
9-1-2021

A Humanitarian Exception: The International Legal Justification for U.S. Military Action Against the Syrian Regime

Nordin, Vincent

Follow this and additional works at: <https://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Nordin, Vincent, Case Note, *A Humanitarian Exception: The International Legal Justification for U.S. Military Action Against the Syrian Regime*, 61 SANTA CLARA L. REV. 811 (2021).
Available at: <https://digitalcommons.law.scu.edu/lawreview/vol61/iss3/3>

This Case Note is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized editor of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

**A HUMANITARIAN EXCEPTION: THE
INTERNATIONAL LEGAL JUSTIFICATION FOR U.S.
MILITARY ACTION AGAINST THE SYRIAN REGIME**

*Vincent Nordin**

The United Nations Charter provides that countries are prohibited from the use of force except when done in self-defense or when authorized by the United Nations Security Council. Although the United States' airstrikes against Syria in 2017 and 2018 did not fit into either of those two exceptions, the airstrikes were legal under international law due to an exception for humanitarian intervention. The question of whether customary international law recognizes such an exception is far from settled. Most scholars of international law believe that humanitarian intervention is not a part of customary international law, while a minority hold the opposite view. This Article sides with the latter. It argues that an exception for humanitarian intervention exists as part of customary international law because such interventions are a widespread practice among states and are accepted as law by a sufficient number of states. Additionally, the adoption of such an exception would lead to a more just world because it would allow states to intervene to stop or mitigate humanitarian crises. There are, naturally, risks associated with the adoption of a humanitarian exception, such as states abusing the exception to pursue less than altruistic goals. That risk, however, can be mitigated by adherence to guidelines that humanitarian interventions would have to meet in order to be legal. Applying the set of guidelines from the Responsibility to Protect, U.S. airstrikes against Syria in 2017 and 2018 would be a legal humanitarian intervention.

* Managing Editor, SANTA CLARA LAW REVIEW Volume 61. J.D. Candidate, Santa Clara University School of Law 2021. I would like to thank Professor David L. Sloss for his help and guidance in writing this Article.

TABLE OF CONTENTS

I. Introduction.....	812
II. Background: The Syrian Civil War.....	814
III. Identification of the Legal Problem	815
IV. Analysis.....	819
A. Authorization by the United Nations Security Council and Self-Defense	819
B. Customary International Law: State Practice	820
C. Customary International Law: <i>Opinio Juris</i>	822
V. Policy argument	827
A. The Advantage of the Humanitarian Intervention Exception.....	828
B. Mitigating the Disadvantages of Humanitarian Intervention Exception.....	828
1. U.S. Airstrikes in Syria	830
2. Russia's Annexation of Crimea	834
VI. Conclusion.....	835

I. INTRODUCTION

The Syrian Civil War has claimed the lives of more than four hundred thousand people since it began in 2011.¹ Many of those deaths were civilians killed during Syrian President Bashar al-Assad's campaign to regain control of the country.² The U.S. responded by conducting airstrikes against the Syrian regime, once after a chemical weapons attack in 2017 that killed over eighty civilians and again after another chemical attack in 2018 that killed more than forty civilians.³

This presents the question of whether the strikes were legal under international law. The U.N. Charter prohibits the use of force but provides exceptions for when force is used in self-defense or when authorized by the United Nations Security Council (UNSC). Even though the U.S. airstrikes did not fit into either of those exceptions, this

1. *Global Conflict Tracker: Civil War in Syria*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/global-conflict-tracker/conflict/civil-war-syria> (last updated Apr. 9, 2021).

2. See The Editors of Encyclopaedia Britannica, *Syrian Civil War*, BRITANNICA, <https://www.britannica.com/event/Syrian-Civil-War/Civil-war> (last visited Apr. 5, 2021).

3. Helene Cooper et al., *U.S., Britain and France Strike Syria Over Suspected Chemical Weapons Attack*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html>; *Syria chemical 'attack': What we know*, BBC (Apr. 26, 2017), <https://www.bbc.com/news/world-middle-east-39500947>.

Article argues the strikes were legal due to the customary international law exception to the U.N. Charter's prohibition on the use of force—humanitarian intervention.

This Article will proceed by explaining the background of the Syrian Civil War and President Assad's use of chemical weapons against civilians. It will then discuss when the U.N. Charter allows for the use of force, and the current scholarship on whether an exception for humanitarian intervention exists as part of customary international law.

Recognizing that most scholars do not think such an exception exists, this Article will show how the customary international law exception for humanitarian intervention has come into being. In order for a practice to become a part of customary international law it must be (1) a widespread practice among states and (2) accepted as law by states. Humanitarian intervention meets both those criteria. As to the first point, evidence of state practice exists in the Cold War era as illustrated by India's intervention in East Pakistan, Tanzania's intervention in Uganda, and Vietnam's intervention in Cambodia.⁴ The most important example of state practice emerged in the post-Cold War era when the North Atlantic Treaty Organization (NATO) intervened to stop the humanitarian crisis in Kosovo.⁵ As to the second point, humanitarian intervention is sufficiently, though certainly not universally, accepted by states as law. The United Kingdom (U.K.) and Belgium have viewed humanitarian intervention as legal since Kosovo.⁶ The United States' position is less clear, though it is accepting of the legality of humanitarian intervention. Furthermore, retroactive praise from states following humanitarian interventions is evidence of yet more states' implicit support for the legality of humanitarian intervention.

This Article will then provide a policy argument to lend support for the idea that humanitarian intervention should exist as part of customary international law. Indeed, the benefits of the existence of such an exception outweigh its disadvantages and would result in a more just world. Recognizing the existence of the exception would allow states to halt or mitigate humanitarian crises. Although the possibility that states may abuse humanitarian interventions to achieve their strategic goals remains, these concerns can be lessened by the presence of guidelines that states would have to meet for their actions to be legal. The final portion of the policy argument will examine how adherence to one set of guidelines set out in the Responsibility to Protect (R2P), would allow for

4. *See infra* Section IV.B.

5. *See infra* Section IV.B.

6. *See infra* Section IV.C.

legal humanitarian interventions like the U.S. airstrikes against Syria but would not allow for actions like Russia's annexation of Crimea.

II. BACKGROUND: THE SYRIAN CIVIL WAR

Demonstrations against President Bashar al-Assad's regime in Syria began in March 2011 as part of a larger political upheaval sweeping the Middle East—the Arab Spring.⁷ What ensued was a multifaction civil war.⁸

Since the beginning of the war, the Assad regime was accused of committing war crimes against Syrian civilians.⁹ On August 20, 2012, “President Obama threaten[ed] to act militarily if Syria cross[ed] a ‘red line’ and use[d] chemical weapons.”¹⁰ While initial reports of the Assad regime's use of chemical weapons had surfaced earlier, the most serious incident involved a sarin gas attack in August 2013 “that killed more than 1,400 civilians in the Damascus suburb of Ghouta.”¹¹ Appearing as though President Obama's “red-line” had been breached, the U.S. did not engage in a military strike against the Assad regime.¹² Instead, the Obama administration decided on a diplomatic solution in which Assad agreed to relinquish his chemical weapons stockpile under a United Nations Security Council Resolution (UNSCR).¹³

Bashar al-Assad, however, did not comply with the agreement. On April 4, 2017, Assad again used chemical weapons against civilians in the northern Idlib province, which resulted in the deaths of eighty-eight people.¹⁴ Bashar al-Assad refused to accept responsibility for the attacks

7. *Why has the Syrian war lasted 10 years?*, BBC (Mar. 12, 2021), <https://www.bbc.com/news/world-middle-east-35806229>; Mona Yacoubian, *Syria Timeline: Since the Uprising Against Assad*, U.S. INST. PEACE (Jan. 1, 2021), <https://www.usip.org/syria-timeline-uprising-against-assad>.

8. See Alicia Sanders-Zakre, *What You Need to Know About Chemical Weapons Use in Syria*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/blog/2018-09-23/what-you-need-know-about-chemical-weapons-use-syria> (last updated Mar. 14, 2019).

9. Ved P. Nanda, *The Future Under International Law of the Responsibility to Protect After Libya and Syria*, 21 MICH. ST. INT'L. L. REV. 1, 14-20 (2013).

10. Haley Bissegger, *Timeline: How President Obama handled Syria*, HILL (Sept. 15, 2013, 10:00 AM), <https://thehill.com/policy/international/322283-timeline-of-how-president-obama-handled-syria->.

11. Sanders-Zakre, *supra* note 8.

12. *Id.*

13. See *id.*

14. Julia Masterson, *Timeline of Syrian Chemical Weapons Activity, 2012-2020*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity> (last updated May 2020); *Chain of events after suspected Syria chemical attack*, NEW INDIAN EXPRESS (Apr. 26, 2017, 9:34 PM), <https://www.newindianexpress.com/world/2017/apr/26/chain-of-events-after-suspected-syria-chemical-attack-1598047-1.html>.

and disputed them as a “fabrication.”¹⁵ Similarly, Russia stated that the Syrian Air Force had struck a terrorist weapons depot that housed the chemical munitions, which in turn released them.¹⁶ Those assertions, however, were not credible. In October 2017, a joint investigative mechanism between the Organization for the Prohibition of Chemical Weapons (OPCW) and the United Nations found the Assad regime guilty of conducting the April 4 attack.¹⁷ The OPCW is the international body designated to implement the Chemical Weapons Convention, an agreement to which the United States, Russia, and Syria are parties.¹⁸ In response to the attack on April 4, President Trump ordered a strike on the Shayrat airbase, which was believed to be the launch site of the chemical weapons attack.¹⁹

Approximately a year later, Assad again used chemical weapons against civilians, this time near Damascus, which killed forty-two people.²⁰ On April 14, 2018 the U.S., as well as France and the United Kingdom, launched an attack against the Assad regime’s chemical weapons infrastructure.²¹ The strike hit a “scientific research center in Damascus, [a] chemical weapons storage facility, located west of Homs, [a]nd a chemical weapons equipment storage facility and command post near Homs.”²²

III. IDENTIFICATION OF THE LEGAL PROBLEM

The discussion above raises the question of whether the Trump administration’s military strikes against the Syrian regime violate international law.

Article 2(4) of the U.N. Charter prohibits the “threat or use of force against the territorial integrity or political independence of any state[.]”²³

15. *Syria chemical ‘attack’*, *supra* note 3.

16. *Id.*

17. Masterson, *supra* note 14.

18. *Chemical Weapons Convention Signatories and States-Parties*, ARMS CONTROL ASS’N, <https://www.armscontrol.org/factsheets/cwcsig> (last updated June 2018).

19. *Timeline: US intervention in Syria’s war since 2011*, AL JAZEERA (Oct. 7, 2019), <https://www.aljazeera.com/news/2019/10/timeline-intervention-syria-war-2011-191007190255685.html>.

20. Ben Hubbard, *Dozens Suffocate in Syria as Government Is Accused of Chemical Attack*, N.Y. TIMES (Apr. 8, 2018), <https://www.nytimes.com/2018/04/08/world/middleeast/syria-chemical-attack-ghouta.html>.

21. *Timeline: US intervention in Syria’s war since 2011*, *supra* note 19.

22. James Griffiths & Laura Smith-Spark, *What we know about the Syria strikes*, CNN (Apr. 14, 2018, 4:37 PM), <https://www.cnn.com/2018/04/14/middleeast/syria-strikes-what-we-know-intl/index.html>.

23. U.N. Charter art. 2, ¶ 4.

This prohibition is accepted as *jus cogens*,²⁴ which means that the concept is so fundamental to the inter-relationship of states that a state cannot deviate from it.²⁵ There are, however, two U.N. Charter based exceptions from the general prohibition. First, pursuant to Chapter VII, a state may use force if the United Nations Security Council provides authorization.²⁶ Second, pursuant to Article 51 a state, or collection of states, may use force in self-defense in response to an armed attack.²⁷

There is, nevertheless, the possibility that humanitarian intervention could still comply with international law if such an exception could be deemed to be customary international law. A practice becomes a part of customary international law when two elements are met; there must be (1) a general practice among states and (2) a belief among states that such practice is legally authorized, also known as *opinio juris*.²⁸ Regarding the first element, the practice must be sufficiently widespread as well as consistent.²⁹ Regarding the second element, the practice must be undertaken “with a sense of legal right or obligation.”³⁰

The majority view among international law scholars is that humanitarian intervention is not a part of customary international law.³¹ This camp of scholars argues that there can be no humanitarian intervention exception to the United Nations Charter’s prohibition on the use of force because the requisite elements needed to establish a practice as part of customary international law are simply not met.³² One scholar, Derek Jinks, encapsulates the majority’s position on the issue of state practice. He refuses to accept that there is an exception for humanitarian intervention because “state practice regarding the legality of humanitarian intervention at present is neither sufficiently extensive nor sufficiently uniform to support the conclusion that the [United Nations] Charter permits it.”³³ Other scholars, such as Dapo Akande, argue that

24. Daniela Abratt, *U.S. Intervention in Syria: A Legal Responsibility to Protect?*, 95 DENV. L. REV. 21, 36 (2017); Dapo Akande, *The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect*, BLOG EUR. J. INT’L L. (Aug. 28, 2013), <https://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/>.

25. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 106 (3d ed. 2018).

26. See U.N. Charter art. 42.

27. U.N. Charter art. 51.

28. MURPHY, *supra* note 25, at 102, 104.

29. *Id.* at 102.

30. *Id.* at 104.

31. Richard B. Bilder, *Kosovo and the “New Interventionism” Promise or Peril?*, 9 J. TRANSNAT’L L. & POL’Y 153, 161 (1999).

32. See *id.* at 161.

33. Goodman, *What Do Top Legal Experts Say About the Syria Strikes?*, JUST SECURITY (Apr. 7, 2017), <https://www.justsecurity.org/39712/top-legal-experts-syria-strikes/>.

“there is little *opinio juris* on which a doctrine of customary international law might be based.”³⁴ Indeed, scholars point to the fact that the only member of the United Nations Security Council, and major nation in general, to explicitly support the idea of a humanitarian intervention exception under customary international law is the United Kingdom.³⁵

Opponents of the humanitarian intervention exception also argue against accepting the legality of such a practice on policy grounds. The main thrust of this argument is based on the idea that powerful states could abuse humanitarian intervention to pursue less than altruistic goals, which would in turn create a more chaotic and less just world.³⁶ The most heinous example of this occurred in 1939, when Nazi Germany annexed the Sudetenland in order to protect ethnic Germans living there and then subsequently invaded the rest of Czechoslovakia.³⁷ Scholars in this camp also raise the question of what is truly just and moral.³⁸ During the NATO bombing of Serbia in 1999, for example, President Clinton was assured that the United States and its allies had “done the right thing” by stopping Slobodan Milosevic from completing his objective of ethnically cleansing Kosovo.³⁹ While that view was certainly shared by many around the world, there was also another view of NATO’s intervention in Kosovo. Richard Bilder expressed this view in an interesting analogy to antiquity:

From [nonwestern governments’] standpoint, the relevant analogy was not the United States and NATO cavalry bravely riding to the rescue of about to be butchered, helpless, decent settlers, but of an arrogant and bullying Imperial Rome, with its docile and subservient “allies” in tow, launching a brutal punitive expedition against a small and weak nation that had the temerity to try to preserve its sovereignty and defy Rome’s ultimatums and hegemony—in the process devastating its territory, killing and humiliating its people, and seeking to capture and bring its leaders in chains to Rome—read, the Hague—as a lesson to others.⁴⁰

Perhaps the analogy indulges in some hyperbole, but it does present a relevant concern that many states around the world have about humanitarian intervention. When does a situation rise to the requisite

34. Akande, *supra* note 24.

35. *See, e.g., id.*

36. Bilder, *supra* note 31, at 160-61.

37. *Id.*; *see generally* History.com Editors, *Nazis take Czechoslovakia*, HISTORY, <https://www.history.com/this-day-in-history/nazis-take-czechoslovakia> (last updated July 28, 2019).

38. *See* Bilder, *supra* note 31, at 160.

39. *Id.* at 153.

40. *Id.* at 154.

level of moral necessity to warrant a humanitarian intervention by foreign powers? To what extent will those powers use such interventions to pursue their own, non-humanitarian, policy goals?

On the other hand, a minority of scholars view humanitarian intervention as a part of customary international law. One of those scholars, Sir Daniel Bethlehem, argued that humanitarian intervention has become an exception under customary international law because of the confluence of several “threads” that although “fragile” and not compelling in isolation, become “robust and compelling” when woven together.⁴¹ The eight threads that constitute Sir Bethlehem’s strand are: (1) the United Nations objective as stated in its preamble to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person”; (2) the “last resort right of States to act in situations of distress . . . and circumstances of necessity,” as recognized by international law; (3) the international legal concept that egregious and illegal acts by states cannot go unaddressed; (4) examples of states engaging in humanitarian intervention, such as Vietnam invading Cambodia; (5) the 1991 no-fly zone over Iraq; (6) NATO’s 1999 Kosovo intervention; (7) Responsibility to Protect (which will be explained later in the Article); and (8) developments in international criminal law.⁴²

Along a similar vein, some scholars in this camp, such as Milena Sterio, have argued that the rapid acceptance and states’ willingness to engage in humanitarian interventions constitutes what they term “a Grotian moment.”⁴³ The term is named after the Dutch Scholar Hugo Grotius, who is often credited with creating modern international law.⁴⁴ A Grotian moment means a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.⁴⁵ As the argument goes, NATO intervention in Kosovo was a watershed moment.⁴⁶ Although the bombing campaign aimed at preventing Yugoslav forces from perpetrating a humanitarian crisis in Kosovo did not have authorization from the United Nations Security Council, “the global consensus on [the] intervention was that it was ‘unlawful but legitimate.’”⁴⁷ This in turn sparked the creation of the Responsibility to Protect doctrine, which attempted to refashion the

41. Daniel Bethlehem, *Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention*, BLOG EUR. J. INT’L L. (Sept. 12, 2013).

42. *Id.*

43. See generally Milena Sterio, *Humanitarian Intervention Post-Syria: A Grotian Moment?*, 20 ILSA J. INT’L & COMP. L. 343 (2014).

44. *Id.* at 344.

45. *Id.* at 344-45.

46. *Id.* at 347.

47. *Id.*

way states in the international system viewed their sovereignty and also authorized humanitarian interventions in limited circumstances.⁴⁸ Other scholars, like Harold Koh, follow a similar line of reasoning.⁴⁹ He argues that Kosovo was a watershed moment for the development of humanitarian intervention in customary international law, and that the Responsibility to Protect shifted the view of humanitarian intervention from states' right to intervene, to a "collective notion that the international community has a duty or 'responsibility to protect' a nation's citizens when the national government has undeniably forfeited that responsibility."⁵⁰

IV. ANALYSIS

A. Authorization by the United Nations Security Council and Self-Defense

The Trump administration's humanitarian interventions in 2017 and 2018 would be illegal under the U.N. Charter.

First, the United States did not receive UNSC authorization to use military force against Syria.⁵¹ This was not for a lack of trying.⁵² Russia and China have partnered in vetoing various Security Council Resolutions authorizing the use of force against Syria for its use of chemical weapons against civilians.⁵³ For example, the veto of Security Council Draft Resolution (S/2017/172) on February 28, 2017, marked the seventh time that Russia had vetoed an attempt at Security Council authorization and the sixth time China had done so.⁵⁴

Second, the United States did not act in self-defense. Syria's use of chemical weapons was part of an intrastate conflict affecting Syrian civilians and was not a direct attack on the U.S. or its allies.⁵⁵ Although during an interview with CNN, President Obama implied that the U.S. would be acting in self-defense since core U.S. interests were implicated

48. *Id.* at 347; *see generally* INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) [hereinafter R2P].

49. Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013), <https://www.justsecurity.org/1506/koh-syria-part2/>.

50. *Id.*

51. Michael Schmitt & Chris Ford, *The Use of Force in Response to Syrian Chemical Attacks: Emergence of a New Norm?*, JUST SECURITY (Apr. 8, 2017), <https://www.justsecurity.org/39805/force-response-syrian-chemical-attacks-emergence-norm/>.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*; Akande, *supra* note 24.

by the chemical weapons attack, such a connection is tenuous at best.⁵⁶ While it is true that the U.S. seeks to stop the proliferation of chemical weapons and to protect its allies near Syria, there remains no serious threat or actual use of chemical weapons against the U.S. or its allies in the region such as Turkey and Israel.⁵⁷

B. Customary International Law: State Practice

In order to be legal, U.S. military action against the Assad regime must fit into a customary international law exception to the prohibition on the use of force. Customary international law provides such an exception for humanitarian intervention outside the framework of the U.N. Charter. The first step in establishing that such humanitarian intervention is part of customary international law is showing that such action is a general practice among states.⁵⁸ This is arguably the case with respect to humanitarian intervention.

There are three clear examples of states engaging in humanitarian interventions in the Cold War era. First, India's intervention into East Pakistan, now known as Bangladesh, in order to stop the genocide against the largely Hindu Bengali minority.⁵⁹ The Indian government justified its military action, in part, by presenting Pakistan's military oligarchy as analogous to Adolf Hitler's Third Reich.⁶⁰ It additionally circulated a then secret, though now public, report among Indian leadership describing the purpose of the intervention as saving the population of East Pakistan from a genocide directed by the Pakistani government.⁶¹ Second, Vietnam's invasion of Cambodia in response to the genocide perpetrated by the communist Khmer Rouge regime.⁶² Pol Pot, Cambodia's Marxist leader, killed approximately two million of his own people and was only stopped in 1979 when Vietnam invaded and

56. See Alan Silverleib, *Exclusive: Obama tells CNN key decisions nearing on Syria, Egypt*, CNN (Aug. 23, 2013, 3:01 PM), <https://edition.cnn.com/2013/08/23/politics/obama-cnn-new-day-interview>.

57. See Oona A. Hathaway & Scott J. Shapiro, *Opinion, On Syria, a U.N. Vote Isn't Optional*, N.Y. TIMES (Sept. 3, 2013), <https://www.nytimes.com/2013/09/04/opinion/on-syria-a-un-vote-isnt-optional.html?hp>.

58. MURPHY, *supra* note 25, at 102.

59. Gary J. Bass, *The Indian Way of Humanitarian Intervention*, 40 YALE J. INT'L L. 227, 253-55 (2015).

60. *Id.* at 253.

61. *Id.*

62. See Abratt, *supra* note 24, at 47.

deposed him.⁶³ Third, Tanzania's invasion of Uganda and the overthrow of Idi Amin's regime on humanitarian grounds.⁶⁴

NATO's air campaign over Kosovo provides an example of states engaging in humanitarian intervention during the post-Cold War era.⁶⁵ On March 24, 1999, nineteen NATO members began Operation Allied Force to prevent the Federal Republic of Yugoslavia's (hereafter "Serbia") ethnic cleansing of Albanians living in Kosovo.⁶⁶ The bombing campaign focused on Slobodan Milosevic's regime and its capacity to carry out its ethnic cleansing objective in Kosovo.⁶⁷ By early June 1999, Serbia had capitulated and agreed to a phased withdrawal from Kosovo.⁶⁸

One may counter by arguing that state practice has not been established because evidence of states engaging in humanitarian intervention outside the U.N. framework is not sufficiently widespread or consistent. Many scholars of international law—such as Oscar Schachter,⁶⁹ Dapo Akande,⁷⁰ and Derek Jinks⁷¹—have made such a claim. While superficially plausible, this contention is unpersuasive because opportunities to engage in humanitarian intervention outside the U.N. framework are infrequent.⁷² In order for there to be an opportunity for a state to engage in humanitarian intervention there needs to be (1) a state perpetrating a humanitarian crisis and (2) a permanent member of the UNSC willing to use its veto to prevent authorization of the use of force against that state. Libya is one example, among many, where a humanitarian intervention outside the U.N. framework could have occurred but did not due to Libya's lack of backing by a permanent member of the UNSC.⁷³

63. *Id.*; *Khmer Rouge: Cambodia's years of brutality*, BBC (Nov. 16, 2018), <https://www.bbc.com/news/world-asia-pacific-10684399>.

64. See Farooq Hassan, *Realpolitik in International Law: After Tanzanian-Ugandan Conflict "Humanitarian Intervention" Reexamined*, 17 WILLAMETTE L. REV. 859, 865 (1981).

65. Koh, *supra* note 49.

66. Schmitt & Ford, *supra* note 51; BENJAMIN S. LAMBETH, NATO'S AIR WAR FOR KOSOVO: A STRATEGIC AND OPERATIONAL ASSESSMENT v, xvii (2001).

67. Bilder, *supra* note 31, at 153.

68. *Note on NATO's Intervention in Kosovo*, in INTERNATIONAL LAW: CASES AND MATERIALS 1130, 1132 (Lori Damrosch & Sean Murphy eds., 7th ed. 2019).

69. Oscar Schachter, *International Law in Theory and Practice*, in INTERNATIONAL LAW: CASES AND MATERIALS 1129, 1129-30 (Lori Damrosch & Sean Murphy eds., 7th ed. 2019).

70. See Akande, *supra* note 24.

71. See Goodman, *supra* note 33.

72. See Jayshee Bajoria & Robert McMahon, *The Dilemma of Humanitarian Intervention*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/dilemma-humanitarian-intervention> (last updated June 12, 2013, 8:00 AM).

73. See Abratt, *supra* note 24, at 48-49, 54.

C. Customary International Law: Opinio Juris

The second element necessary to establish a practice as part of customary international law is *opinio juris*, or that states accept the practice as law.⁷⁴ While there is certainly no global consensus on the legality of humanitarian intervention,⁷⁵ a significant number of states, including three permanent members of the United Nations Security Council, view such action as legal.

The U.K.'s public position on humanitarian intervention is the clearest example of the legality of such a practice. Despite lacking UNSC authorization for NATO's operation in Kosovo, the U.K.'s Secretary of State for Defense, George Robertson, stated, "[w]e are in no doubt that NATO is acting within international law and our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a human catastrophe."⁷⁶ In 2017, the U.K.'s Attorney General, Jeremy Wright, reiterated his country's position that humanitarian intervention, in exceptional circumstances, exists as a customary law exception to the U.N.'s prohibition on the use of force.⁷⁷

Belgium has also explicitly supported the idea that humanitarian intervention serves as an exception to the U.N.'s prohibition on the use of force. During its oral defense before the International Court of Justice on the Legality of Use of Force against Yugoslavia, Belgium presented the argument that NATO's actions were justified by past precedent of states acting on the grounds of humanitarian necessity without UNSC authorization.⁷⁸

Furthermore, other NATO members' participation in the bombing of Serbia provides tacit support for the humanitarian intervention exception under customary international law. As the U.S. Assistant Secretary of State for Democracy, Human Rights, and Labor during the Kosovo campaign noted in hindsight, all the members of NATO that participated in bombing Serbia accepted the legality of humanitarian intervention without UNSC approval.⁷⁹ Certainly, no NATO member thought its actions against Serbia were illegal.

74. MURPHY, *supra* note 25, at 104.

75. *See, e.g.*, Schachter, *supra* note 69, at 1129.

76. *Note on NATO's Intervention in Kosovo*, *supra* note 68, at 1132.

77. Jeremy Wright, Attorney Gen., U.K., Attorney General's Speech at International Institute for Strategic Studies: The modern law of self-defense (Jan. 11, 2017), <https://www.justsecurity.org/wp-content/uploads/2017/01/United-Kingdom-Attorney-General-Speech-modern-law-of-self-defense-IISS.pdf>.

78. Legality of the Use of Force (Yugo. v. Belg.), 1999 I.C.J. Pleadings 11-12 (May 10, 1999).

79. Koh, *supra* note 49.

Along a similar vein, the U.S. accepts the legality of humanitarian intervention because it (1) never perceives itself as violating international law and (2) has stated that it would conduct humanitarian interventions outside the U.N. Charter framework.⁸⁰ If a country always views its international actions as legal, states that it will operate in a certain fashion, and does so, then it follows that the country supports the legality of such operations. Kosovo represents the genesis of the United States' position on the matter. Although the U.S. never presented a formal legal opinion for Operational Allied Force,⁸¹ it both participated in a humanitarian intervention and presented a humanitarian justification, among others, for the operation.⁸²

The U.S. position on the legality of humanitarian intervention was crystallized during the Obama administration. Its 2010 National Security Strategy states that the U.S. and "all member states of the U.N." have recognized the responsibility to prevent humanitarian crises resides in sovereign states but passes to the international community when those states fail to prevent such crises or perpetrate them.⁸³ This concept is called the Responsibility to Protect and is the name of a 2001 report by the International Commission on Intervention and State Sovereignty (ICISS).⁸⁴ At a speech in Stockholm later in his first term, President Obama made the argument that the United States would be increasingly confronted with humanitarian crises in the future and would be compelled to act to uphold international norms despite not acting in self-defense or lacking UNSC authorization.⁸⁵ Shortly thereafter, President Obama addressed the U.N. General Assembly and said, "sovereignty cannot be a shield for tyrants" to commit human rights violations or for the international community to do nothing in response.⁸⁶

The Trump administration has continued the view of humanitarian intervention as legal. The clearest expression of this view can be seen in former U.N. Ambassador Nikki Haley's statement at the UNSC, when

80. See Jack Goldsmith, *Two Important Implications from President's Press Conference in Sweden*, LAWFARE (Sept. 5, 2013, 7:37 AM), <https://www.lawfareblog.com/two-important-implications-presidents-press-conference-sweden>; see also Abratt, *supra* note 24, at 24.

81. *Note on NATO's Intervention in Kosovo*, *supra* note 68, at 1131-32.

82. *Id.*

83. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 48 (2010), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

84. Nanda, *supra* note 9, at 5-6.

85. Goldsmith, *supra* note 80.

86. *Text of Obama's Speech at the U.N.*, N.Y. TIMES (Sept. 24, 2013), <https://www.nytimes.com/2013/09/25/us/politics/text-of-obamas-speech-at-the-un.html?ref=politics&pagewanted=all&pagewanted=print>.

she warned that the U.S. would act without UNSC authorization to prevent humanitarian crises.⁸⁷ On April 5, 2017, the U.K., France and the U.S. brought forward a UNSC resolution to both condemn and investigate a chemical weapons attack the Syrian government had perpetrated a day earlier.⁸⁸ Yet, Russia protected Syria by vetoing the resolution.⁸⁹ In response, Ambassador Haley stated, “[w]hen the United Nations consistently fails in its duty to act collectively, there are times in the life of states that we are compelled to take our own action.”⁹⁰ On April 7, the U.S. conducted a missile strike against a Syrian regime air base.⁹¹

There is, however, a significant amount of opposition to the concept of humanitarian intervention. Russia has been a vocal opponent of humanitarian intervention when such opposition does not conflict with, but rather complements, its foreign policy objectives.⁹² For example, after NATO began Operation Allied Force in Kosovo, Russia introduced a Security Council Resolution to condemn NATO’s campaign as a “flagrant violation” of the U.N. Charter.⁹³ Vladimir Putin has felt so strongly about the illegality of humanitarian intervention taken outside the U.N. Charter that he wrote an opinion editorial in the *New York Times* in which he attempted to persuade the American public against military action in Syria during the Obama Administration.⁹⁴ He argued that attacking the Assad regime (or humanitarian intervention in general) would risk destroying the idea underpinning “the stability of international relations”—the United Nation’s prohibition on the use of force absent Security Council authorization—and might even risk the United Nations suffering the “fate of the League of Nations.”⁹⁵ Ironically, Russia would engage in its own humanitarian intervention less than a year later in Crimea.⁹⁶

Like Russia, China views humanitarian intervention as illegal. In 2018, China condemned the United States’ airstrike against the Syrian

87. See Abratt, *supra* note 24, at 24.

88. *Id.* at 23-24.

89. See *id.* at 24.

90. *Id.*

91. See *id.*

92. See, e.g., Note on NATO’s Intervention in Kosovo, *supra* note 68.

93. *Id.* at 1131.

94. See generally Vladimir V. Putin, Opinion, *A Plea for Caution From Russia*, N.Y. TIMES (Sept. 11, 2013), <https://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html>.

95. See generally *id.*

96. See *infra* Part V.

regime as violating international law.⁹⁷ In addition, a group of 130 states, including China, issued the 2000 Declaration of the South Summit, which rejected the concept of humanitarian intervention because it has “no legal basis in the United Nations Charter.”⁹⁸

The concept of R2P suggests that the international community is reluctant to codify humanitarian intervention outside the confines of the U.N. Charter. Both R2P’s original report and its final adoption in the 2005 World Summit Outcome stress the need to address humanitarian crises through the UNSC.⁹⁹ Although both versions conceive of the possibility of a state acting without UNSC authorization, such as through a General Assembly “Uniting for Peace” resolution,¹⁰⁰ this non-UNSC authorization mechanism would still require a state to act through an organ of the U.N. and within its Charter.

An important distinction, however, does exist between R2P and the World Summit Outcome. R2P does not completely adhere to the belief that humanitarian interventions must occur within the confines of the U.N. Charter. The ICISS envisioned that regional or sub-regional organizations could conduct humanitarian interventions within their boundaries when the UNSC rejects a proposal for legitimate humanitarian intervention.¹⁰¹ Such an action would directly contravene Article 53(1) of the U.N. Charter, which states that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council”¹⁰² This suggests that some members of the international community do believe in the legality of humanitarian intervention. Canada, for example, can be counted among those members since it created ICISS for the express purpose of addressing the tension between humanitarian intervention and state sovereignty.¹⁰³ Another example of ICISS’ willingness to circumvent UNSC authorization of humanitarian interventions is evident

97. See Laura Zhou & Agence France-Presse, *China opposes Western air strikes on Syria, calls for talks*, S. CHINA MORNING POST (Apr. 14, 2018, 6:15 PM), <https://www.scmp.com/news/china/diplomacy-defence/article/2141732/china-opposes-western-airstrikes-syria-calls-talks>.

98. See Akande, *supra* note 24; see also GROUP OF 77 SOUTH SUMMIT, DECLARATION OF THE SOUTH SUMMIT (2000), https://www.g77.org/summit/Declaration_G77Summit.htm.

99. R2P, *supra* note 48, at para. 6.13; *Responsibility to Protect*, UNITED NATIONS, OFF. ON GENOCIDE PREVENTION & RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml> (last visited Apr. 6, 2021) [hereinafter World Summit Outcome].

100. R2P, *supra* note 48, at para. 6.7; see World Summit Outcome, *supra* note 99, at para. 139.

101. R2P, *supra* note 48, at paras. 6.28, 6.31.

102. U.N. Charter art. 53, ¶ 1.

103. World Summit Outcome, *supra* note 99.

in the organization's concern about the improper use of UNSC permanent member veto power.¹⁰⁴

Despite these counterarguments, states' retroactive praise for humanitarian intervention points to the conclusion that states do generally accept the practice as legal. For example, Australia, Canada, France, Germany, Israel, Japan, Spain, Italy, Saudi Arabia, Jordan, and Turkey all expressed support for President Trump's 2017 missile strike against a Syrian airbase in response to the Assad regime's use of chemical weapons against civilians.¹⁰⁵ Additionally, more nations supported than opposed or condemned the April 2018 airstrikes against Syria's chemical weapons infrastructure.¹⁰⁶ Thirty-nine countries expressed their support for the strikes, including all twenty-nine members of NATO,¹⁰⁷ while seventeen countries condemned the strike.¹⁰⁸ It would appear that the legality of humanitarian intervention, albeit in highly limited circumstances, has become a popular view among states.

Furthermore, France's participation in the April 2018 airstrikes against Syria provides additional evidence that it accepts the legality of humanitarian intervention. After it had conducted the strikes, France justified its actions by alluding to their legality.¹⁰⁹ At an emergency session of the United Nations Security Council the French ambassador stated:

[o]ur action is in full conformity with the objectives and values enshrined in the United Nations Charter, from its very first lines. Our organisation aims to 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.'¹¹⁰

Taken with its participation in Operation Allied Force in 1999, France's participation in the April 2018 strike and subsequent justification suggest that the French government accepts the legality of humanitarian intervention. This would mean that a majority of the

104. *See infra* Part V.

105. Schmitt & Ford, *supra* note 51.

106. Alonso Gurmendi Dunkelberg et al., *Mapping States' Reactions to the U.S. Strikes Against Syria of April 2018 – A Comprehensive Guide*, JUST SECURITY (May 7, 2018), <https://www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/>.

107. *Id.*; Associated Press, *NATO's 29 members support Syria airstrikes: NATO chief*, CTV NEWS (Apr. 14, 2018, 12:27 PM), <https://www.ctvnews.ca/world/nato-s-29-members-support-syria-airstrikes-nato-chief-1.3885258>.

108. Dunkelberg et al., *supra* note 106.

109. *Id.*

110. *Id.*

permanent members on the United Nations Security Council support the legality of humanitarian intervention.

Russia's failed attempts to condemn humanitarian interventions at the United Nations Security Council lends additional support to the idea that states do accept the legality of humanitarian intervention outside the U.N. Charter. After the April 2018 air strikes against the Syrian regime, Russia introduced, but failed to pass, a United Nations Security Council Resolution condemning aggression against Syria perpetrated by the United States, the United Kingdom, and France.¹¹¹ Eight countries voted against Russia's proposed resolution—the U.S., the U.K., France, the Netherlands, Sweden, Kuwait, Poland, and Ivory Coast—and four abstained, while only two countries voted with Russia—Bolivia and China.¹¹² Russia also attempted to condemn NATO's bombing campaign against Serbia as illegal, but failed because twelve members of the United Nations Security Council disagreed with Russia's characterization of the operation.¹¹³ Indeed, Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, the Netherlands, Slovenia, the U.K., and the U.S. voted against Russia's proposed resolution.¹¹⁴

V. POLICY ARGUMENT

The legal argument for the existence of a humanitarian intervention exception under customary international law is, admittedly, a close call. Therefore, it is necessary to assess whether accepting the humanitarian intervention exception or not would yield the best outcome. Upon completing such an analysis, it is clear that customary international law should be interpreted to allow humanitarian interventions because its benefits outweigh its disadvantages and would result in a more just world. Furthermore, states' abuse of humanitarian intervention—the main policy argument against accepting humanitarian intervention as a customary law exception—can be mitigated by adherence to rules about such interventions. An analysis of R2P's rules for engaging in humanitarian intervention shows that legitimate actions, such as the U.S. airstrikes against Syria, would be allowed while illegitimate actions, such as Russia's annexation of Crimea, would not.

111. Doug Stanglin et al., *Pentagon: U.S. allied strike set back Syrian chemical weapons program 'for years'*, USA TODAY (Apr. 14, 2018, 8:43 AM), <https://www.usatoday.com/story/news/world/2018/04/14/us-missile-strike-syria-russia-condemns-aggression/517062002/>.

112. *U.N. rejects Russian attempt to condemn U.S. 'aggression' on Syria*, HINDU (Apr. 14, 2018, 6:36 PM), <https://www.thehindu.com/news/international/un-rejects-russian-attempt-to-condemn-us-aggression-on-syria/article23541095.ece>.

113. U.N. SCOR, 54th Sess., 3989th mtg. at 5-6, U.N. Doc. S/PV.3989 (Mar. 26, 1999).

114. *Id.* at 6.

A. The Advantage of the Humanitarian Intervention Exception

The main advantage of recognizing a humanitarian intervention exception is the ability to stop humanitarian crises that would have continued were it not for such an intervention. It is certainly morally just for a group of states to stop such crises. In 1999, should NATO have left Albanian Kosovars to the ethnic cleansing, rapes, and massacres perpetrated by Slobodan Milosevic's forces?¹¹⁵ The answer is no. States should not be forced to stand aside and watch preventable mass human suffering, or to allow "the horror to unfold," as former U.N. Secretary-General Kofi Annan phrased it.¹¹⁶ If a humanitarian intervention exception exists, there is at least the possibility that such horrors could be stopped or mitigated.

B. Mitigating the Disadvantages of Humanitarian Intervention Exception

The main disadvantage to accepting the humanitarian intervention exception is that states might abuse such interventions to achieve their own strategic objectives. While certainly legitimate, this concern can be minimized with an accompanying set of guidelines accepted as part of the customary law exception. The ICISS was aware of the potential for abuse when it wrote R2P and included six factors that an intervention would have to meet in order to be legal.¹¹⁷ They are: (1) right authority; (2) just cause; (3) right intention; (4) last resort; (5) proportional means; and (6) reasonable prospects.¹¹⁸

In terms of right authority, the ICISS stipulated that UNSC authorization should be sought before launching any sort of humanitarian intervention.¹¹⁹ As R2P states, "[t]here is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes."¹²⁰ If the UNSC refused to authorize the military action for whatever reason, then the matter could be taken to the floor of the UN General Assembly for a non-binding "Uniting for Peace" procedure, or action could be taken by a regional organization.¹²¹

115. HUMAN RIGHTS WATCH, UNDER Orders: WAR CRIMES IN KOSOVO 109 (2001), https://www.hrw.org/reports/2001/kosovo/part_two.pdf.

116. Press Release, Secretary General, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136, GA/9596 (Sept. 20, 1999).

117. Abratt, *supra* note 24, at 57.

118. *Id.*; R2P, *supra* note 48, at para. 4.16.

119. R2P, *supra* note 48, at XII.

120. *Id.*

121. *Id.* at XIII.

Just cause, the second factor, means that there must be serious and irreparable harm occurring to human beings or imminently likely to occur.¹²² The ICISS laid out two broad situations that, in its opinion, would justify the use of force. The first is the “large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation.”¹²³ The second is large-scale “ethnic cleansing.”¹²⁴ Interestingly, the ICISS explicitly stated that it would not quantify “large scale.”¹²⁵

The third factor is the right intention of military intervention. While R2P recognizes that a military intervention may have multiple purposes,¹²⁶ it is taken with the right intention when its primary purpose is to stop or mitigate human suffering.¹²⁷

Fourth, the humanitarian intervention must be taken as a last resort, meaning that it can only be justified if every non-military option to resolve the situation has been explored.¹²⁸ “This does not necessarily mean that every such option must literally have been tried and failed.”¹²⁹ R2P recognizes that this is simply not realistic due to time constraints.¹³⁰ Yet, there must be “reasonable grounds” for the conclusion that a given option would not work, based on all the circumstances of the situation.¹³¹

The fifth factor concerns proportional means to the ascertained threat. According to R2P, a military intervention uses proportional means when the “scale, duration and intensity” of the intervention is the “minimum necessary to secure the humanitarian objective in question.”¹³²

Finally, the military intervention must have a reasonable prospect of successfully “halting or averting the atrocities . . . that triggered the intervention in the first place.”¹³³ The ICISS seemed to be most concerned about the possibility of a military intervention making a situation worse, even if it was taken for a humanitarian purpose.¹³⁴

122. *Id.* at para. 4.18.

123. *Id.* at para. 4.19.

124. *Id.*

125. R2P, *supra* note 48, at para. 4.21.

126. *See id.* at para. 4.35.

127. *See id.* at para. 4.33.

128. *Id.* at XII.

129. *Id.* at para. 4.37.

130. *Id.*

131. R2P, *supra* note 48, at para. 4.37.

132. *Id.* at para. 4.39.

133. *Id.* at para. 4.41.

134. *Id.*

The following two sections will apply R2P's factors to two situations—the United States' airstrikes against Syria and Russia's annexation of Crimea—and will illustrate how rules for engaging in humanitarian intervention would allow for legitimate humanitarian interventions and would recognize the illegality of illegitimate humanitarian interventions.

1. U.S. Airstrikes in Syria

U.S. airstrikes against the Syrian regime comply with R2P's factors for humanitarian intervention.

First, the administration's airstrikes against the Assad regime in Syria were taken with the right authority due to Russia's improper use of its Security Council veto. The ICISS considered the Security Council veto, which each permanent member of the UNSC wields, as the principal obstacle to stopping humanitarian crises and lamented the unconscionable fact that "one veto can override the rest of humanity on matters of grave humanitarian concern."¹³⁵ To address this issue the ICISS supported prohibiting permanent members of the UNSC from using their veto power in situations where their "vital national interests" were not involved.¹³⁶ Russia has violated that prohibition. In August of 2013, the UNSC failed to reach an agreement on a U.K. proposed resolution that would have authorized the use of military force against the Syrian regime.¹³⁷ More recently, in April of 2018, Russia used its veto power to defeat an American UNSC resolution to investigate chemical weapons attacks in Syria.¹³⁸

Russia will certainly claim that its intervention in Syria and support of Bashar al-Assad are vital to its national interests. Indeed, Russia views its actions in Syria as a conduit to be seen as a global power and to counter the spread of Islamic extremism by maintaining stability in the Middle East.¹³⁹ The problem with the former assertion is that it is amorphous; there is no limit to when and where this justification could be used. The latter, while superficially plausible, fails for two reasons.

135. *Id.* at para. 6.20.

136. *Id.* at para. 6.21.

137. *Syria resolution authorizing military force fails in U.N. Security Council*, CBS NEWS (Aug. 28, 2013, 4:48 PM), <https://www.cbsnews.com/news/syria-resolution-authorizing-military-force-fails-in-un-security-council/>.

138. Merrit Kennedy, *Russia Vetoes U.S. Resolution On Syria In U.N. Security Council*, NPR (Apr. 10, 2018, 2:48 PM), <https://www.npr.org/sections/thetwo-way/2018/04/10/601153602/u-n-security-council-meets-about-syria-as-inspectors-prepare-to-head-in>.

139. See Becca Wasser, *The Limits of Russian Strategy in the Middle East*, RAND CORP. 3-4 (2019), https://www.rand.org/content/dam/rand/pubs/perspectives/PE300/PE340/RAND_PE340.pdf.

The first reason is that humanitarian intervention would not stop Russia from achieving its objective: Bashar al-Assad would likely remain in power, and stability in the region would be maintained. Following the Security Council backed deposal of Muammar Gaddafi in Libya in 2011,¹⁴⁰ Russia most likely feared that approval of a military intervention would mean the destruction of Bashar al-Assad's regime. Yet, Syria's situation differed from that in Libya for one important reason—international support of the targeted leader. Whereas Gaddafi could not depend on the support of any major nation,¹⁴¹ Assad could count on Iran's support and its various Shia militias and Russia.¹⁴² Those countries' commitment to the survival of the Assad regime would be a critical factor in American policymakers' decision-making regarding whether to depose Assad and would, most likely, serve as a deterrent against intervention.¹⁴³ As one commentator put it, Iran and Russia's backing of the Syrian regime “effectively put an end to any realistic expectation of forced regime change in Syria in the foreseeable future.”¹⁴⁴ Second, Russia has a serious problem with domestic Islamic extremism, as evidenced by the several terrorist attacks made in Russian cities and the ongoing jihadist insurgency in the Caucasus mountains.¹⁴⁵ Yet, the prevalence of Islamic extremist groups in Syria could actually be helping the situation in Russia.¹⁴⁶ Having found more fertile ground for jihad, many extremists have fled to Syria, which has in turn reduced the amount of violence in the Caucasus.¹⁴⁷

140. See Richard Roth, *U.N. Security Council approves no-fly zone in Libya*, CNN (Mar. 18, 2011, 2:52 PM), <https://edition.cnn.com/2011/WORLD/africa/03/17/libya.civil.war/index.html?hpt=T2>.

141. The support of Venezuela and Zimbabwe was unlikely to shift the debate. See Thair Shaikh, *Libya can still count on a few allies*, CNN (Mar. 10, 2011, 5:38 PM), <https://edition.cnn.com/2011/WORLD/africa/03/04/libya.allies/index.html>.

142. See Michel Duclos, *Russia and Iran in Syria— a Random Partnership or an Enduring Alliance?*, ATLANTIC COUNCIL 1-2 (June 2019), https://www.atlanticcouncil.org/wp-content/uploads/2019/06/Russia_and_Iran_in_Syria_a_Random_Partnership_or_an_Enduring_Alliance.pdf.

143. See Christopher J. Bolan, *U.S. Strategy in Syria is Dangerously Adrift*, FOREIGN POL'Y RES. INST. (Apr. 1, 2019), <https://www.fpri.org/article/2019/04/u-s-strategy-in-syria-is-dangerously-adrift/>.

144. *Id.*

145. Colin P. Clarke, *Russia Is Not a Viable Counterterrorism Partner for the United States*, RAND CORP.: RAND BLOG (Feb. 9, 2018), <https://www.rand.org/blog/2018/02/russia-is-not-a-viable-counterterrorism-partner-for.html>; Valery Dzutsati, *Despite Demise of Insurgency in North Caucasus, Russian Authorities Still Wary of Its Remnants*, JAMESTOWN FOUND. (May 20, 2020, 6:27 PM), <https://jamestown.org/program/despite-demise-of-insurgency-in-north-caucasus-russian-authorities-still-wary-of-its-remnants/>.

146. See INT'L CRISIS GRP., *THE NORTH CAUCASUS INSURGENCY AND SYRIA: AN EXPORTED JIHAD?* i, 6-7 (2016), <https://d2071andvip0wj.cloudfront.net/238-the-north-caucasus-insurgency-and-syria-an-exported-jihad.pdf>.

147. See *id.* at i, Dzutsati, *supra* note 145.

Second, President Trump's air strikes against Syrian government targets fit the just cause requirement because they were taken in response to chemical attacks that caused large scale loss of life to civilians.¹⁴⁸ Between the 2017 and 2018 attacks, President Bashar al-Assad killed more than 120 of his own citizens.¹⁴⁹

Third, the strikes were taken with the right intention because their primary purpose was to "halt or avert human suffering."¹⁵⁰ After Syria's 2017 chemical weapons attack, President Trump described the attack as "a disgrace to humanity" and continued by stating that "[t]hese heinous actions by the Assad regime cannot be tolerated. The United States stands with our allies across the globe to condemn this horrific attack"¹⁵¹ After the 2018 chemical attack and the United States' subsequent air strikes, President Trump rhetorically asked why Iran and Russia would want to ally themselves to Syria, a nation associated with the "mass murder of innocent men, women and children?"¹⁵² Of course, actions taken in the international arena almost always have multiple purposes. Yet, all R2P requires is that halting or averting human suffering be the primary purpose of the intervention.¹⁵³ Given the highly limited and precise nature of the strikes—attacking an airbase from which the chemical attack originated in 2017 and attacking Assad's chemical weapons infrastructure in 2018—it is plausible that the strikes were primarily about halting or averting human suffering.¹⁵⁴ Launching cruise missiles and conducting airstrikes against a couple targets in Syria certainly does not indicate a strategy of regime change.

Fourth, the U.S. had already attempted to end the crisis diplomatically, therefore, the strikes were done as a last resort.¹⁵⁵ As previously mentioned, the United States has tried multiple times to pass a UNSCR concerning the Syrian civil war and the Syrian government's use of chemical weapons, but was prevented by Russia and China.¹⁵⁶ More importantly, the United States did persuade Syria to give up its chemical weapons through diplomacy in 2013.¹⁵⁷ Although the naiveté of such an action is debatable, the United States' creation of a diplomatic

148. R2P, *supra* note 48, at para. 4.20; *see* Masterson, *supra* note 14.

149. *Syria chemical 'attack'*, *supra* note 3; Cooper, *supra* note 3.

150. R2P, *supra* note 48, at para. 4.33; Dana Bash et al., *Trump on Syria's Assad: 'Something should happen'*, CNN (Apr. 6, 2017, 10:26 PM), <https://www.cnn.com/2017/04/06/politics/donald-trump-syria-options/index.html>.

151. Bash et al., *supra* note 150.

152. Masterson, *supra* note 14.

153. R2P, *supra* note 48, at para. 4.33.

154. *See* Sanders-Zakre, *supra* note 8.

155. R2P, *supra* note 48, at para. 4.37; Abratt, *supra* note 24, at 63-65.

156. Schmitt & Ford, *supra* note 51.

157. *See* Sanders-Zakre, *supra* note 8.

agreement to solve the issue, and Syria's subsequent violation of that agreement, shows that military intervention was a last resort.

Fifth, the strikes were also proportional because they were limited to airbases and Assad's chemical weapons infrastructure.¹⁵⁸ R2P requires that the military action taken must be the minimum necessary to achieve the desired result.¹⁵⁹ In the realm of kinetic military action, it is almost impossible to envision an intervention more limited than those conducted by the Trump administration in 2017 and 2018.

Sixth, the strikes had a reasonable prospect of success because they stood a reasonable chance of halting the chemical weapon attacks and because the strikes did not worsen the situation. In terms of the former, the strikes destroyed, or at least attempted to destroy, Bashar al-Assad's means of using chemical weapons and attempted to deter their further use.¹⁶⁰ The 2017 strike targeted Shayrat airbase because it was used to store chemical weapons and housed the aircraft used to deploy them.¹⁶¹ The 2018 strike targeted a research center for developing, producing, and testing chemical weapons technology and chemical weapons storage sites.¹⁶² The U.S. military believed that the strike had at least done some damage to Assad's ability to use chemical weapons.¹⁶³ Indeed, after the attack, U.S. Lieutenant General Kenneth McKenzie asserted that the strikes had "set the Syrian chemical weapons program back for years."¹⁶⁴

Moreover, when writing R2P, the ICISS was responding to Secretary-General Kofi Annan's millennium challenge and was concerned with the humanitarian crises of the 1990s: Rwanda and various crises emanating from the breakup of Yugoslavia.¹⁶⁵ As a result, this factor stipulates that a country's humanitarian intervention must not make a situation worse than if no action were taken.¹⁶⁶ President Trump's strikes are consistent with this factor because the strikes did not exacerbate Syrian civilian's suffering by directly harming or killing them, or by prolonging the civil war.

158. R2P, *supra* note 48, at para. 4.39; Abratt, *supra* note 24, at 66.

159. R2P, *supra* note 48, at para. 4.39; Abratt, *supra* note 24, at 65.

160. R2P, *supra* note 48, at para. 4.41; *see* Abratt, *supra* note 24, at 67.

161. *See Syria war: Why was Shayrat airbase bombed?*, BBC (Apr. 7, 2017), <https://www.bbc.com/news/world-us-canada-39531045>.

162. *See US-led strikes on Syria: What was hit?*, BBC (Apr. 16, 2018), <https://www.bbc.com/news/world-middle-east-43769332>.

163. *Id.*

164. *Id.*; Stanglin et al., *supra* note 111.

165. *See* R2P, *supra* note 48, at VII-VIII.

166. *Id.* at para. 4.41.

2. Russia's Annexation of Crimea

Conversely, Russia's 2014 annexation of Crimea would not comply with R2P's factors and would, therefore, be illegal. President Putin argued that, among other reasons, Russia's actions were a legal humanitarian intervention because of the threat that the new nationalist Ukrainian government posed to ethnic Russians in Crimea.¹⁶⁷ The annexation, however, does not comply with any of R2P's factors.

First, the annexation of Crimea was not done with right authority. Russia never sought Security Council authorization to launch a humanitarian intervention in Crimea; Russia never submitted the matter for consideration under a "Uniting for Peace" procedure; and Russia did not act through a regional organization.¹⁶⁸

Second, there was no "large scale loss of life" or "large scale ethnic cleansing" being perpetrated against ethnic Russians that would rise to the level of just cause envisioned by the ICISS.¹⁶⁹ One might counter that there existed a significant enough threat to ethnic Russians living in Crimea to warrant Russia's intervention. Vladimir Putin accused the pre-2014 revolution Ukrainian government of discriminating against ethnic Russians by forcing them to assimilate and stated that the post-revolution government would repress ethnic Russians.¹⁷⁰ President Putin even suggested that ethnic Russians might be subject to harsher laws as the new Ukrainian government was the ideological heir of "[Stepan] Bandera, Hitler's [Ukrainian] accomplice during World War II."¹⁷¹ Yet, the ICISS specifically stated that it had "resisted any temptation to identify as a ground for military intervention human rights violations falling short of outright killing or ethnic cleansing," such as discrimination based on ethnicity.¹⁷²

Third, Russia's actions were not taken with the right intentions because the primary purpose for the annexation was something other than halting human suffering, such as recapturing former Soviet

167. See *Transcript: Putin says Russia will protect the rights of Russians abroad*, WASH. POST (Mar. 18, 2014), https://www.washingtonpost.com/world/transcript-putin-says-russia-will-protect-the-rights-of-russians-abroad/2014/03/18/432a1e60-ae99-11e3-a49e-76adc9210f19_story.html.

168. See Steven Pifer, *Five years after Crimea's illegal annexation, the issue is no closer to resolution*, BROOKINGS (Mar. 18, 2019), <https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/>.

169. R2P, *supra* note 48, at para. 4.19.

170. See *Transcript*, *supra* note 167.

171. *Id.*

172. R2P, *supra* note 48, at para. 4.25.

territories,¹⁷³ securing a port for the Black Sea Fleet,¹⁷⁴ or ensuring domestic regime security.¹⁷⁵

Fourth, even if the annexation of Crimea was taken with the right intention for a just cause, it was not a last resort. To the extent that the operation was a humanitarian one—Vladimir Putin’s humanitarian justification is suspect at best—Russia never tried to resolve whatever grievance it had with the Ukrainian government concerning ethnic Russians in Crimea diplomatically.

Fifth, Russia’s annexation was also not proportional because it was, by no stretch of the imagination, the minimum necessary to achieve the desired result.

The final factor, reasonable prospects for success, is somewhat difficult to analyze because it raises the question of whether Russia’s annexation made the humanitarian situation better rather than worse. This means that there must have been a humanitarian crisis that necessitated the intervention. As mentioned previously, there was no large-scale crisis, and Russia annexed Crimea for motives other than a humanitarian one. It is, therefore, impossible to answer whether a non-existent and non-imminent humanitarian crisis was made better by annexation.

VI. CONCLUSION

The United States’ use of military force against the Assad regime is legal under international law because there is a customary international law exception to the U.N. Charter’s prohibition on the use of force—humanitarian intervention. Furthermore, the customary international law exception should exist because its advantages outweigh its disadvantages and would lead to a more just world.

The discussion and analysis of humanitarian intervention raises several additional thoughts that must be addressed before ending. First, if humanitarian intervention is an illegal violation of the prohibition on the use of force then perhaps there is something wrong with the current international legal system. The United Nations was “built upon the idea of sovereignty for all its members,” and it is the organization’s main concern.¹⁷⁶ Yet does that mean that fundamental human rights must be

173. See Daniel Treisman, *Why Putin Took Crimea: The Gambler in the Kremlin*, 95 FOREIGN AFF. 47, 47 (2016), <https://www.foreignaffairs.com/articles/ukraine/2016-04-18/why-russian-president-putin-took-crimea-from-ukraine>.

174. *Id.* at 48.

175. Michael McFaul et al., *Faulty Powers: Who Started the Ukraine Crisis?*, 93 FOREIGN AFF. 167, 170 (2014), <https://www.foreignaffairs.com/articles/eastern-europe-caucasus/2014-10-17/faulty-powers>.

176. Abratt, *supra* note 24, at 35.

forever subordinate to a state's inviolable sovereignty? Must states be forced do nothing and watch a genocide unfold for fear of infringing on another state's sovereignty? After Operation Allied Force, former Secretary of State Madeline Albright stated that, "[t]he crisis in Kosovo should cause a re-examination of the paradigms of the past. As the world has changed, so have the roles of key institutions such as the EU, NATO and the United Nations."¹⁷⁷ Indeed, those paradigms—primarily absolute state sovereignty—are increasingly incongruent with the morality and nature of the modern world.

Second, to what extent does conducting humanitarian interventions, to the extent they are illegal, erode the rule of law and risk the destruction of the current international system based on the United Nations? Some scholars of international law share a similar opinion with Vladimir Putin, that humanitarian intervention outside the U.N. framework could result in the end of the United Nations system.¹⁷⁸ Other scholars question the role the United Nations has played in preserving international peace and argue that the current system might not be worth keeping.¹⁷⁹ Michael Glennon, for example, claimed that "[d]iplomatic historians have yet to identify a single instance of interstate violence that was actually stopped by the United Nations."¹⁸⁰ This raises the question: would violating the current international order by conducting a humanitarian intervention really be a net negative occurrence?

Third, does international law matter? History has shown that if states, especially powerful ones, determine that a certain course of action is in their interests, then they will take such action despite its illegality. Similarly, if a state determines that conducting a humanitarian military operation is morally just and not too costly, then it will conduct the operation even if it is illegal. There have certainly been no serious reprisals levied against states for conducting legitimate humanitarian interventions. All this lends credence to the idea that it really does not matter what international law is. What matters is power, and a state's will to use it. Perhaps the fundamental nature of international relations has not changed too much over time and can still be accurately described by the statement the Athenians made to the Melians in Thucydides' *Peloponnesian War*: "since you know as well as we do that right, as the

177. Madeleine K. Albright, *To Win the Peace . . .*, WALL ST. J. (June 14, 1999, 12:01 AM), <https://www.wsj.com/articles/SB929319276835175074>.

178. See Putin, *supra* note 94; see Hathaway & Shapiro, *supra* note 57 (arguing that use of military force without the authorization of the Security Council endangers the United Nations system).

179. See, e.g., Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFF. 2, 4 (1999).

180. *Id.*

world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”¹⁸¹

181. THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 352 (Robert B. Strassler ed., Simon & Schuster 1996).