The Use of Chemical Weapons against the Syrian People: Does It Justify Forceful Intervention?

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On August 21, 2013 the Syrian government used chemical weapons against its own civilians, killing over 1,000 in a single attack.[1] Following this horrific incident, some Western states, most notably the United States, contemplated attacking Syria without United Nations Security Council (UNSC) authorization, raising a heated debate among legal experts over the legal basis for such an attack under international law. Ultimately, an intended military campaign was called off at the last minute. Intense diplomatic processes were initiated to prevent the use of force and to begin removing Syria's stockpiles of chemical weapons, leading to the adoption of UNSC Resolution 2118 on September 27, 2013.[2] The resolution mandated, *inter alia*, the expedited disclosure and destruction of all Syrian chemical weapons and determined that in the event of non-compliance, measures will be imposed under Chapter VII of the United Nations Charter. Chapter VII allows for both forceful (Art. 42) and non-forceful (Art. 41) means and measures by the Security Council against a state. According to Resolution 2118, then, the imposition of forceful measures against Syria in the event of non-compliance will require another Security Council resolution. Such a resolution would still be subject to a veto by the permanent members of the Security Council, among them China and Russia, which are likely to continue to block any authorization to use force against Syria. Thus, if no such resolution is adopted in the face of Syrian non-compliance, the option

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to use military force by the United States and its allies against Syria may reemerge, reviving the debate over the legality of such an action.

From the beginning of his presidency, President Obama has stated his preference for adhering to international standards, underlining the importance of the United States setting an example for the international community.[3] Hence, while an American decision on whether to use force in Syria is, as in other situations, inevitably based on strategic as well as moral considerations, it is also clearly premised on legal guidelines. Furthermore, the legal aspects to the potential use of force in Syria are relevant to similar dilemmas elsewhere where the use of force might be contemplated.

The legal basis in international law for a military attack against Syria without UNSC authorization is far from clear-cut. Indeed, the Obama administration has refrained from officially stating its position on the legal basis for such an attack. Many scholarly legal opinions seem to conclude that there is no formal legal basis in international law for military intervention in Syria.[4] Others argue that such action is allowed, either based on the concept of humanitarian intervention or on other legal justifications. Still others claim that existing international law – specifically the norms regarding the use of force – does not suit a situation such as that in Syria, and therefore new legal standards should be developed. The following essay analyzes these different positions. It should be noted that the essay focuses solely on the legality of the use of force in the context of Syria's use of chemical weapons against its civilians, and does not address arguments related specifically to the implications of potential Syrian non-compliance with UNSC Resolution 2118.

The Use of Force under the UN Charter

Article 2(4) of the UN Charter sets forth the basic rule on the legality of using force, prohibiting 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."[5] Accordingly, any use of force against Syria is prohibited unless a valid basis is found in international law. Notably, Article 2(4) not only prohibits the actual use of force but also the "threat" of using force. Therefore, the ensuing analysis bears relevance to the pronouncements made by President Obama as well as other US and non-US officials on the intention to strike Syria, notwithstanding the fact that military force was eventually not employed.

Article 2(4) does not prohibit a state from using force internally (i.e., a state against an organized armed group in that state), nor does it prohibit a request by a state for other states to use force on its territory. Thus, it could be argued that if the Syrian opposition forces had enough effective control over Syria to be legally regarded as the new government (or otherwise satisfy the criteria for such status), they could request other states to assist them in their fight against the "former Assad regime." Under such a circumstance, forcible intervention would not be prohibited under Article 2(4).

In earlier stages of the Syrian conflict, some countries recognized the National Coalition of Syrian Revolutionary and Opposition Forces as the sole legitimate representative of the Syrian people. It is doubtful, however, whether existing or further recognition of the Syrian opposition is anything more than a political act, mainly due to the opposition's apparent lack of cohesiveness, insufficient territorial control over Syria, and inability to govern. As was noted by the United States State Department with regard to Libya:

> International law focuses on the question of recognition, and recognition tends to follow facts on the ground, particularly control over territory. As a general rule, we are reluctant to recognize entities that do not control entire countries because then they are responsible for parts of the country that they don't control, and we're reluctant to derecognize leaders who still control parts of the country because then you're absolving them of responsibility in the areas that they do control.[6]

Furthermore, even explicit *political* recognition of the opposition does not necessarily remove *legal* recognition from the Assad regime, especially given that many states continue to have diplomatic relations with the regime and consider it as the legitimate government.[7] Hence, forcible intervention inside Syria against the Assad regime in support of armed opposition groups would probably be considered as regulated by Article 2(4) of the UN Charter.[8]

Exceptions to the Prohibition on the Use of Force Based on the UN Charter

The UN Charter contains two exceptions to the general prohibition on the use of force. The first is use of force authorized by the Security Council under Chapter VII of the Charter, when "necessary to maintain or restore international peace and security."[9] Examples were the authorizations by

the Security Council to use force against Iraq (1990)[10] and the NATO-led operation in Libya in 2011.[11] To date, however, Russia and China have blocked every attempt of the Security Council to authorize the use of force against Syria, rendering this exception inapplicable.

The second exception is self-defense. Article 51 of the UN Charter reaffirms the "inherent right of individual or collective self-defence if an armed attack occurs."[12] In other words, if a state has been attacked, it has the right to respond with force. The article also recognizes the notion of "collective self-defense," namely the use of force by one or more states that were requested to assist an attacked state to defend itself. At the moment, neither the United States nor any of its allies in the region has been the subject of an armed attack by Syria.[13] The Syrian civilians attacked by their own government do not have the legal right under Article 51 to request forcible intervention in self-defense on their behalf.

The fact that an actual armed attack has not taken place is not the end of the story. It is widely accepted that under certain conditions, the use of force against anticipated attacks is permitted. President Obama seemed to allude to this notion when claiming that "if fighting spills beyond Syria's borders, these [chemical] weapons could threaten allies like Turkey, Jordan, and Israel."[14] According to his statement, the threat is not necessarily limited to the use by Syria of chemical weapons against these states, but also to the threat that they might fall into the hands of terrorist groups that might use them.[15] The common view is that a valid claim of anticipatory self-defense – prior to an actual armed attack – is based on establishing that there is a need to use force in order to thwart an imminent armed attack. The Caroline Affair (1837)[16] is widely regarded as delineating the conditions necessary for anticipatory self-defense, whereby a state must show "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[17] Therefore, to claim anticipatory self-defense, the threat must be concrete and it must be clear that using force is the only viable option.[18] Furthermore, the traditional view of anticipatory self-defense equates "imminence" with "immediacy," meaning that the threat must be immediate in order to justify a preemptive strike. Clearly the potential risk described above does not meet this requirement of the criterion of imminence. There was no immediate threat that Syrian chemical weapons were to be used against neighboring countries, either by Syria itself or by terrorist

organizations – neither when the United States was considering attacking Syria, nor at the present.

There is, nonetheless, a growing understanding that stretches the notion of imminence, whereby preemptive use of force may be justified when failure to act would deprive a state of the ability to defend itself from an attack in the future.[19] In other words, "the potential victim State may take forceful action if the 'window of opportunity' to mount an effective defense is about to close."[20] In the commentary to the Tallinn Manual on the International Law Applicable to Cyber Warfare (2013), the concept of the "window of opportunity" is clarified:

> This window may present itself immediately before the attack in question, or, in some cases, long before it occurs. The critical question is not the temporal proximity of the anticipatory defensive action to the prospective armed attack, but whether a failure to act at that moment would reasonably be expected to result in the State being unable to defend itself effectively when that attack actually starts.[21]

The fulfillment of the criteria of this wider interpretation of imminence, however, is likewise questionable with regard to the Syrian situation. At the time the United States was considering an attack, the chemical weapons remained in the hands of the Assad regime and there was no concrete threat that they would be used against US forces or US allies. Nor was there any particular indication that the chemical weapons were about to come under the control of terrorist groups that might use them in such a way.[22] Thus, it seems that the threat described above was neither concrete nor imminent enough to justify the use of preemptive self-defense at the time that the use of force against Syria was being contemplated.

Another argument based on the notion of preemptive self-defense in the Syrian case focuses on the use of force against the general threat of facing chemical weapons in future conflicts. President Obama put forward this rationale, stating:

> If we fail to act, the Assad regime will see no reason to stop using chemical weapons. As the ban against these weapons erodes, other tyrants will have no reason to think twice about acquiring poison gas, and using them. Over time, our troops would again

> face the prospect of chemical warfare on the battlefield. And it could be easier for terrorist organizations to obtain these weapons, and to use them to attack civilians.[23]

This, according to John B. Bellinger III, former Legal Advisor for the US State Department under President George W. Bush, could provide the basis for preemptive military action under the collective self-defense regime. Bellinger suggests that because the Syrian regime used chemical weapons against its own people, this triggers the right to use collective self-defense to maintain international peace and security in the name of deterring future incidents of chemical weapons use.[24] However, this argument does not seem to be based on the existing customary legal regime applicable to the notion of self-defense. Rather, the underlying rationale of the notion of preemptive use of force is that force may be used against a state only when there is a threat that the state will carry out an armed attack. It cannot serve to justify using force against a state merely to deter that state, let alone other states, from using certain means of warfare in the future.

Humanitarian Intervention

Over the last two decades, legal scholars have debated whether there are other exceptions to the prohibition on the use of force without prior UNSC authorization aside from self-defense. Some suggest the acceptance of an exception of "humanitarian intervention," which justifies the unilateral or multilateral use of force against a state in extreme cases to prevent a humanitarian catastrophe or to stop widespread human rights abuses.[25]

The United Kingdom has long been an ardent advocate of the doctrine of humanitarian intervention and, unlike the United States, publicly stated its view that humanitarian intervention offers the legal justification to use force in Syria, even without Security Council authorization. On August 29, 2013, the British government released a document that states:

> If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met: (1) there is

> convincing evidence…of extreme humanitarian distress on a large scale requiring immediate and urgent relief; (2)…there is no practicable alternative to the use of force if lives are to be saved; and (3) the proposed use of force must be necessary and proportionate…and must be strictly limited in time and scope…All three conditions would clearly be met in this case.[26]

The main precedent cited as the basis for the justification to use force for humanitarian purposes without UNSC authorization is the NATO intervention in Kosovo in 1999. There are different views as to whether or not the intervention in Kosovo has indeed created a general norm of humanitarian intervention. Rather than explicitly outlining the legal justifications for their use of force in Kosovo, various NATO members (including the US) proffered a narrow list of factors (e.g., violations of previous Security Council resolutions, failure to cooperate with the International Criminal Tribunal for the former Yugoslavia, hundreds of thousands of displaced persons, etc.) that, taken together, justified military force to be used in Kosovo notwithstanding the language of the UN Charter. This approach, limiting the use of force to these unique circumstances, is sometimes referred to as the "factors" approach.[27]

Others claim that the NATO intervention in Kosovo actually set a much broader precedent. Sir Daniel Bethlehem, former principal legal advisor of the UK Foreign and Commonwealth office, argues that although most NATO states did not publicly provide legal justifications for intervening, let alone claim humanitarian intervention as the legal basis for doing so, they nonetheless were indeed intervening on that basis.[28] Bethlehem analyzes several legal elements and precedents and concludes that a principle of humanitarian intervention has emerged in customary international law beyond the specific circumstances of the Kosovo precedent.[29] However, this position is not universally accepted. There are many states that contend that humanitarian intervention has not matured into an accepted legal exception to the prohibition on the use of force of Article 2(4).[30] Furthermore, the fact that the United States declined to base its threat to use force against Syria on this rationale, leaving the UK alone in formally asserting this justification, serves as a clear indication of America's reluctance to accept the existence of a norm in international law permitting humanitarian intervention.

The concept of humanitarian intervention is sometimes confused with the notion of the "Responsibility to Protect (R2P)." R2P is a soft-law doctrine[31] that began to develop in the early twenty-first century, was stipulated in the outcome document of the UN World Summit of 2005,[32] and was subsequently adopted by the Security Council.[33] R2P determines that "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means."[34] In the event that a state does not offer such protection, or is in fact the perpetrator of such violence, the international community has the obligation to intervene to put an end to the atrocities being committed, using either peaceful or military means.[35] This doctrine is widely accepted as justifying a decision by the Security Council to authorize the use of force. It is highly doubtful, however, whether the R2P doctrine can serve as a legal basis to allow for humanitarian intervention without Security Council authorization.

One of the problems of relying on the doctrine of humanitarian intervention in the Syrian context is that if this was indeed the rationale for intervening, then the thrust of the operation should be on relieving the humanitarian crisis in Syria. According to the aforementioned official statement of the British government, however, the United Kingdom did not appear to be basing its legal justification to forcibly intervene in Syria on the widespread violence against Syrian civilians per se. Rather, in a somewhat contradictory manner, it limited its focus to the suffering caused only by the use of chemical weapons that, while deplorable, has caused far fewer fatalities than those caused by conventional weapons.[36] President Obama also clearly focused on deterring Assad from using chemical weapons and not on relieving the suffering of the Syrian population. It is doubtful, therefore, whether military action in Syria that is solely intended as deterrence against the future use of chemical weapons adequately fulfills the factual basis for a claim of humanitarian intervention.

Using Force in Response to the Unlawful Use of Chemical Weapons?

In the draft legislation submitted by the Obama administration to Congress regarding authorization for the use of the US armed forces in connection with the conflict in Syria, the stated rationale of the operation focused on the

unlawful use of chemical weapons. The preamble explains, "The objective of the United States' use of military force in connection with this authorization should be to deter, disrupt, prevent, and degrade the potential for, future uses of chemical weapons or other weapons of mass destruction."[37]

This then raises the question whether the use of force could have been permitted based on the Syrian breach of the prohibition against the use of chemical weapons – a prohibition that is universally accepted as binding customary international law.[38] It has been asserted that using force to enforce this norm is justified because the prohibition against using chemical weapons is considered a *jus cogens* norm, a norm so fundamental in international law that no derogation is permitted.[39] But this position is disputed on the grounds that it contradicts the concept that force cannot be used to enforce international obligations and that any military action taken against Syria under this rationale would thus amount to a forcible reprisal, which is widely accepted as prohibited under international law.[40] Moreover, the undisputed *jus cogens* norm of the prohibition of the use of force is more widely acknowledged than the prohibition regarding chemical weapons.[41]

Break the Law to Remake the Law?

The discussion thus far has looked at the issue from a formal international law perspective, reading the black letter *lex lata.* Some scholars argue, however, that even if the law forbids the use of force in a case such as Syria, using force could still have been justified under a rationale of "illegal but legitimate." As one commentator noted, "Those who argue that international legality is the *sine qua non* for legitimate action in the international arena ignore the fact that there are situations of extreme necessity in both domestic and international law where obeying the strict letter of the law may allow a greater harm to occur."[42] Accordingly, in certain cases, moral considerations or concerns related to existential threats could form a basis to justify an act that violates existing legal norms.[43]

A similar approach to international law looks at the law, or at least to the rules governing the legality of the use of force, as a flexible and pragmatic body of norms that must be interpreted in a way that takes into account changing realities. Such a pragmatic approach to international law also entails, to some extent, disregarding the formal letter of existing law, as in the "illegal but legitimate" approach, but unlike that approach, does not

suggest disregarding the law, but rather applying a flexible interpretation to the relevant norms.[44]

The United States seems to adopt such a position.[45] Harold Koh, the former Legal Advisor for the US State Department, outright rejects what he terms "the absolutist approach" with regard to the legal basis for the use of force, namely a formal, rigid, and strict approach to interpreting the rights of states under the UN Charter. According to Koh, "the absolutist position does not acknowledge that the U.N. has multiple purposes – including protecting human rights, promoting regional security, and ending the scourge of war – instead flattening those purposes to a single goal: protecting sovereignty."[46] He argues, rather, that international law is flexible enough, and indeed has come to accept military action based on moral grounds, such as preventing atrocities that result from the deliberate use of chemical weapons.[47] In some respects, Koh's analysis of a potential approach to the use of force in Syria resembles the "factors-based" approach applied in the case of NATO in Kosovo. These factors include "the catastrophic humanitarian situation, the likelihood of future atrocities, the grievous nature of already-committed atrocities that amount to crimes against humanity and grave breaches of the Geneva Conventions, the documented deliberate and indiscriminate use of chemical weapons against civilians in a way that threatens a century-old ban, and the growing likelihood of regional insecurity."[48] Based on Koh's stance and the factors approach regarding Kosovo, it could be argued that if the cumulative circumstances are grave enough, military action could be justified on moral grounds in extreme humanitarian situations and that international law should be interpreted accordingly.

Moreover, applying a flexible and pragmatic approach to international law can lead to the modification of existing law, adapting it to new realities. Indeed, customary international law develops through the combination of state practice (i.e., the way states behave) and *opinio juris*, which is the legal reasoning underlying a state's behavior.[49] Therefore, when a state acts in a way that contradicts existing international law, it may be contributing to the development of a new customary norm that will replace the previous rule. This is the paradox of customary law: "the only way to change it is to break it."[50] Malcolm Shaw, a well-known international law expert, explains in his book that "behaviour contrary to a custom contains within itself the seeds of a new rule and if it is endorsed by other nations, the previous law will disappear and be replaced, or alternatively there could be a period of

time during which the two customs co-exist until one of them is generally accepted."[51] It follows that if forcible action is taken in circumstances such as the Syrian case, and this action is justified as legal and consequently endorsed by other states, a new legal norm might be said to emerge.

One of the main arguments against an approach that permits the use of force that is morally legitimate, despite contradicting formal legal rules, is that it could encourage violating international law at will. Based on their sense of what is moral and legitimate, other states could use force under the pretext of applying flexible interpretations or of creating new rules that reflect their own concept of "pragmatism" and "flexibility." This could lead to an increase in situations in which force is used and ultimately to the collapse of the entire legal prohibition on the use of force between states.[52]

On the other hand, strictly maintaining and applying a formal and narrow legal approach to the use of force arguably falls short of adequately addressing emerging threats, such as the use of weapons of mass destruction. In this context, a comment by Rosalyn Higgins, a former judge in the International Court of Justice, is noteworthy:

> If international law was just "rules," then international law would indeed be unable to contribute to, and cope with, a changing political world. To rely merely on accumulated past decisions (rules) when the context in which they were articulated has changed – and indeed when their content is often unclear – is to ensure that international law will not be able to contribute to today's problems and, further, that it will be disobeyed for that reason.[53]

Conclusion

An international legal basis for striking Syria in response to its use of chemical weapons against its civilians, without Security Council authorization, is far from clear. One possible legal justification may have been to apply the doctrine of humanitarian intervention, yet relying on this doctrine is controversial. Moreover, the military strikes contemplated by the Obama administration and the justification for intervention by the United Kingdom appear to have only been a deterrent for further chemical weapons use, rather than having been designed to end the humanitarian catastrophe that has already claimed over 100,000 lives. This has the effect of undermining,

at least to a certain degree, the fundamental basis of applying the doctrine of humanitarian intervention.

Alternatively, an attack against Syria based on the extreme suffering of civilians and on the deplorable use of chemical weapons could have been carried out without regard to the formal rules of international law, relying instead on moral and ethical arguments and on a flexible approach to the law. Applying a flexible interpretation to the law could also lead to the creation of new norms since international law develops through both the practice of states and the way they legally justify their actions (*opinio juris*). It is therefore unfortunate that the United States has to date refrained from presenting an official position on the legal justification for an attack in Syria (including on the legal basis for a future attack in case of non-compliance with Resolution 2118). Because the United States has not provided the requisite *opinio juris*, the possibility of further developing a rule into customary international law is hindered.

The approach calling for the flexible application of the rules on the use of force raises serious counter claims that if the United States and its allies are willing to disregard the existing law, then other states may use the same justification to use force in the future, risking the erosion of an already fragile international legal structure. On the other hand, accepting the notion that international law, based on a narrow and strict interpretation of the UN Charter, blocks states from using force in situations where logic, ethics, and moral considerations demand the use of force, could eventually lead to the frustration of the fundamental goal of the Charter: maintaining international peace and security.

Ultimately, the broad discussion regarding the legal basis of striking Syria, as well as the legal justifications provided, reflects a significant debate in international law dealing with the legality of the use of force. This debate consists of two opposing positions: those who believe that the law should be stringently adhered to lest the collapse of the entire legal structure becomes at risk; and those who believe that such a rigid interpretation of the law, allowing for immoral or illogical consequences, would ultimately result in the law being disregarded and hence lead to such a collapse anyway. While both positions hold merit, the latter is more persuasive and thus a flexible approach to international law governing the use of force is not only preferable, but also required.

Notes

1 Joby Warrick, *More than 1,400 killed in Syrian chemical weapons attack, U.S. says*, The Washington Post, August 30th, 2013, http://articles.washingtonpost.com/2013-08-30/world/41606663_1_obama-administration-u-s-intelligence-analysts-syrian-government; Sam Dagher, Farnaz Fassihi, Adam Entous, *U.S. Suspects Syria Used Gas*, The Wall Street Journal, August 21st, 2013, http://online.wsj.com/news/articles/SB10001424127887324165204579026123332790830.

2 S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sep. 27, 2013).

3 See, for example, President Obama's Nobel Prize address: "To begin with, I believe that all nations – strong and weak alike – must adhere to standards that govern the use of force. I – like any head of state – reserve the right to act unilaterally if necessary to defend my nation. Nevertheless, I am convinced that adhering to standards, international standards, strengthens those who do, and isolates and weakens those who don't." (President Barack Obama, *A Just and Lasting Peace*, Nobel Lecture (Dec. 10, 2009)).

4 See, for example, the following: Julian Ku, *Would Syria's Use of Chemical Weapons Change the Legality of U.S. Intervention?*, Opinio Juris, December 7th, 2012; Deborah Pearlstein, *So Was Congress Thinking of Authorizing Force in Syria?*, Opinio Juris, April 26th, 2013; John Quigley, *Syria Insta-Symposium: John Quigley on Intervention*, Opinio Juris, August 31st, 2013; Shane Darcy, *Military force against Syria would be a reprisal rather than humanitarian intervention, but that doesn't make it any more lawful*, Blog of the European Journal of International Law, September 1st, 2013); Oona A. Hathaway and Scott J. Shapiro, *Authorization for action in Syria*, The Washington Post, August 28th, 2013; Carsten Stahn, *On 'Humanitarian Intervention', 'Lawmaking' Moments and What the 'Law Ought to Be'–Counseling Caution Against a New 'Affirmative Defense to Art. 2(4)' After Syria*, Opinio Juris, October 8th, 2013, http://opiniojuris.org/2013/10/08/guest-post-humanitarian-intervention-lawmaking-moments-law-counseling-caution-new-affirmative-de/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.

5 U.N. Charter Article 2, para. 4.

6 US Senate, Committee on Foreign Relations, Libya and War Powers, Hearing, S. Hrg. 112–189, 28 June 2011, 39 (www.gpo.gov/fdsys or http://www.fas.org/irp/congress/2011_hr/libya.pdf).

7 Dapo Akande, *Self Determination and the Syrian Conflict – Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does this Mean and What Implications Does it Have?*, Blog of the European Journal of International Law, December 6th, 2012, http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/.

8 Such intervention might also be considered a violation of the principle of non-intervention; *see* Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, 205 (June 27).

9 U.N. Charter Article 42.

10 S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

11 S.C. Res. 1973, U.N. Doc S/RES/1973 (Mar. 17, 2011). Interestingly, Russia and China have voiced reservations over the interpretation of this Resolution as authorizing the use of force.
12 U.N. Charter Article 51.
13 There have been minor cross-border incidents, such as stray shelling into the territories of both Turkey and Israel. However, it is questionable whether these amount to an "armed attack" by Syria against these states, and, in any event, these States have not requested US assistance in defending themselves.
14 President Barack Obama, Remarks by the President in Address to the Nation on Syria (September 10, 2013). Daniel Bethlehem points out in this regard that "the recent request by Turkey under the framework of NATO, now agreed, to be provided with Patriot missile batteries to protect against the risk of a Syrian use of chemical weapons, suggests the possibility of a collective self-defence rationale for military intervention to address such a threat." (Daniel Bethlehem, *A Brief Reply on the Legal Bases for Intervention in Syria*, Opinio Juris, December 8th, 2012, http://opiniojuris.org/2012/12/08/a-brief-reply-on-the-legal-bases-for-intervention-in-syria/).
15 The President refers to this possibility, saying that "…it could be easier for terrorist organizations to obtain these weapons, and to use them to attack civilians" (*ibid*.). *See also* Ashley Deeks, *Syria, Chemical Weapons, and Possible U.S. Military Action*, Lawfare, December 10th, 2012.
16 The Caroline incident had its origins in a rebellion against British rule in Canada in 1837. British forces destroyed the steamer Caroline, which was being used to transport men and munitions, while it was in a United States port, killing two people. In a letter of 24 April 1841, United States Secretary of State Daniel Webster insisted that for the raid to have been lawful, the British government had to show a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation' and that, even if such a necessity existed, 'the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it" (Max Planck Encyclopedia of Public International Law).
17 R.Y. Jennings, *The Caroline and McLeod Cases*, 32 The American Journal of International Law 82, 89 (1938).
18 "We must recognize that there may well be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation…But we should avoid interpreting the customary law as if it broadly authorized preemptive strikes and anticipatory defense in response to threats." (Oscar Schachter, *The Right of States to Use Armed Force*, 82 Michigan Law Review 1620, 1634 (1984)).
19 Michael Schmitt, *The Syrian Intervention: Assessing the Possible International Law Justifications*, 89 U.S. Naval War College, International Law Studies 744, 744 (2013). For a general analysis see, for example, Sean D. Murphy, *The Doctrine of Preemptive Self-Defense* 50 Villanova Law Review 699, (2005).
20 Schmitt, *ibid*. at 748.
21 Tallinn Manual on the International Law Applicable to Cyber Warfare (Michael N. Schmitt, gen. ed., 2013), http://www.ccdcoe.org/249.html.

22 Schmitt, *supra* note 20. *See also* Deeks, *supra* note 16.
23 President Barack Obama, *supra* note 15.
24 John B. Bellinger III, *A Tough Case For Strikes on Syria*, Council on Foreign Relations, September 10th, 2013, http://www.cfr.org/syria/tough-case-strikes-syria/p31375.
25 For a short general analysis of the concept see Malcolm Shaw, International Law (6th ed., 2008) 1155 – 1158.
26 For the official full text, see: https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version. Eventually the UK Parliament rejected the UK government's request to authorize the use of force in Syria. However this rejection was not based on reference to legal considerations, and therefore does not seem to affect the validity of the legal thesis of the UK government.
27 Deeks, *supra* note 16.
28 Sir Daniel Bethlehem, *Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention*, Blog of the European Journal of International Law, September 12th, 2013, http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/.
29 Bethlehem, *ibid.* With regard to Syria, Bethlehem submits that beyond the general analysis of the conditions to assert a claim of humanitarian intervention, a full analysis would require consideration of a whole host of other legal issues, including at least: (a) the legal effect of the Security Council's failure to act, (b) the legal effect that attaches to the use of chemical weapons, as distinct from other massive humanitarian violations that have occurred previously; (c) the legal effect of resolutions of the Arab League; (d) the legal effect of the opposition of Russia, China, Iran and others to the suggestion of intervention; and (e) the legal effect of the massive cross-border refugee flows into Turkey, Jordan and elsewhere.
30 See, for example, Dapo Akande, *The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect*, Blog of the European Journal of International Law, August 28th, 2013, http://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/. Akande contends that there is "very little State support for the view that international law permits States to use force extraterritorially on humanitarian grounds." Furthermore, after NATO's intervention in Kosovo, the G77 (composed of 133 member States of the UN) declared their rejection of "the so-called 'right' of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law." (Declaration of the South Summit from the Group of 77 South Summit (April 2000), para. 54, http://www.g77.org/summit/Declaration_G77Summit.htm).
31 Soft-law is a term referring to instruments (i.e., resolutions, treaty text not in force, international reports, etc.) and norms that "all share a certain proximity to law and have a certain legal relevance, but at the same time they are not legally binding per se as a matter of law." (Max Planck Encyclopedia of Public International Law).
32 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

33 S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006).
34 2005 World Summit Outcome, *supra* note 33, para.138.
35 The operative paragraph of the World Summit Outcome document states: "The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis…" (2005 World Summit Outcome, *ibid.* at para. 139).
36 Bethlehem, *supra* note 29. Bethlehem, who acknowledges that humanitarian intervention could potentially serve as a legal basis to attack Syria, cautions that "[w]hether any intervention on humanitarian grounds would ultimately be assessed to be lawful would also be heavily contingent on the facts (including the soundness of the evidence relied upon) and the appreciations of the proper purpose of any such action and likelihood that such a purpose would be achieved."
37 Text of draft legislation regarding Authorization for Use of United States Armed Forces in connection with the conflict in Syria, http://www.whitehouse.gov/sites/default/files/docs/aumfresolutiontext.pdf.
38 This prohibition also appears in the 1993 Chemical Weapons Convention (CWC) but Syria was not, at the time of the attack on August 21, 2013, a party to this convention (Syria ratified the CWC on September 14, 2013). In addition, Syria was bound by the 1925 *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* that prohibits the use of such methods of warfare in international armed conflicts.
39 Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapon Attacks*, American Society of International Law, August 30th, 2013, http://www.asil.org/insights/volume/17/issue/21/legality-intervention-syria-response-chemical-weapon-attacks.
40 Anderson, *ibid. See also* Carsten Stahn, *Syria and the Semantics of Intervention, Aggression and Punishment*, Blog of the European Journal of International Law, September 19th, 2013, http://www.ejiltalk.org/syria-and-the-semantics-of-intervention-aggression-and-punishment/.
41 Anderson*, supra* note 40.
42 Michael Ignatieff, *How to Save the Syrians*, The New York Review of Books, September 13th, 2013.
43 Anderson, *supra* note 40. See also Jack Goldsmith, *More on the UN Charter, Syria, and "Illegal but Legitimate"*, Lawfare, September 5th, 2013, http://www.lawfareblog.com/2013/09/more-on-the-un-charter-syria-and-illegal-but-legitimate/.
44 Kenneth Anderson, *Five Fundamental International Law Approaches to the Legality of a Syria Intervention*, Lawfare, September 5th, 2013, http://www.lawfareblog.com/2013/09/five-fundamental-international-law-approaches-to-the-legality-of-a-syria-intervention/.
45 Anderson, *supra* note 40, writing that "(t)he United States by and large adopts a pragmatic view of international law, and this provides perhaps the best, or at least most plausible, argument in favor of intervention to address violations of the

norm against chemical weapons use by the Assad regime. The argument is that the United States acts to defend a norm that, while lacking formal expression in a strictly legalistic sense, has long endured as a profound humanitarian constraint."

46 Harold Koh, *Syria and the Law of Humanitarian Intervention (Part III – A Reply)*, Just Security, October 10th, 2013, http://justsecurity.org/2013/10/10/syria-law-humanitarian-intervention-part-iii-reply/.

47 Harold Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, Just Security, October 2nd, 2013, http://justsecurity.org/2013/10/02/koh-syria-part2/; *see also* Jens Iverson, *Guest Post: The New Haven School on Syria–Observing Professors Koh and Stahn*, Opinio Juris, October 16th, 2013, http://opiniojuris.org/2013/10/16/jens-iverson-guest-post-new-haven-school-syria-observing-professors-koh-stahn/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.

48 Koh, *ibid.*

49 Professor Malcolm Shaw (*supra* note 26) explains that "…the substance of customary law must be looked for primarily in the actual practice and *opinio juris* of states" (at 74). With regard to state practice, Shaw notes that "[t]here are a number of points to be considered concerning the nature of a particular practice by states, including its duration, consistency, repetition and generality." (*ibid.,* 76) And *opinio juris,* focuses on "how the state views its own behavior." As he explains, "The *opinio juris* or belief that a state activity is legally obligatory, is the factor which turns the usage into a custom and renders it part of the rules of international law. To put it slightly differently, states will behave a certain way because they are convinced it is binding upon them to do so." (*ibid.*, 84). In this context, also see Akande, *supra* note 31. Akande explains that this is why for the UK to see its vision of international law on humanitarian intervention established, it has to insist that that vision is already established. This is what the *opinio juris* aspect of custom requires.

50 Akande, *supra* note 31.

51 Shaw, *supra* note 26, 91.

52 For detailed criticism on the approach of Koh, see Carsten Stahn, *On 'Humanitarian Intervention', 'Lawmaking' Moments and What the 'Law Ought to Be'–Counseling Caution Against a New 'Affirmative Defense to Art. 2(4)' After Syria*, Opinio Juris, October 8th, 2013, http://opiniojuris.org/2013/10/08/guest-post-humanitarian-intervention-lawmaking-moments-law-counseling-caution-new-affirmative-de/. For a comparative analysis of the positions of Koh and Stahn, see Iverson, *supra* note 47.

53 Rosalyn Higgins, Problems and Process: International Law and How We Use It 3 (1994).