 21st century, 2005, 165. See, however, *J. A. Green*, Questioning the Peremptory Status of the Prohibition of the Use of Force, Mich. J. Int'l L. (2011), 215 et seq., 222.

[14] Art. 1 of the UNGA Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, A/RES/2131(XX), 1965; Principles 1 & 2(3) of the UNGA Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, A/RES/2625(XXV), 1970; UNGA Definition of Aggression, A/RES/3314(XXIX), 1974; UNGA Manila Declaration on the Peaceful Settlement of Disputes, A/RES/37/10, 1982; Arts. 1-4 & 13 of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations A/RES/42/22, 1987; Preamble and Arts. 1(3) & 23 of the UNGA Declaration on the Prevention and Removal of Disputes and Situations which May Threaten International Peace and Security and on the Role of the UN in This Field A/RES/ 43/51, 1988. The UNGA Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from Threat or Use of Force in International Relations contains detailed provisions dealing with

UN Charter's overall objective to "save succeeding generations from the scourge of war".[16] In terms of Art. 2(4) of the UN Charter, states must:

> "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".[17]

The Charter provides for only two explicit exceptions to this prohibition.[18] First, force may be used in those cases where the UN Security Council, acting under Chapter VII, has authorised the use of force in order to maintain or restore international peace and security.[19] Second, a state is permitted, under the Charter, to use force in response to an armed attack.[20]

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the prohibition of the use of force, subject to the fact that states have the inherent right of individual or collective self-defence if an armed attack occurs: see Arts. 1-4, 13 & 16 of A/RES/ 42/22, 1987: "1. Every state has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state, or from acting in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and of the Charter of the United Nations and entails international responsibility. 2. The principle of refraining from the threat or use of force in international relations is universal in character and is binding, regardless of each state's political, economic, social or cultural system or relations of alliance. 3. No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter. 4. States have the duty not to urge, encourage or assist other states to resort to the threat or use of force in violation of the Charter." Art. 13 provides that: "States have the inherent right of individual or collective self-defence if an armed attack occurs, as set forth in the Charter." Art. 16 states that: "States shall abide by their commitment to the principle of peaceful settlement of disputes, which is inseparable from the principle of refraining from the threat or use of force in their international relations."

15 See Art. 18 of the Charter of the Organisation of American States, 1948, which states that: "The American states bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfilment thereof." Art. 3(a) of the African Union Non-Aggression and Common Defence Pact, 2005 states that state parties undertake to resolve any differences by peaceful means in order to avoid endangering peace and security and "to refrain from the use of force or threat to use force in their relations with each other and in any manner whatsoever, incompatible with the United Nations Charter". It further provides that "no consideration whatsoever, be it political, economic, military, religious or racial, shall justify aggression".

16 Charter of the United Nations, 1945, Preamble.

17 Charter of the United Nations (note 16), Art. 2(4).

18 See Arts. 39, 42 & 51 of the Charter of the United Nations (note 16); *B. Simma*, NATO, the UN and the Use of Force: Legal Aspects, EJIL 10 (1999), 3 et seq.; *S. Chesterman*, Just War or Just Peace?, Humanitarian Intervention and International Law, 2001, 47 et seq.

19 Charter of the United Nations (note 16), Art. 42. See further *E. de Wet*, The Chapter VII Powers of the United Nations Security Council, 2004; *A. Randelzhofer*, Article 2(4), in: B. Simma/D. Kham/G. Nolte/A. Paulus (eds.), The Charter of the United Nations: A Commentary, 2nd ed. 2002, 130.

20 Charter of the United Nations (note 16), Art. 51; *C. Gray* (note 5), 124 et seq.

By virtue of the near-universal application of the UN Charter and the fact that the prohibition of the use of force is an accepted rule of customary international law, the prohibition of the use of force is applicable to all states.[21]

While there may be debates about the scope, limits and application of the two main exceptions to the prohibition on the use of force, their place as part of international law is not seriously questioned.[22] There are, however, other potential exceptions whose place in international law is, at least, doubtful. The use force for humanitarian purposes is one such exception,[23] and it is to its status that we now turn.

III. Humanitarian Intervention under International Law Prior to the Action in Syria

1. Humanitarian Intervention under the UN Charter

There is no explicit reference to humanitarian intervention as an exception to the prohibition of the use of force in the Charter. Yet it has been suggested that humanitarian intervention is permitted under the Charter.[24] This argument is based on a narrow construction of Art. 2(4) of the Charter,

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[21] *I. Brownlie*, International Law and the Use of Force by States, 1963, 113; *J. N. Singh*, Use of Force under International Law, 1984, 210.

[22] See *C. Gray* (note 5). For debate on the scope and content of the right to use force in self-defence, see e.g. *M. E. O'Connell/C. Tams/D. Tladi*, Self-Defence against Non-State Actors, in: A. Peters/C. Marxsen (eds.), Max Planck Trialogues on the Law of Peace and War, Vol. I, 2019 (forthcoming); *D. Tladi*, The Intervention in Côte d'Ivoire, in: T. Ruys/O. Corten/A. Hofer (eds.), The Use of Force in International Law: A Case-Based Approach, 2018, 783 et seq.; *W. Kaufman*, What's Wrong with Preventative War? The Moral and Legal Basis for the Preventative Use of Force, Ethics and International Affairs, 23 et seq.; *O. Corten*, The Military Operations Against the "Islamic State" (ISIL or Da'esh) – 2014, in: T. Ruys/O. Corten/A. Hofer (note 22), 873 et seq.; *A. Deeks*, The NATO Intervention in Libya – 2011, in: T. Ruys/O. Corten/A. Hofer (note 22), 749 et seq.; *D. Bethlehem*, Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors, AJIL 106 (2012), 771. See also *J. Gardam*, Necessity, Proportionality and the Use of Force by States, 2004.

[23] For an overview of the use of force for humanitarian purposes, see *K. Jayakumar* (note 8); *A. de Waal/R. Omaar*, Can Military Invention be "Humanitarian"?, <http://www.merip.org>.

[24] For a discussion of humanitarian intervention, see *B. Simma* (note 18), 5; *D. Bethlehem*, Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention, EJILTalk!, 12.9.2013, <https://www.ejiltalk.org>; *H. H. Koh*, Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward), EJILTalk!, 4.10.2013, <https://www.ejiltalk.org>.

in particular the qualifiers that states must refrain from the 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".[25] Authors who support an argument in favour of a humanitarian intervention exception to the prohibition of the use of force, argue that Art. 2(4) provides that the use of force will *not* be contrary to this article, and thus illegal, if it is *not* directed against the territorial integrity or political independence of a state, or if it is *consistent* with the principles of the UN.[26] These authors contend that humanitarian intervention is not directed against the territory or the political independence of states, and that it is carried out to give effect to the principles of the UN – and thus not in contravention of Art. 2(4).[27] Further, they are of the view that, as humanitarian intervention was designed to protect human rights, it is a distortion to argue that the use of force on the basis of humanitarian intervention is prohibited by Art. 2(4), as such use of force is not against the purposes of the Charter.[28] *Koh*, the former legal adviser of the US State Department, for example, makes the

[25] Art. 2(4) of the Charter of the United Nations (note 16).

[26] See *C. Gray* (note 5), 31, who articulates the question as follows: "Should the words 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations' be construed as a strict prohibition on all use of force against another state, or did they allow the use of force provided that the aim was not to overthrow the government or seize the territory of the state provided that the action was consistent with the purposes of the UN?"

[27] See *F. R. Tesón* (note 7), 151, who argues that "genuine humanitarian intervention does not result in territorial conquest or political subjugation". See further *W. M. Reisman/M. S. McDougal*, Humanitarian Intervention to Protect the Ibos, in: R. B. Lillich (ed.), Humanitarian Intervention and the United Nations, 1973, 167, 177.

[28] *C. Greenwood*, Is There a Right of Humanitarian Intervention? The World Today, 49 (1993), 34 et seq. See further *F. R. Tesón*, Humanitarian Intervention, 1997, 151, who states that "The remaining task is to determine whether humanitarian intervention can survive the 'purpose' test. [...] It needs hardly be emphasized that the promotion of human rights is a main purpose of the United Nations. Writers who support a right of humanitarian intervention have forcefully contested the invariable priority of the purpose of maintaining international peace in the system created by the charter. It is urged along these lines that a purposive reading of Article 2(4), a reading that is mandated by its very own wording, indicates that the use of force to overthrow despotic regimes cannot be included in the blanket prohibition. The promotion of human rights is as important a purpose in the Charter as is the control of international conflict. Therefore, the use of force to remedy serious human rights depravations, far from being 'against the purposes' of the UN Charter, serves one of its main purposes. Humanitarian intervention is in accordance with one of the fundamental purposes of the UN Charter. Consequently, it is a distortion to argue that humanitarian intervention is prohibited by Article 2(4)." See also *A. C. Arend/R. Beck*, International Law and the Use of Force: Beyond the UN Paradigm, 1993, 134, who state that "[h]umanitarian interventions do not involve a prolonged military presence by the intervening state in the target state; a loss of territory by the target state; a regime change there; or any actions 'inconsistent with the purposes of the United Nations'".

point that the Charter's prohibition on the use of force should be understood not as the end in itself, but as a means for promoting the broader purposes of the UN.[29]

Writers who have differed with this narrow construction of Art. 2(4) contend that there cannot be an action by a state involving the use of force that is *not* against the territorial integrity or political independence of the targeted state and that "most uses of force, no matter how brief, limited, or transitory, do violate a state's territorial integrity".[30] Therefore "even minor military incursions are unlawful uses of force" as they involve a breach of the territorial integrity of the state.[31]

The wording of Art. 2(4) of the Charter is clear and an interpretation which seeks to read into it exceptions which are not there, disregards the *travaux préparatoires* of the article and the purpose of the provision.[32] The legislative history of the UN Charter illustrates a clear intention by its drafters to render illegal all "excuses" for resorting to military force, except for those explicitly stated in the Charter.[33] It has been argued that:

> "a cursory perusal of Art. 2(4) does not suffuse any intervention on humanitarian grounds with legality, unless one follows a radical mode of legal interpretation and reads in additional words that are not already there in the text".[34]

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[29] *H. H. Koh*, The War Powers and Humanitarian Intervention, Hous. L. Rev. 53 (2016), 1006 et seq.

[30] *R. Higgins*, Problems and Process: International Law and How We Use It, 1994, 240; *C. Gray*, The Use of Force for Humanitarian Purposes, in: N. D. White/C. Henderson, Research Handbook on International Conflict and Security Law, *Jus ad Bellum, Jus in Bello* and *Jus post Bellum*, 2013, 2, <https://ssrn.com>, noting that "Article 2(4) is an absolute prohibition of the use of force; its concluding words are not to be construed as a loophole allowing the use of force for what states may claim to be benign purposes. These words limit rather than enable the use of force." See further *C. Tams,* Humanitarian Uses of Force, Adam Smith Research Foundation Working Papers Series 9-10, <www.glasgowheart.org>, noting that the Charter rules, which have remained textually unchanged and peremptory in nature, prescribe a rigid regime with regard to the use of force. As this regime does not enshrine an express humanitarian exception, contemporary international law excludes humanitarian uses of force outside the UN framework. For further support of this argument, see *O. Corten*, Le Droit Contre La Guerre, 2008, 741 et seq.; and *A. Randelzhofer* (note 19).

[31] *R. Higgins* (note 30), 245.

[32] *A. Randelzhofer* (note 19), with respect to the proposition that unilateral humanitarian intervention does not breach said provision, states that "such an interpretation of Art. 2(4) disregards the *travaux préparatoires* and the purpose of the provision and is, therefore, not tenable".

[33] *K. Jayakumar* (note 8); see further *B. Simma* (note 18), 2, who refers to the prohibition in provision 2(4) of the Charter as "watertight" and states that "It is clear, on the basis of both a teleological and historical interpretation of Article 2(4), that the prohibition enacted therein was, and is, intended to be of a comprehensive nature."

[34] *K. Jayakumar* (note 8).

Franck states as follows in his conclusion that Art. 2(4) does not allow for unilateral humanitarian interventions:

> "It is clear from the negotiating record that the Charter's Articles 2(4) and 51 were intended to circumscribe, and perhaps even abrogate, unilateral recourse to force except in response to an armed attack by one state to another. This makes it hard to construe those texts as anything but a prohibition of any humanitarian intervention that involves the use of military force, since even egregious violations by a government of the fundamental human rights of its own citizens does not evidently cross the original 'armed attack' threshold. [...] The Charter's Article 2(4), strictly construed, prohibits states' unilateral recourse to force. The text makes no exception for instances of massive violation of human rights or humanitarian law when these occur in the absence of an international aggression against another state."[35]

In our view, the latter interpretation of the Charter is correct. The Charter *could* have allowed for exceptions for the use of force for the purposes of humanitarian intervention, but it deliberately did not do so.[36] The use of force against the territorial integrity or political independence of a state is an example of a way in which force is used inconsistently with the purposes of the UN. The use of force in the territory of another state which does not fall within the exceptions in Art. 51 of the Charter, irrespective of its humanitarian purpose, infringes upon the territorial integrity and political independence of a state, and is on this basis alone inconsistent with the purposes of the UN. This inconsistency cannot be cured by arguing that Art. 2(4) contemplates that humanitarian intervention is in fact consistent with another purpose of the UN – the protection of human rights.[37]

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[35] *T. F. Franck*, Recourse to Force: State Action Against Threats and Armed Attacks, 2002, 136 et seq.

[36] *R. Higgins* (note 30), 255.

[37] See further 17th Summit of Heads of State and Government of the Non-Aligned Movement, 18.9.2016, 180, para. 777, <http://cns.miis.edu>, where the Heads of State or Government reiterated the rejection by the Movement of the so-called "right" of humanitarian intervention, which, it was stated, "has no basis either in the UN Charter or in international law". See further *C. Gray* (note 30), 2, 8.

2. Humanitarian Intervention under Customary International Law

It has long been recognised that the law relating to the use of force in the Charter exists side by side with customary international law.[38] From that perspective, even if the Charter does not recognise a right to intervene for humanitarian purposes, there remains the possibility that a rule of customary international law may permit, as an exception, the right to humanitarian intervention. A caveat is necessary: in terms of Art. 103 of the Charter, called the "supremacy clause":

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

To the extent that such a rule of humanitarian intervention would be inconsistent with the Charter rule prohibiting the use of force, then by virtue of the primacy of the Charter stipulated in Art. 103 and the status of the prohibition of the use of force as a peremptory norm of general international law from which no derogation is allowed,[39] such an exception would be invalid, unless the exception itself was a peremptory norm of general international law (*jus cogens*).[40]

There are different approaches to the question whether Art. 103 also implies the supremacy of the Charter over customary international law.[41]

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[38] See *Nicaragua v. U.S.* (note 13), para. 176, where the Court states that "Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter."

[39] The ban on the use of inter-state force is widely held to be a peremptory norm of general international law or *jus cogens.* See *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Rwanda*), Preliminary Objections, ICJ Reports 2006, 148 ("The prohibition against the use of force is a cornerstone of the United Nations Charter."); *Nicaragua v. U.S.* (note 13); separate opinion of Judge *Simma* (note 13), 328; *C. Joyner* (note 13).

[40] Art. 53 of the Vienna Convention on the Law of Treaties, 1969, provides that "[…] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

[41] See *R. Kolb*, Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?, ZaöRV 64 (2004), 21. In the words of *Kolb*, "this provision is replete with a plethora of uncertainties, ranging from the root of its meaning, to points on interpretation".

While it is generally accepted that under Art. 103, Charter obligations also prevail over customary international law, scholars such as *Bowett* and *Orakhelashvili* are of the view that Art. 103 does not provide for the superiority of the Charter over non-treaty norms.[42] Although Art. 103 does not specifically refer to the Charter enjoying supremacy over customary international law, the authors are of the view that the supremacy of the Charter in this regard is based on the status of the UN Charter as the constitution of the international community.[43] The International Law Commission (ILC) stated that:

> "[…] given the character of some Charter provisions, the constitutional character of the Charter and the established practice of States and United Nations organs, Charter obligations may also prevail over inconsistent customary international law."[44]

Accordingly, pursuant to its status as the constitution of the international community and its near-universal application, the prohibition of the use of force in the Charter trumps all other non-Charter obligations.[45] Even in the event that the supremacy of Art. 103 over rules of customary international law is questioned, in light of the status of the prohibition of the use of force as a *jus cogens* norm, no derogation is permitted from the prohibition of the use of force.[46]

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[42] *N. Detsomboonrut*, International Law as a Constitutionalized Legal System, unpublished Ph.D. thesis, University of Edinburgh, 2015, <http://hdl.handle.net>; *D. Bowett*, The Impact of Security Council Decisions on Dispute Settlement Procedures, EJIL 5 (1994), 92; *A. Orakhelashvili*, The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions, EJIL 16 (2005), 59, 69.

[43] *N. Detsomboonrut* (note 42), 184; *M. W. Doyle*, A Global Constitution? The Struggle over the UN Charter, 2010; *P. M. Dupuy*, The Constitutional Dimension of the Charter of the United Nations Revisited, Max Planck UNYB 1997, 13 et seq.; *B. Sloan*, The United Nations Charter as a Constitution, Pace Int'l Law Rev. 1 (1989), 61.

[44] ILC, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.702, ILCYB, 2006.

[45] See Arts. 4 and 103 of the Charter of the United Nations. Art 4 of the Charter of the United Nations states that: "Membership in the United Nations is open to all peace-loving states which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations." Art. 103 of the Charter of the United Nations, the "supremacy clause", is widely accepted by UN Member States – see *R. Bernhardt*, Article 103, in: B. Simma/D. Kham/G. Nolte/A. Paulus (note 18), 1293. For views that the near universal membership of the UN is evidence of the universal scope of the prohibition of the use of force, see *I. Brownlie* (note 21), 113; *J. N. Singh* (note 21), 210.

[46] *A. C. de Beer* (note 13). The *jus cogens* status of the prohibition of the use of force under international law is beyond dispute. *Armed Activities on the Territory of the Congo*

Notwithstanding what is said above, it is nonetheless necessary, if just for completeness sake, to consider whether such a rule of customary international law supporting humanitarian intervention had formed to start off with. The analysis is also appropriate because if the formal requirements for a customary international law rule permitting humanitarian intervention were shown to exist, it would raise the question whether humanitarian intervention itself had been "accepted and recognized" as has having a peremptory character, in a way that would modify the current peremptory norm relating to the prohibition of the use of force. To identify a rule of customary international law, one needs to show that there exists a widespread and general practice of states that is accepted by them as law (*opinio juris)*.[47] Accordingly, in order to support the development of a rule of customary international law allowing for the use of force for purposes of humanitarian intervention, there would need to be evidence that states consistently use force on the basis of humanitarian on the basis of a belief that they are legally (and not just morally) obliged to do so. It is also important to note that practice which has been objected to by a number of states cannot be constitutive of customary international law since, by definition, it cannot be reflected general practice nor can it reflect belief by the general community of states that the practice constitutes a rule of customary international law.

(*Democratic Republic of the Congo v. Rwanda*) (note 39); *Nicaragua v. US Merits* (note 13; *C. Joyner* (note 13).

[47] See ILC Report on the work of the 66th session, 2014, A/69/10, 240. Draft conclusion 2 reads: "'Customary international law' means those rules of international law that derive from and reflect a general practice accepted as law […]." See further draft conclusion 7, in terms of which state practice includes "the conduct of States 'on the ground', diplomatic acts and correspondence, legislative acts, judgements of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties and acts in connection with resolutions of organs of international organizations and conferences". See also draft conclusion 11, noting that the forms of evidence of *opinio juris* (a general practice accepted as law) include, but are not limited to: "[…] statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of Government legal advisers, official publications in fields of international law, treaty practice and action in connection with resolutions of organs of international organizations and of international conferences. Inaction may also serve as evidence of acceptance as law". See further *Constitution of the Maritime Safety Committee of the Inter-governmental Maritime Consultative Organisation Advisory Opinion*, ICJ Reports 1960, 150; *South West Africa Cases* (*Ethiopia and Liberia v. South Africa*), Second Phase, ICJ Reports 1966, 6; *Nicaragua v. U.S.* (note 13), 14; *Fisheries Jurisdiction* (*UK of Great Britain and Northern Ireland v. Iceland*), Merits, ICJ Reports 1974, 3; *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), Second Phase, ICJ Reports 1970, 3. See also *M. Koskenniemi*, From Apology to Utopia: The Structure of International Legal Argument, 1989, 363.

Practice on the ground, i.e. the actual use of force for humanitarian purposes, has been rare and in many instances it has either not been claimed by the state using force as humanitarian intervention or it has been objected to by other states. For example, the US-led intervention in Grenada in 1983, termed operation Urgent Fury, though occurring in response to action by the *de facto* rulers after a coup, was not typically a case of humanitarian intervention.[48] Apart from the fact that it was purportedly done because the situation in Grenada had been declared by some Caribbean States as a threat to the security of the region,[49] it was subjected to severe criticism by most states and labelled a "flagrant violation of international law" by the UN General Assembly.[50]

Perhaps the best example of humanitarian intervention on the ground is the North Atlantic Treaty Association (NATO) intervention in Kosovo in the 1999,[51] when 19 NATO member States elected to use force without Security Council authorisation for humanitarian purposes, for a limited period of time, to prevent the massacre of Kosovar Albanians by *Slobodan Milosevic's* forces.[52]

However, the legal value of even this apparently clear-cut case of humanitarian intervention for the purposes of formation of customary international law is doubtful to say the least. The UK and Belgium were the only participating states that clearly sought to justify their actions as legally authorised under international law by the doctrine of humanitarian intervention. During a meeting of the Security Council on 24.3.1999 to deliberate on the intervention in Kosovo, the Permanent Representative of the UK stated that the intervention was "legal [and that it was] justified as an exceptional

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[48] For discussion see *N. Hajjami*, The Intervention of the United States and Other Eastern Caribbean States in Grenada – 1983, in: T. Ruys/O. Corten/A. Hofer (note 22), 385 et seq. For other cases which might appear similar to humanitarian intervention but was motivated by other considerations, see the following chapters in: T. Ruys/O. Corten/A. Hofer (note 22): *D. Kritsiotis*, The Indian Intervention into (East) Pakistan – 1971, 169 et seq.; *R. Kolb*, The Belgian Intervention in the Congo – 1960 and 1964, 76 et seq.; *C. Kreß/B. K. Nußberger*, The Entebbe Raid – 1976, 234 - 241; and *K. Chan*, The Ugandan-Tanzanian War - 1978-79, 255 et seq.

[49] *J. Quigley*, The United States Invasion of Grenada: Stranger than Fiction, U. Miami Inter-Am. L. Rev. 18 (1987), 271, 305.

[50] A/RES/38/7, The Situation in Grenada, 2.11.1983, where the UNGA stated that it "Deeply deplores the armed intervention in Grenada, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State […]."

[51] *F. R. Tesón*, Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention, Amsterdam Law Forum 1 (2009), 42 et seq.; *C. Greenwood*, Humanitarian Intervention: The Case of Kosovo, FYBIL, 2002, 141-175.

[52] *C. Greenwood* (note 51), 160 et seq.

measure to prevent an overwhelming humanitarian catastrophe".[53] During a debate before the House of Commons on 25.3.2018, the UK Secretary of State said that "the decision to commit service personnel to military action can be taken only with the greatest reluctance".[54] This was reiterated by the then UK Secretary of Defence, *Lord Robertson*.[55] Belgium relied on the doctrine of humanitarian intervention before the International Court of Justice (ICJ) in the application brought by Yugoslavia in order to institute proceedings against Belgium for a violation of the prohibition of the use of force in bombing Yugoslav territory together with other North Atlantic Treaty Organization (NATO) members.[56]

Other participating States were non-committal about the legality of the action. The US statement during the meeting was particularly revealing. The statement begins by explaining that the actions of NATO were "necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force" and that these actions by Belgrade "foreshadow[ed] a humanitarian catastrophe of immense proportions".[57] However, nowhere does the US representative claim that this "necessary" action was legal. If anything, on two occasions, the Permanent Representative of the US states that the action was taken "with the greatest reluctance".[58] Similarly non-committal statements were

[53] United Nations Security Council, 3988th Meeting on 24.3.1999, UN Doc. S/PV.3988, 12. Sir *J. Greenstock* on behalf of the UK stated: "The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe." He further stated that: "Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable."

[54] Statement by the Secretary of State for Defence in the House of Commons, 25.3.1999, <https://api.parliament.uk>.

[55] See *G. Robertson*, Kosovo: An Account of the Crisis, 1999, 10, <www.defense-aerospace.com> *Lord Robertson*, the UK Secretary of Defence at the time, stated that: "The UK was clear that the military action taken was justified in international law as an exceptional measure to prevent an overwhelming humanitarian catastrophe and was the minimum necessary to do so."

[56] *Legality of Use of Force* (*Yugoslavia v. Belgium*), ICJ Reports 1999, pleadings of Belgium, 10.5.1999, CR 99/15.

[57] UN Doc. S/PV.3988 (note 53), 4.

[58] See UN Doc. S/PV.3988 (note 53), statement of *P. Burleigh* of the US, 4: "We and our allies have begun military action only with the greatest reluctance. But we believe that such action is necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in Kosovo — all of which foreshadow a humanitarian catastrophe of immense proportions." He later reiterates that the UK and its allies "have initiated action today with the greatest reluctance".

made by other participating states.[59] A little more ambiguous, perhaps flirting with the suggestion that the intervention was legal on the grounds of humanitarian intervention without saying so, was the statement of the Netherlands. It noted that countries taking up arms to avert a humanitarian catastrophe would prefer a Security Council resolution, but where such a resolution is not attainable, the Netherlands will act on the legal basis which it has available. The Netherlands further stated that "what we have available in this case is more than adequate".[60]

Damning for the precedential value of the Kosovo intervention, however, were statements by states that questioned the legality of the operations. Russia, for example, described the strikes as "unilateral use of force" which was "carried out in violation of the Charter of the United Nations (UN) and without the authorization of the Security Council".[61] Similarly, China stated that the intervention "amount[ed] to a blatant violation of the United Nations Charter and of the accepted norms of international law".[62] India's statement was equally firm, noting that the intervention was "in clear violation of Article 53 of the Charter" and that

> "no country, group of countries or regional arrangement, no matter how powerful, can arrogate to itself the right to take arbitrary and unilateral military action against others".[63]

The delegation of Malaysia for its part stated that "as a matter of principle" it was

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59 UN Doc. S/PV.3988 (note 53), statement of Canada, 6: "Humanitarian considerations underpin our action. We cannot simply stand by while innocents are murdered, an entire population is displaced, villages are burned and looted, and a population is denied its basic rights merely because the people concerned do not belong to the 'right' ethnic group"; UN Doc. S/PV.3988 (note 53), statement of France, 9: "We cannot abandon that community to violent repression. What is at stake today is peace, peace in Europe – but human rights are also at stake. The actions that have been decided upon are a response to the violation by Belgrade of its international obligations, which stem in particular from the Security Council resolutions adopted under Chapter VII of the United Nations Charter."

60 UN Doc. S/PV.3988 (note 53), statement of the Netherlands, 8: "We have participated in and assumed responsibility for the North Atlantic Treaty Organization (NATO) decision because there was no other solution. As for the Netherlands, this decision was not taken lightly […]. It is President Milosevic's recourse to violence in Kosovo that has finally convinced us that the impending humanitarian catastrophe […] could not be averted by peaceful means."

61 UN Doc. S/PV.3988 (note 53), 2.

62 UN Doc. S/PV.3988 (note 53), 12.

63 UN Doc. S/PV.3988 (note 53), 15.

> "not in favour of the use or threat of use of force to resolve any conflict situation, regardless of where it occurs. If the use of force is at all necessary, it should be a recourse of last resort, to be sanctioned by the Security Council."[64]

Ukraine noted that in adhering to the norms and principles enshrined in the UN, it considers the use of military force against a sovereign state without the authorisation of the Security Council as inadmissible.[65]

The views expressed by states in the Security Council seemed to reflect a general recognition that notwithstanding the existence of a tremendous humanitarian crisis in Kosovo, the intervention exceeded the bounds of international law.[66] That the intervention remained illegal despite its possible moral justification, was echoed by a Commission of Inquiry headed by South African *Richard Goldstone*.[67] *Goldstone* described the Kosovo intervention as "illegal but legitimate".[68] This view was generally reflected in academic literature.[69]

The qualification of "legitimacy" in respect of an illegal intervention is however irrelevant from a legal perspective. As *Franchini* and *Tzanakopoulos* observe, the problem with the qualification of "illegal but legitimate" is that legitimacy is an amorphous concept whose content is often dependent on perspective, philosophical outlook and geopolitical position.[70] The problem manifested itself in stark terms when, in 2014, the Russian Federation

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64 UN Doc. S/PV.3988 (note 53), 9 et seq.

65 UN Doc. S/PV.3988 (note 53), 10.

66 Footnotes 61-65 above; UN Doc. S/PV.3988 (note 53) – statements by e.g. Slovenia, 3; Argentina, 7; Malaysia, 8 and Bahrain, 9, refer to the humanitarian crisis in Kosovo.

67 See The Independent International Commission on Kosovo, The Kosovo Report Conflict, International Response, Lessons Learned, 2000, 4, where the Commission concludes that: "The 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 and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule."

68 See note 67.

69 See, e.g. *B. Simma* (note 18), 1; *A. Cassese*, *Ex iniuria ius oritur:* Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, EJIL 10 (1999), 23; *T. F. Franck* (note 39), 174 et seq.; *J. I. Charney*, Anticipatory Humanitarian Intervention in Kosovo, AJIL 93 (1999), 838.

70 *D. Franchini/A. Tzanakopoulos*, The Kosovo Crisis (1999), in: T. Ruys/O. Corten/A. Hofer (note 22), 594 et seq. state that: "The problem with legitimacy when juxtaposed to legality (note that in American parlance the two are sometimes employed as synonymous) is precisely that it lies in the eye of the beholder. Given the lack of any generally agreed upon definition, or of precise criteria (the devil is in the details!), legitimacy becomes a 'weasel word', an empty vessel which sounds good and with which nobody in their right would take issue – but which masks or obscures the fundamental disagreement as to its scope and content that lies underneath."

intervened in Crimea.[71] While the Russian intervention in Crimea was not typically a humanitarian intervention, Russia did justify its actions on "the well-known Kosovo-precedent".[72] The sentiment, expressed in many of the statements in support of the operation in Kosovo, that it was an exception (and thus not a precedent), is equally unhelpful because in the future when a state (or group of states), seek(s) to intervene in a manner that is illegal but, in its view legitimate, they too will point out the exceptional nature of their intervention.[73]

The intervention in Kosovo, and the justifications offered for it as well as responses to it, are evidence that humanitarian intervention is not a recognised ground for using force under customary international law. Indeed, the Non-Aligned Movement (NAM) strongly rejected the doctrine of humanitarian intervention and sees it as a pretext for intervention by powerful states. At the 17th NAM Summit, the heads of state and government:

> "*reaffirmed* the Movement's commitment to enhance international cooperation to provide humanitarian assistance in full compliance with the UN Charter and mindful of the relevant UN resolutions, where applicable, in particular 46/182 and in this regard, they reiterated the rejection by the Movement of the so-called 'right' of humanitarian intervention, which has no basis either in the UN Charter or in international law".[74]

3. Responsibility to Protect

The controversy surrounding the NATO Intervention in Kosovo brought the issue of humanitarian intervention in cases of mass human atrocities to a head, and the UN Secretary-General, *Kofi Annan*, made various pleas to the international community at the UN General Assembly to try to find a new consensus on how to approach issues of humanitarian intervention in these cases.[75] In response to this challenge, the Canadian Gov-

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[71] For discussion, see *M. O'Connell*, The Crisis in Ukraine – 2014, in: T. Ruys/O. Corten/A. Hofer (note 22), 855 et seq.

[72] *M. O'Connell* (note 71), 858 citing a statement by Russian President, *Vladimir Putin*. See also *D. Franchini/A. Tzanakopoulos* (note 7071), 622, citing the same statement.

[73] *D. Franchini/A. Tzanakopoulos* (note 70), 621.

[74] See 17th Summit of Heads of State and Government of the Non-Aligned Movement (note 37). See further *C. Gray* (note 30), 2, 8.

[75] See *K. A. Annan,* We The Peoples –The Role of the United Nations in the 21st Century, 2000, 48, where *Annan* said: "But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend eve-

ernment established the International Commission on Intervention and State Sovereignty (ICISS) in order to investigate the issue.[76] It was the ICISS that put forward the concept of a Responsibility to Protect, which is described in the ICISS report as:

> "the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states".[77]

The Responsibility to Protect was supported by the High-level Panel set up by the UN Secretary-General to consider the future of the UN collective security system. The Panel's report, *A More Secure World*, stated that there was an emerging norm that there is a collective responsibility to protect in cases of genocide, ethnic cleansing or serious violation of international humanitarian law.[78] The Responsibility to Protect was further supported by the member states of the UN in the World Summit Outcome Document of the UN Millennium Summit (Outcome Document) and was included in the section on "Human Rights and the Rule of Law".[79]

While the concepts "Responsibility to Protect" and "humanitarian intervention" are related, they are not synonymous. Humanitarian intervention has been described as:

> "the protection by a state or a group of states of fundamental human rights, in particular the right of life, of nationals of, and residing in, the territory of other states, involving the use or threat of force, such protection taking place neither upon authorization by the relevant organs of the UN nor upon invitation by the legitimate government of the target state".[80]

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ry precept of our common humanity?"; 17th Summit of Heads of State and Government of the Non-Aligned Movement (note 37), VII.

[76] Report of the International Commission on Intervention and State Sovereignty (ICISS) The Responsibility to Protect, <http://responsibilitytoprotect.org>, December 2001, viii. *C. Gray* (note 30), 11 et seq.

[77] 17th Summit of Heads of State and Government of the Non-Aligned Movement (note 37), VIII.

[78] High Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, UN Doc. A/59/565, 2.10.2004, paras. 199-203.

[79] 2005 World Summit Outcome Document, UN Doc. A/60/L.70 (16.9.2005), paras. 138-139.

[80] *D. Kritsiotis*, Reappraising Policy Objections to Humanitarian Intervention, Mich. J. Int'l L. 19 (1998), 1021.

While humanitarian intervention concerns military intervention, the Responsibility to Protect is much broader and consists of three pillars.[81] The first pillar recalls the duty of a government to protect its own citizens. The second pillar places a responsibility on third party states to assist the territorial state in meeting its responsibility.[82] It is the third pillar of the Responsibility to Protect that is related to the use of force.

Yet, this third pillar of Responsibility to Protect, while similar to humanitarian intervention in that it foresees military intervention in a state to repress atrocities against civilian population, is a vastly different concept. This is because this third pillar is meant to operate within the constraints of international law on the prohibition of the use of force.[83] Thus, where action by other states involve military force, UN Security Council authorisation is necessary. The 2004 report of the UN High Level Panel,[84] on which the World Summit Outcome Document was based, provides that military action must be a last resort and must be authorised by the Security Council:

> "We endorse the emerging norm that there is a collective international responsibility to protect, *exercisable by the Security Council authorizing military intervention as a last resort,* in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."[85]

This conception of Responsibility to Protect, as exercisable with Security Council authorisation, was accepted by states in the World Summit Outcome Document, where member states stated as follows:

> "We are prepared to take collective action […] through the Security Council […] on a case-by-case basis […] 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."[86]

From what is said above with regards to the *jus ad bellum* as it currently stands, the use of force in response to humanitarian atrocities in Syria with-

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81 World Summit Outcome, UN Doc. A/RES/60/1; Report of the Secretary-General: Implementing the Responsibility to Protect, UN Doc. A/63/677.

82 ICISS Report (note 76), 10.

83 See UN Doc. A/RES/60/1 (note 81), paras. 138-139. States note that they are prepared to take collective action "through the Security Council" where national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

84 See UN Doc. A/59/565 (note 78), paras. 199-203.

85 See UN Doc. A/59/565 (note 78), (emphasis added).

86 See UN Doc. A/RES/60/1 (note 81), paras. 138-139.

out UN authorisation would in essence amount to an armed reprisal.[87] Armed reprisals are widely regarded as unlawful and there is no exception for an armed reprisal for humanitarian purposes.[88] The argument that the strikes against Syria amounted to an armed reprisal is supported by the fact that various states in public statements referred to the strikes as being a "proportionate", "appropriate", "adequate" or "needed" response to the use of chemical weapons by Syria,[89] pointing to the most extensively cited basis for regarding the use of force as an armed reprisal and not a legitimate act in self-defence: the punitive nature of the action, where the aggressor

[87] *S. Darcy*, Military Force against Syria Would Be a Reprisal Rather than Humanitarian Intervention, but That Doesn't Make It Any More Lawful, 1.9.2013, <www.ejiltalk.org>.

[88] *S. Darcy*, Retaliation and Reprisal, in: M. Weller (ed.), Oxford Handbook on the Use of Force, 2013; *M. O'Connell*, Unlawful Reprisals to the Rescue against Chemical Attacks?, 12.4.2019, <www.ejiltalk.org>; *M. Hakimi*, The *Jus ad Bellum*'s Regulatory Form, AJIL 112 (2018), 181. See further *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 46; Draft Articles on Responsibility of States (note 13), Art. 50(1)(a) states that "countermeasures shall not affect the obligation to refrain from the threat or use of force" under the Charter of the United Nations, and Art. 50, Comment (4) confirms that Art. 50(1)(a) "excludes forcible measures from the ambit of permissible countermeasures"; see further The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 24.10.1970, A/RES/2625(XXV), 122 ("States have a duty to refrain from the acts of reprisal which involve the use of force.").

[89] *A. G. Dunkelberg/R. Ingber/P. Pillai/E. Pothelet*, Mapping States' Reactions to the Syria Strikes of April 2018 – A Comprehensive Guide, 7.5.2018, <www.justsecurity.org>. Turkey and Estonia's Ministries of Foreign Affairs were of the view that the strikes were an appropriate response to chemical attacks in Syria. Turkey called the strikes "an appropriate response to the chemical attack which caused the deaths of many civilians" and Estonia said that the strikes were "a proper and proportionate response to the repeated use of chemical weapons by the Syrian regime against the Syrian people". Romania called the strikes "a firm response to the atrocities that have resulted in numerous casualties among the civilian population in Douma". Spain's Prime Minister considered the strikes "a measured and proportionate response to the brutal attacks committed by the Syrian regime against the civilian population". Georgia's Foreign Minister stated that the strikes were "an appropriate and needed response to chemical attacks against the civilian population", while Macedonia's Minister of Foreign Affairs considered the airstrikes to be "an adequate and measured reaction", aimed at preventing a further breach of the Chemical Weapons Convention and the principles of international humanitarian law. The G7 expressed its full support for all efforts made by the US, UK and France to "degrade the Assad regime's ability to use chemical weapons and to deter any future use, demonstrated by their action taken on April 13", and viewed the action taken as "limited, proportionate and necessary – and taken only after exhausting every possible diplomatic option to uphold the international norm against the use of chemical weapons". NATO also expressed the allies' "full support" for the strikes which "intended to degrade the Syrian regime's chemical weapons capability and deter further chemical weapon attacks against the people of Syria".

state uses force against the delinquent state to punish that state for the harm done, out of a feeling of "justice or outrage".[90]

The Responsibility to Protect essentially provides that the Security Council could authorise, on a case-by-case basis, action that it is able to and had been authorising for over a decade.[91] From a legal standpoint, therefore, the Responsibility to Protect is not a basis for the use of force in humanitarian intervention without Security Council authorisation and has therefore not changed the current prohibition on the use of force outside self-defence and UNSC authorised enforcement action as set out in the UN Charter.[92] It has been argued that the Outcome Document does not exclude the possibility of unilateral action without Security Council authorisation.[93] This reasoning is, however, unhelpful and, at any rate, does not take the matter very far. At best, all that it tells us is that the Outcome Document has no effect on the law and if that is the case, which it is, then the current law, which prohibits intervention save in cases of self-defence or where there is Security Council authorisation, remains intact.

The description of the law above leads to the conclusion that, prior to the intervention in Syria in April 2018, international law did not recognise the right to intervene in a third State for humanitarian purposes without Security Council authorisation. The question, however, is whether the events of April 2018 could have altered the path of the law. It is to this question that we now turn.

IV. Has the Recent Action against Syria Affected the State of the Law?

In April 2018, Syria allegedly crossed what erstwhile President *Obama* referred to as the "thin red line".[94] On 13.4.2018, in response to alleged chemical attacks by Syria which killed more than 80 civilians, President *Trump* ordered "a targeted military strike on the air base in Syria from

[90] See *D. Kretzmer*, The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*, EJIL 24 (2013), 254.

[91] *P. Arrocha* (note 11), 14.

[92] *P. Arrocha* (note 91). See also *D. Tladi,* The Security Council, the Use of Force and Regime Change: Libya and Côte d'Ivoire, SAYIL 37 (2012), 22, 30.

[93] *C. Stahn*, Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?, AJIL 101 (2007), 99, 109.

[94] *M. Lander*, Obama Threatens Force Against Syria, The New York Times, 20.8.2012, <www.nytimes.com>.

where the chemical attack was launched".[95] President *Trump* stated that "It is in this vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons".[96] This action was joined by the United Kingdom and France.

Hakimi argues that the use of force against Syria on 13.4.2018 had certain novel characteristics: states did not simply look the other way, but broadly condoned the operation against Syria.[97] She points out that the US publicly owned what it did[98] and the Security Council met to discuss it the next day.[99] While it is true that outside of the intervening states, various states publicly endorsed the intervention action[100] before the Security Council

[95] *M. R. Gordon/H. Cooper/M. D. Shear*, Dozens of US Missiles Hit Air Base in Syria, The New York Times, 6.4.2017, <www.nytimes.com>.

[96] Transcript and video: Trump Speaks About Strikes in Syria, The New York Times, <www.*nytimes*.com>.

[97] *M. Hakimi*, The Attack on Syria and the Contemporary Jus ad Bellum, 15.4.2018, EJIL Talk!, <www.ejiltalk.org>.

[98] *M. Hakimi* (note 97). See further *H. Cooper*, Mattis Wanted Congressional Approval Before Striking Syria. He was Overruled, 17.4.2018, New York Times, <www.justsecurity.org> for remarks by the US Secretary of Defence: "The French, the United Kingdom, the United States, allies, all NATO allies, we worked together to maintain the prohibition on the use of chemical weapons. […] We did what we believe was right under international law, under our nation's laws."

[99] See S/PV.8233 (note 4).

[100] *A. G. Dunkelberg/R. Ingber/P. Pillai/E. Pothelet* (note 89). States opposed to the *Assad* regime supported the strikes and condemned the use of chemical weapons. According to a statement by the Saudi Foreign Ministry, Saudi Arabia expressed its "full support [...] for the American military operations on military targets in Syria" as a response to the Syrian regime's use of chemical weapons against innocent civilians. The Prime Minister of Israel similarly states that Israel fully supports President *Trump's* decision to act against the use of chemical weapons in Syria, and the Australian Defence Minister *Marise Payne* conveyed Australia's "full support" for the strikes. Denmark's Minister of Foreign Affairs confirmed that "Denmark unconditionally supports the response toward the Syrian atrocities from our allies". Ukraine, Oman, Qatar and the UAE also supported the strikes. Ukraine supported the "actions of the allies in response to the use of chemical weapons" in Syria, Oman expressed its support for "the reasons that led the US, UK and France to take military action against Syrian military installations", and Qatar confirmed its "support for the American, British and French military operations against specific military targets that the Syrian regime uses in its attacks against the innocent civilians". The UAE Minister of Foreign Affairs expressed the UAE's support for the military operations "that targeted the prohibited weapons and their facilities in Syria". Lithuania's Minister of Foreign Affairs condemned the use of chemical weapons in Syria and considered the airstrikes to be "necessary steps for encouraging the Syrian regime and its supporters to seek a political solution to the conflict". Various states also indicated their support for the strikes as a response to the use of chemical weapons. Albania's Ministry for Europe and Foreign Affairs viewed the strikes as "a timely response to the use of chemical weapons, once again, by the Syrian regime, which represents a serious crime, a breach of international norms and as such it should be punished". According to Jordan's Minister of Foreign Affairs, the strike is a message that the use of chemical weapons will not be tolerated.

met on 14.4.2018, none of the statements referred to humanitarian intervention as a justification. At best, states indicated their "understanding" for the reasons for the attack and denounced the use of chemical weapons.[101] While some states referred to the strikes as a one-time event to prevent the use of chemical weapons in future,[102] others, while supporting the strikes, also emphasised the UN Charter and the role of the Security Council in resolving the Syria conflict.[103] Certain states expressed that the Organisation for

French President *Emmanuel Macron* issued a statement that he had ordered the French forces to intervene as part of an international operation with the US and the UK, "directed against the hidden chemical arsenal of the Syrian regime". The Canadian Prime Minister supported the decision by the UK, US and France "to take action to degrade the Assad regime's ability to launch chemical weapons attacks against its own people". Finland's president noted that the strike was "aimed at discouraging any further violation of the prohibition on the use of chemical weapons". Greece's Ministry of Foreign Affairs unequivocally condemned the use of chemical weapons and supported the efforts to eradicate them. The G7 expressed its full support for all efforts made by the US, UK and France to "degrade the Assad regime's ability to use chemical weapons and to deter any future use, demonstrated by their action taken on April 13". See further statements by Turkey, Spain, Estonia, Romania, Macedonia, Georgia and NATO (note 89).

101 *A. G. Dunkelberg/R. Ingber/P. Pillai/E. Pothelet* (note 89). Ireland's Ministry of Foreign Affairs expressed "understanding" for the strikes. The Belgian Prime Minister also stated that Belgium shows "understanding" for the strikes, while Norway's Foreign Minister stated that he "understands the background" that led to the action. New Zealand's Prime Minister was of the view that since the use of the veto powers at the UNSC have prevented a diplomatic solution, it "accepts" why the US, UK and France have responded to a grave violation of international law and use of chemical weapons. The Czech Republic's Minister of Foreign Affairs stated that he "understands" the military action "as a clear message to anyone, who would want to carry on with the chemical attacks in Syria". Japan's Foreign Minister said that Japan supports the determination of the US, UK and France "not to accept the proliferation of the use of chemical weapons, and understands these measures […]".

102 *A. G. Dunkelberg/R. Ingber/P. Pillai/E. Pothelet* (note 89). See statement by the Minister of Foreign Affairs of Bulgaria ("We consider missile strikes in Syria as a one-time military operation and as an opportunity to prevent new chemical attacks.") and the statement by the Defence Minister of Australia, who emphasised the US Defence Minister Mr *Mattis'* assurances that Saturday strikes were a "one time shot".

103 *A. G. Dunkelberg/R. Ingber/P. Pillai/E. Pothelet* (note 89). Estonia confirmed its support of UNSCR 2254 (2015) and the Geneva Communiqué (2012), and called on the UNSC to "uphold their responsibilities in this regard". Romania called on all parties involved in the Syrian conflict to "actively support the UN's efforts to end this crisis, based on the relevant UN Security Council resolutions, in particular Resolution 2254/2015 and the Geneva Communiqué". Namibia was of the view that the UNSC must "live up to its Charter obligations and find a lasting solution to bring about peace in Syria, through peaceful means". It considered unilateral action as "incompatible with the UN Charter". Argentina called on the international community to make efforts that preserve peace and security and encouraged dialogue within the framework of existing international commitments. Brazil stated that overcoming conflict in Syria required full respect of the UN Charter and international law; and Mexico and Peru expressed their desire to end the use of chemical weapons through international law and multilateral instruments. Austria confirmed that strikes such as the strikes by the US, UK

the Prohibition of Chemical Weapons (OPCW) should have been allowed to complete its investigation as to the use of chemical weapons in Syria before further action was taken.[104] In addition to this, there were states that neither denounced the use of chemical weapons nor clearly supported the strikes,[105] with others condemning or strongly condemning the strikes.[106]

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and France, without a UN mandate, are in principle prohibited under international law, and Sweden expressed its "regret that the United Nations Security Council, not least because of the Russian veto, has not been able to agree on how the use of chemical weapons in Syria should be stopped by political means and in accordance with the UN Charter". Indonesia underlined "the need for all parties to respect international laws, and norms, in particular, the UN Charter on international peace and security" and Malaysia emphasised that "in dealing with matters of peace and security, all parties must act in a manner consistent with the Charter of the United Nations and international law". See further statements by Pakistan, stating that its position on the situation in Syria is based on "the principles of international law, the UN Charter and the rules of inter-state conduct with special focus on respect for the sovereignty and territorial integrity of Syria".; Thailand (stating that it would consider the matter "in accordance with international law as a member of the UN"; Vietnam (confirming that "all disputes and differences should be settled by peaceful means on the basis of international law, especially the United Nations Charter, and of the principle of respecting independence and sovereignty of countries") and the African Union (stating its commitment to multilateralism and calling on the UNSC to fulfil "the responsibilities conferred upon them by the United Nations Charter"). Switzerland, Bolivia and Costa Rica also called for diplomacy and adherence to international law and the UN Charter.

[104] *A. G. Dunkelberg/R. Ingber/P. Pillai/E. Pothelet* (note 89). Algeria's Prime Minister cautioned that states should have waited for the findings of an investigation into the alleged chemical attack before taking any steps, and Lebanon made a similar observation. Bahrain expressed its full support for the military operation while calling on the UNSC and the OPCW to investigate the use of chemical weapons in Eastern Ghouta, and India also supported "an impartial and objective investigation by the OPCW to establish the facts". See further statement by Russia (note 4) which heavily criticized the actions of the US, UK and France in not waiting for the OPCW to finish its investigation and disrespecting the OPCW.

[105] *A. G. Dunkelberg/R. Ingber/P. Pillai/E. Pothelet* (note 89). See statements by the Ministries of Foreign Affairs of Egypt (expressing Egypt's "deep concern over the ongoing military escalation on the Syrian scene" and advocating for a political solution); Iraq (similarly expressing its concern about recent developments in Syria and calling on the international community to step up efforts to find political solutions to the Syrian crisis); the Philippines (confirming that it is "monitoring the situation in Syria after the US and its allies launched military strikes in the Syrian capital to stop suspected use of chemical weapons"), and Chile and Panama, emphasising the need to achieve "lasting peace for the Syrian people".

[106] *A. G. Dunkelberg/R. Ingber/P. Pillai/E. Pothelet* (note 89). Russian President *Vladimir Putin* regarded the US attacks on Syria as "aggression against a sovereign state in violation of the norms of international law" and Iranian Foreign Ministry spokesman *Bahram Qasemi* stated that Iran "strongly condemns" the military strike. Iran called the strikes a "flagrant breach of international laws and principles, and a violation of Syria's right to national sovereignty and territorial integrity". China's Foreign Ministry stated that "the military strikes on Syria by the US, the UK and France violate the basic principle of prohibition of use of force in international law and run contrary to the UN Charter. The Modern international law prohibits retaliatory force measures against illegal behaviors". It denounced the use of force against Syria on the basis of punishing the use of chemical weapons or unilateral humanitarian

At the Security Council meeting, some states indicated their understanding for the action, without going as far as stating that it was legal.[107] A careful analysis of statements by the members of the Council illustrates that there is no consistent support for the use of force on the basis of humanitarian intervention. With regards to the US, UK and France, it was only the UK who explicitly stated the legal basis for its use of force against Syria as being humanitarian intervention.[108] The UK, consistent with its stance in the Kosovo situation, stated that any state is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering.[109] It referred to exceptional circumstanc-

intervention and "bypassing the Security Council" as not conforming to international law. Bolivia and Costa Rica condemned the illegal use of force and called for adherence to the Charter. Lebanon similarly condemned the attacks as a flagrant breach of the sovereignty of Syria and a violation of international charters and custom. North Korea stated that the attacks were a clear act of aggression upon a sovereign state which can never be tolerated. Cuba also condemned the attack as a flagrant violation of international law under the pretext of the alleged use of chemical weapons against civilians. South Africa noted its grave concern re the airstrikes and condemned the use of chemical weapons, but at the same time stated that "the alleged use of chemical weapons in Syria cannot be a justification for military airstrikes in a territory of a sovereign state without the authorisation of the UNSC".

107 See S/PV.8233 (note 4), 13: The Netherlands stated that "Even if the Council fails to act, it should be clear to the world that the use of chemical weapons is never permissible." In the view of the Netherlands, this, seen against the background of "past horrors and the unabated risk of reoccurrence", made the response by France, the UK and the US "understandable". It is noteworthy that the representative does not say "legal". Moreover, later on in the statement, the representative makes the following observations: "[…] should the Council continue to suffer from paralysis inflicted by a single permanent member, we must not forget that the United Nations is bigger than the Council alone. We have a stronger leadership at the top of the United Nations Organisations, and we have a powerful General Assembly." This is not a ringing endorsement of the legality of unilateral action, but might be interpreted as a call for different multilateral avenues where the Council fails to act. See further statement by Poland, S/PV.8233 (note 4), 11. While the presentative stated that "We fully understand the reasons behind the action taken last night by the United States, the United Kingdom and France against Syrian chemical-weapons capabilities. We support that action, as it is intended to deter chemical-weapons attacks against the people of Syria", this was immediately followed by a confirmation that it is for the Security Council to take appropriate action: "Let me underline that it is the primary responsibility of the Security Council to set up an investigative mechanism to examine the use of chemical weapons in Syria." After the vote defeating the proposed resolution by Russia, the representative for France took the opportunity to state that the voting reflects the Council's "understanding" of the action, but did not state that the Council found the action to be legal. See statements by France, S/PV.8233 (note 4), 23: "The result of the voting sends a clear message that the members of the Council understand the circumstances, reason for and objectives of the military action taken yesterday. The Council understands why such action, which has been acknowledged as proportional and targeted, was required."

108 S/PV.8233 (note 4), 6 et seq.

109 S/PV.8233 (note 4), 6 et seq.

es and stated that the attack was based on reliable information.[110] The UK further stated that it is

> "hard to believe that it is in line with the principles and purposes of the Charter to use or condone the use of chemical weapons, and in the United Kingdom's view it cannot be illegal to use force to prevent the killing of such numbers of innocent people".[111]

The French statement also seemed to suggest, without expressly saying so, that the intervention was in line with the Charter. It stated that its action is fully in line with the objectives and values proclaimed by the UN.[112] The US Representative stated that the UK, France, and the US "acted to deter the future use of chemical weapons by holding the Syrian regime responsible for its crimes against humanity".[113] The US further stated that it "will not allow the Al-Assad regime to continue to use chemical weapons" and that

> "if the Syrian regime should use this poison gas again, the United States is locked and loaded. When our President draws a red line, our President enforces the red line."[114]

It further said the responses by the UK, France and the US were "justified, legitimate and proportionate".[115]

Several states, including those condemning the actions alleged to have been carried out by Syria, questioned the consistency of the intervention with international law and the UN Charter. Russia, China, and the Syrian Arab Republic unsurprisingly criticised the attack against Syria.[116] Russia was of the view that the attack constituted

> "[a]n act of aggression against a sovereign State on the front lines in the fight against terrorism was committed without permission from the Security Council and in violation of the Charter of the United Nations and the norms and principles of international law".[117]

It stated that the US used the staged use of toxic substances against civilians as a pretext.[118] China noted that it has consistently stood for the peace-

110 S/PV.8233 (note 4), 6.
111 S/PV.8233 (note 4).
112 S/PV.8233 (note 4), 9.
113 S/PV.8233 (note 4), 5.
114 S/PV.8233 (note 4), 6.
115 S/PV.8233 (note 114).
116 S/PV.8233 (note 4), 3, 9 et seq.
117 S/PV.8233 (note 4).
118 S/PV.8233 (note 4).

ful settlement of disputes and against the use of force in international relations.[119] The Chinese representative emphasised that China advocates respect for the sovereignty, independence, unity and territorial integrity of all countries. As such, it was of the opinion that:

> "Any unilateral military actions that circumvent the Security Council contravene the purposes and principles of the Charter of the United Nations, violate the basic norms enshrined in international law and those governing international relations, and would hamper the settlement of the Syrian issue with new compounding factors."[120]

China urged all parties concerned to refrain from actions that may lead to a further escalation of the situation, return to the framework of international law and resolve the issue through dialogue and consultation.[121] The representative for Kazakhstan stated that

> "Whatever action taken under whatever good pretext cannot and will not justify the military use of force. Violence carried out against violence will never bring about peace and stability."[122]

The Syrian Arab Republic also launched scathing criticism against the US, UK and France.[123] The representative for Equatorial Guinea condemned the attacks as "a clear violation of Chapter VII of the Charter of the United Nations and of the principles and norms of international law".[124] Kuwait and Côte d'Ivoire emphasised the role of the UN and the Security Council. Kuwait denounced the airstrikes as the result of efforts to "disrupt the will of the international community", by hindering the Security Council to take measures at its disposal to end the ongoing use of internationally prohibited chemical weapons in Syria.[125] Côte d'Ivoire reasserted its posi-

119 S/PV.8233 (note 4), 10.
120 S/PV.8233 (note 4), 10.
121 S/PV.8233 (note 4), 10.
122 S/PV.8233 (note 4), 10.
123 S/PV.8233 (note 4), 20 et seq. The Syrian Arab Republic stated, *inter alia*, that the strikes were: "In flagrant violation of the principles of international law and the United Nations Charter, the United States, Britain and France, it was an attack against the Charter, the Council, international law and 193 members of this Organization" and condemned "in the strongest terms this tripartite attack, which once again shows undeniably that those three countries pay no heed to international legitimacy, even though they repeatedly say they do".
124 S/PV.8233 (note 4), 17. Equatorial Guinea stated that: "While surgical and very selective, last night's strikes are a violation of Chapter V of the Charter of the United Nations and of the principles and norms of international law."
125 S/PV.8233 (note 4), 24. Kuwait stated that: "[…] yesterday's use of force was the result of efforts to disrupt the will of the international community, specifically by hindering the Security Council in its determination to take measures at its disposal to end the ongoing use

tion that the response to the crisis in Syria cannot be a military response and noted that the maintenance of peace is entrusted to the UN and the Security Council as its primary responsibility.[126] Ethiopia cautiously noted that the strikes should not lead to the situation spiralling out of control, but called for "maximum restraint, the exercise of wisdom and a quick return to dialogue". It further emphasised the importance of adhering to the principles of the United Nations Charter.[127]

Other states, without a direct interest in the Syria debate, also questioned the legality of the intervention. Kazakhstan implicitly rejected any humanitarian intervention exception to the use of force and maintained that UN Security Council approval was required for the airstrikes.[128] Bolivia strongly criticised the airstrikes as a use of force in violation of the Charter, and unilateral action against the sovereignty and territorial integrity of another member state.[129] Moreover, even states sympathetic with the motives for the intervention (and even supportive of it), questioned the legality of humanitarian intervention. Poland, for its part, said that it "fully understand[s] the reasons behind" the intervention and that it "support[s] the action". At the same time, however, it noted that it is "the competent international bodies [that] should take decisions" directed at states like Syria.[130] The President of the Security Council in his capacity as the representative of Peru similarly emphasised that

> "any response to the crimes committed in Syria, as well as a solution to the conflict in Syria overall, must be consistent with the Charter, with international law and with the Council's resolutions".[131]

Sweden's statement perhaps best exemplified the cautious approach – it did not clearly support the airstrikes nor comment on humanitarian intervention as an exception to the use of force under the Charter. The Swedish representative denounced Syria's

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of internationally prohibited chemical weapons in Syria. That is a flagrant violation of Resolution 2118 (2013), which unequivocally expresses the Security Council's intention to act under Chapter VII of the Charter when one party or several parties fail to comply with its provisions or in the case of the continued use of chemical weapons in Syria."

126 S/PV.8233 (note 4), 18.

127 S/PV.8233 (note 4), 16.

128 S/PV.8233 (note 4), 10. The representative for Kazakhstan stated that: "Whatever action taken under whatever good pretext cannot and will not justify the military use of force."

129 S/PV.8233 (note 4), 14. Bolivia stated that: "Three permanent members have made the decision, in violation of the Charter of the United Nations, to take unilateral action against the sovereignty and territorial integrity of another State Member of the Organization."

130 S/PV.8233 (note 4), 11.

131 S/PV.8233 (note 4), 18 et seq.

> "systematic violations of international humanitarian law, international human rights law and international law in utter disregard for the letter and the spirit of the Charter".[132]

It further stated that the use of chemical weapons is a serious violation of international law and constitutes a threat to international peace and security, and that member states had a common legal and moral duty to defend non-proliferation regimes with regard to chemical weapons.[133] At the same time, Sweden supported the Secretary-General in his statement of the preceding day that there is an obligation, particularly when dealing with matters of peace and security, to act consistently with the Charter and international law in general – a veiled suggestion that airstrikes were not consistent with the Charter and international law.[134]

These views are, of themselves, a serious hindrance to the potential customary international law-establishing value of the US, UK and French intervention. In addition to the examples of contrary state practice (and expression of *opinio juris),* the statement of the Secretary-General of the UN was quite telling. While noting "the seriousness of the recent allegations of the use of chemical weapons" in Syria and that "Syria represents the most serious threat to international peace and security", he felt it his

> "duty to remind Member States that there is an obligation, particularly when dealing with matters of peace and security, to act consistently with the Charter of the United Nations, and with international law in general".[135]

In this context he reminded members that the "Security Council has the primary responsibility for the maintenance of international peace and security" and consequently "urge[d] all members to show restraint and to avoid any act that could escalate matters […]".[136] It is hard to read sentiments of the Secretary-General as anything but, first, an expression of the understanding for the frustration of the US, UK and France that led them to intervene, but also, second, a suggestion that the manner in which they acted was contrary to the UN Charter and the international law.

The debate in the UNSC took place in the context of a draft resolution proposed by Russia aimed at condemning the intervention.[137] The resolu-

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[132] S/PV.8233 (note 4), 12. This was the same wording used by the Secretary-General – see S/PV.8233 (note 4), 2.

[133] S/PV.8233 (note 4).

[134] S/PV.8233 (note 4).

[135] S/PV.8233 (note 4), 2.

[136] S/PV.8233 (note 4).

[137] See S/2018/355, 14.4.2018. This strongly worded draft resolution by the Russian Federation stated that the UNSC, "*Appalled* by the aggression against the Syrian Arab Republic

tion did not pass and this might suggest support for the intervention. However, closer attention to the actions of members of the UN Security Council reveals a different view. First, while the resolution failed, it is telling that, out of 15 members, only eight members opposed the resolution,[138] with three supporting[139] it and four abstaining,[140] from it. More importantly, quite apart from the fact that only 8 states opposed to the draft resolution, the debate illustrates that some of those states voting against the resolution and all of those voting for the resolution, do not believe that humanitarian intervention is permissible under the UN Charter and international law.[141]

What was the effect of the debates in the Security Council discussed above, if any? *Hakimi* argues that states (as a group) made a decision on the law, deciding to deprive Art. 2(4) of "its operational relevance and its normative bite" and it is significant that states acted "as if it were lawful".[142] She points out that the reaction was meant to be fact-specific to condone one operation, without purporting to apply or establish a standard of general applicability of an exception to Art. 2(4) for an entire category of humanitarian interventions.[143] While it is true that the decision of the Security Council as an entity in voting against the resolution proposed by Russia did not condemn the use of force, it is equally the case that many other cases of unlawful use of force are never condemned – and for that matter can never be condemned – not because of any specific considerations by states, but simply because of political dynamics in the Security Council.

The decision of the Council, as such, does not affect the rules of customary international law.[144] What affects the rules of customary international

by the US and its allies in violation of international law and the UN Charter, *Expressing* grave concern that the aggression against the sovereign territory of the Syrian Arab Republic took place at the moment when the Organization for the Prohibition of Chemical Weapons Fact-Finding Mission team has just begun its work to collect evidence of the alleged use of chemical weapons in Douma and urging to provide all necessary conditions for the completion of this investigation, 1. *Condemns* the aggression against the Syrian Arab Republic by the US and its allies in violation of international law and the UN Charter, 2. *Demands* that the US and its allies immediately and without delay cease the aggression against the Syrian Arab Republic and demands also to refrain from any further use of force in violation of international law and the UN Charter, 3. *Decides* to remain further seized on this matter."

138 The United States, the United Kingdom, France, the Netherlands, Côte d'Ivoire, Poland, Sweden, Kuwait.

139 Russia, China and Bolivia.

140 Equatorial Guinea, Ethiopia, Kazakhstan and Peru.

141 See discussion on the debate in para. III of this article.

142 *M. Hakimi* (note 97).

143 *M. Hakimi* (note 97).

144 See Draft Conclusion 12(a) of the ILC (A/CN.4/L.702, note 44) – a resolution adopted by an international organisation or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

law are the actions (and attitudes) of states.[145] For the formation of customary international law, there must be the necessary *opinio juris* – i.e. states must perform or abstain from conduct because of a belief that they are obliged to do so.[146] Even states that vote in favour of a resolution frequently make it clear that they do not regard a particular resolution as reflecting the law as it is (*lex lata*).[147] One therefore has to closely scrutinise the statements of members of the Security Council in order to decide whether a certain *opinio juris* may be deduced from those statements.[148] With regards to the Russian draft resolution it is clear from the statements by states that even the states voting in favour of the resolution, did not believe that humanitarian intervention is permissible under the UN Charter and international law.[149]

Writers have further argued for the use of chemical weapons as providing a self-standing justification for the use of force by states, claiming that the use of chemical weapons on a large scale provides "an independent basis in international law for countries to use force against the government perpetrating such an illegal action".[150] When the US first threatened force against Syria in 2013, it was contended that we are perhaps seeing unfold a rapidly emerging acceptance of a new exception to the prohibition on the use of force grounded in a critical rule of international law (prohibition against use of chemical weapons), the importance of which depends on its enforcement, including through force, against violators.[151] Having regard to the statements by states discussed, however, no state clearly supported such a self-

[145] See Draft Conclusion (A/CN.4/L.702, note 44), stating that "acts in connection with resolutions of international organizations or international conferences" is a form of state practice DC 12(2): A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development. Draft conclusion 6, as provisionally adopted in 2014 by the International Law Commission's Drafting Committee, includes among a non-exhaustive list of "forms of State practice". This includes voting, joining in a consensus, statements etc. See ILC Report on the work of the 66th Session (note 47), Draft Conclusion 12(3).

[146] See further *The SS Lotus Case* (*France v. Turkey*), 1927 PCIJ Ser. A no. 10. The practice of the Council will only reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

[147] *M. Wood*, International Organizations and Customary International Law; *J. I. Charney*, Distinguished Lecture in Public International Law Presented at Vanderbilt University Law School, 4.11.2014, Vand. J. Transnat'l L. 48 (2015).

[148] See ILC Report on the work of the 66th session (note 47), Draft Conclusions 6 and 10.

[149] See discussion on the debate in para. III of this article.

[150] *D. P. Fidler*, Neither Humanitarian Intervention Nor Self-Defense in Syria: A New Justification for the Use of Force in International Law?, 28.8.2013, <https://armscontrollaw.com>.

[151] *D. P. Fidler* (note 150).

standing justification, although many states denounced the use of chemical weapons. International law has not recognised an exception to the prohibition on the use of force to deter or in response to the use of chemical weapons – there is no treaty, state practice or *opinio juris* supporting this notion. In order to act as a catalyst for change and drive the emergence of a new customary international law rule permitting the rule of force for specifically the use of chemical weapons, there would need to be a clear and consistent justification by states of an exception to the prohibition of the use of force on this specific basis. This is particularly the case where the law on the prohibition on the use of force is as clear (and as fundamental) as it is. Any practice purporting to change this existing rule, must be clear, widespread (or at least widely accepted) and not subject to many objections. This is not the case with the notion of the right to unilaterally use force in response to the use of chemical weapons.

V. Concluding Remarks

There is little question that, prior to the April 2018 airstrikes by the US, France and the UK in Syria, international law did not recognise the right to unilateral military intervention in third party states for humanitarian purposes. Even cases where intervention on humanitarian grounds was not motivated by other interests, such as the Kosovo case, struggled to find legal acceptance, resulting in legally dubious phrases like "illegal but legitimate". The clear and unambiguous rejection of humanitarian intervention by a large section of the international community of states resulted in the emergence of the concept of the Responsibility to Protect. But the concept of Responsibility to Protect, though politically well supported, did little to change the rules on unilateral intervention on humanitarian grounds. Responsibility to Protect is, ultimately dependent on the authorisation of the UN Security Council, which is a recognised ground for intervention. The question thus is whether the recent strikes in Syria have had any effect on the law.

There is no question that the airstrikes constitute practice by the three acting states. However, for a rule of customary international law recognising an exception, there needs to be a general practice. One incident, involving three states is unlikely to establish general and consistent practice. This is even more the case when several states have been critical of the intervention. Moreover, quite apart from the lack of practice in support for the US, UK, and French intervention in Syria, *opinio juris* based on the intervention

also seems to reflect support for the current position, namely that humanitarian intervention is not recognised under international law. This is particularly evident in the statements of states that expressed doubt or concern about the intervention.[152] Even more telling, was the legal views of states like Sweden, Côte d'Ivoire, Poland, Peru and Bolivia, who, while condemning Syria, continued to call for a multilateral response over a unilateral one.[153] This suggest that their legal views were not based on politics but on legal principle. The lack of *opinio juris* however, is starker when considering the statements of the intervening states. They themselves, while expressing the view that the intervention was legitimate, are ambiguous about the legal justification. The US, for example, in justifying its action did not seek to rely on the legal doctrine of humanitarian intervention. *Donald Trump*, in defending US action, stated the main aim of the attack as establishing "a strong deterrent" against chemical weapons use[154] – thus not to prevent the many other human atrocities that were being committed in Syria.

The analysis above indicates that there is no right for the use of force on the basis of unilateral humanitarian intervention under current international law. Art. 2(4) of the UN Charter prohibits it and it does not fall within the carefully worded exceptions in the UN Charter (namely self-defence, which requires an armed attack against a state; or a UN Security Council resolution). There is further no evidence of state practice supporting a new rule of

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[152] S/PV.8233 (note 4). See, e.g., statements by Bolivia (note 14-15), Russia (note 3-5, 25) and China (note 10).

[153] Sweden (S/PV.8233, note 4), 12 stated: "It is our common legal and moral duty to defend the non-proliferation regimes that we have established and confirmed. That is best done through true multilateralism and broad international consensus." Côte D'Ivoire, S/PV.8233 (note 4), 18 reiterated its unequivocal condemnation of the use of chemical weapons, but also referred to its "strong conviction in the virtues of multilateralism" and its belief that "resorting to force in order to maintain international peace and security must be authorized by the Security Council in order to preserve its essential legal authority and to thereby prevent any deviation or abuse". Bolivia, S/PV.8233 (note 4), 14 expressed its condemnation of the use of chemical weapons but noted that it is "surprised by the fact that, given that, they have a greater responsibility for maintaining international peace and security, the permanent Council members bypass the United Nations when it suits them. They advocate for multilateralism as long as it serves their purposes and then simply discard it." Poland, S/PV.8233 (note 4), 11 et seq., similarly condemned the chemical attacks but noted that "the competent international bodies should take decisions that will enable the perpetrators to be identified and brought to justice". The representative for Poland further stated: "Let me underline that it is the primary responsibility of the Security Council to set up an investigative mechanism to examine the use of chemical weapons in Syria." Peru, S/PV.8233 (note 4), 19 was of the view that "the Council is the organ with the primary responsibility for the maintenance of international peace and security, and it is up to its members to act in unity and to uphold that responsibility".

[154] *Trump*: US, Allies Attacking Syria to Stop Chemical Weapons, 4.4.2018, <https://mainichi.jp>.

customary international law allowing for such unilateral intervention; states do not appear to use force for humanitarian purposes on the basis that there is a clear legal rule obliging them to do so. If anything, justification is *ad hoc* and the basis for justification inconsistent, and as such, however much one would wish it so from a humanitarian perspective, has no effect on the current state of the law.