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The Attack on Syria in Response to the Use of Chemical Weapons:
The Legal Dimension
Pnina Sharvit Baruch

While Article 2(4) of the UN Charter stipulates the basic prohibition on the use of force against a state, the Charter contains two exceptions to this prohibition: the use of force authorized by the UN Security Council under Chapter 7 of the Charter, and the use of force in situations of self defense against armed attack, pursuant to Article 51.

The combined attack by the United States, Britain, and France on Syrian targets following the use by the Assad regime of chemical weapons did not follow any Security Council resolution authorizing the use of force. Similarly, it is very difficult to argue justification based on the right to self defense, since there was no armed attack against any of the attacking states, and it is also hard to claim that Assad's actions amounted to a concrete threat of any anticipated attack on them, creating the right of preemptive self defense. True, it may be possible to justify preventive self defense against a future threat. However, this justification is controversial in itself and difficult to apply in this case, since neither the Assad regime nor its use of chemical weapons is a potential threat to any of the states that participated in the attack.

In the past, an argument was raised, based on the idea of preventive self defense, that focused on preventive action against the general threat of facing chemical weapons in a future conflict. According to this argument, the absence of a military response to the use of chemical weapons would erode the existing prohibition against the use of such weapons, encouraging future tyrants and terrorists to employ them. However, this argument does not sit well with the existing legal basis for the idea of preventive self defense, which stipulates that force can only be used against a state when there is a real threat of armed attack by this state. This rationale cannot provide justification for the use of force against a state purely as deterrence against the future use of certain means of warfare by that state, let alone by other states.

For the past two decades there has been a debate on the question of whether, apart from self defense, it is also possible to recognize the exception of "humanitarian intervention," namely the use of force against a state in extreme cases of widespread human rights abuses, such as situations of genocide and ethnic cleansing, in order to prevent a humanitarian catastrophe. The main precedent for the idea of "humanitarian intervention"

is NATO's military intervention in Kosovo in 1999. However, instead of presenting this as an explicit legal justification for the intervention, most NATO members, including the United States, chose to present a list of specific particular factors (including violations of previous Security Council resolutions and the situation of hundreds of thousands of displaced people) which, cumulatively, justified the use of force in Kosovo, notwithstanding the language of the UN Charter. This approach, which restricts the use of force to the unique circumstances of that situation, is sometimes referred to as "the factors approach." There is a tendency to confuse the idea of humanitarian intervention and the notion of the "responsibility to protect (R2P)," which determines that in extreme situations, such as genocide and widespread war crimes, the international community has the obligation to intervene in order to end the atrocities. However, this doctrine is perceived as a basis for justifying a UN Security Council decision to authorize the use of force, but not as a legal basis for the use of force without such authorization.

Britain, in an announcement published on the day of the attack, is the only country that explicitly declared that humanitarian intervention constitutes the legal basis for the use of force against Syria in response to the use of chemical weapons against its citizens. However, one of the problems of relying on the humanitarian intervention doctrine in the Syrian context is that even if it does provide the rationale for military intervention, the focus of the operation should be to relieve the humanitarian crisis facing Syrian citizens and stop the violence against them. Limiting armed intervention to a response to the use of chemical weapons which, although certainly serious and worthy of condemnation, caused fewer casualties than those resulting from the use of conventional weapons by the Assad regime weakens the argument.

It is also difficult to justify the use of force against Syria purely on the basis of a breach of the international prohibition on the use of chemical weapons, however severe the prohibition: modern international law forbids armed reprisals, that is, the use of force intended to enforce international commitments.

Some claim, however, that even if formal law forbids the use of force in a case like that of Syria, such force could still be justified on the rationale of "illegal but legitimate." In other words, there are situations of extreme need where strict adherence to the law could lead to greater harm. Accordingly, in certain cases, moral considerations or fears regarding existential threats could provide a justification for action that appears to constitute a breach of existing legal norms.

A similar approach to international law sees formal law, or at least the rules applying to the legality of the use of force, as a flexible, pragmatic set of norms, to be interpreted in a way that takes account of changing realities. Such a pragmatic approach to international

law in general, and to the law on the use of force in particular, necessarily involves disregarding some of the formal wording of the law; however, unlike the "illegal but legitimate" doctrine, the pragmatic approach does not propose completely ignoring the law, but rather applying a flexible interpretation to the relevant norms. The United States appears to be taking this approach, as shown in a speech given by Prof. Harold Koh, who served as the Legal Advisor of the US State Department during the Obama administration, which was far more committed to compliance with the rules of international law than the Trump administration. Prof. Koh rejected the "absolutist approach" to the legal basis for the use of force, and argued that "international law has evolved sufficiently to permit morally legitimate action to prevent atrocities by responding to the deliberate use of chemical weapons." Based on this approach and on an analysis of the Kosovo case, it can be argued that when the cumulative circumstances are sufficiently severe, military action can be morally justified in extreme humanitarian situations, and international law must be interpreted accordingly.

In addition, implementing a flexible and pragmatic approach to international law could lead to a change in the law, to adjust to the new reality. Indeed, customary international law develops through the combination of state practice and *opinio juris*, the legal reasoning for a state's actions. Therefore, when a state acts in a way that contradicts existing international law, it could develop a new customary norm that replaces the previous rule. This is particularly true in the case of coordinated action by a number of important states, with the explicit or implicit consent of many other states. In order for a customary new rule to develop, however, the attacking states must present the legal rationale underlying their military action.

The approach calling for a flexible application of the rules regulating the use of force arouses serious counter-arguments, claiming that if the United States and its allies are prepared to ignore existing laws, then other states could use the same justification for future use of force, thus endangering the already fragile structure of international law in this field. On the other hand, and this is apparently the main point – acceptance of the idea that international law, based on a formalistic and narrow interpretation of the UN Charter, bars states from using force in situations where logic, ethics, and moral considerations demand it, could ultimately frustrate the main purpose of the UN Charter – the preservation of international peace and security.

Since states in fact generally conduct themselves in a way that shows that in their opinion the use of force in cases like the one under discussion is justified, and since it appears that the debate surrounding the legality of the action is only of interest to the legal community, then at both a moral and a practical level, a flexible approach to international law regarding the use of force is not only preferable, but also required.