

# Maryland Journal of International Law

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Volume 29

Issue 1 Symposium: *"The International Law and Politics of External Intervention in Internal Conflicts"* and Special Issue: *"Politics of Religious Freedom"*

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Article 7

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### Recommended Citation

Feisal A. al-Istrabadi, *The Limits of Legality: Assessing Recent International Interventions in Civil Conflicts in the Middle-East*, 29 Md. J. Int'l L. 119 (2014).

Available at: <https://digitalcommons.law.umaryland.edu/mjil/vol29/iss1/7>

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# The Limits of Legality: Assessing Recent International Interventions in Civil Conflicts in the Middle-East

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## INTRODUCTION

Legal commentators and practitioners expend great effort assessing international military interventions in legal terms. It is to be expected, of course, that they should do so, and such commentaries are obviously invaluable. Often such analyses seem forced, however, and do not adequately acknowledge *Realpolitik* considerations that enter into states' decisions respecting where and when to intervene militarily when civil conflicts arise. This paper argues that in the current international system—i.e., the United Nations system—such *Realpolitik* considerations often trump legal ones, and constitute the true limit on state action. Legal considerations, then, frequently take on a secondary importance.

Calls for international intervention in civil conflicts in the Middle East, whether with or without United Nations Security Council (UNSC, the Council) authorization, have occurred in at least three countries since 2006: Iraq, Libya, and Syria.<sup>1</sup> In the case of Libya and Syria, many such calls were grounded in appeals to the doctrine of humanitarian intervention or the responsibility to protect

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1. The wars in Iraq and Libya are analyzed, respectively, in sections III and IA, *infra*. Syria is assessed in sections IB and II, *infra*.

civilians against abuses committed by their respective governments.<sup>2</sup> In Iraq, though the Council did not authorize renewed hostilities in 2003, it did authorize the presence of the Multinational Force in Iraq (MNF-I) pursuant to its Chapter VII powers after the commencement of hostilities.<sup>3</sup> The presence of US forces in Iraq in the “surge” phase, therefore, can be thought of conceptually as a UNSC-authorized international intervention at a time when Iraq was patently in thrall to a brutal and barbaric civil war.

This article considers the doctrine of humanitarian intervention<sup>4</sup> in conflicts that involve the competing interests of the five permanent members of the Security Council. These competing political interests appear to be a far better analytical tool for assessing whether intervention is likely to occur than legal considerations. The focus of this argument is the different international reactions to the civil wars in Libya and Syria. The discussion of the different reactions to these two internal conflicts is informed by the fact that in Syria—where the international community *qua se* failed to intervene—much larger numbers of civilian casualties occurred than Libya, where the international community did intervene.<sup>5</sup> Since *Realpolitik* considerations often trump legal considerations at international fora such as the UNSC, this paper argues that it remains easier—and more predictive—to analyze international interventions in civil conflicts in political, rather than legal, terms.

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2. The UNSC authorized Member States and regional organizations, in cooperation with the Secretary-General, to use “all necessary measures . . . to protect civilians and civilian populated areas under threat of attack.” S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011). As to Syria, more than one US senator called for unilateral military intervention to relieve the suffering of civilians and to support rebel forces. *See e.g.*, Mark Landler, *Romney Calls for Action on Syria, but His Party Is Divided*, N.Y. TIMES, May 29, 2012, at A6.

3. *See* S.C. Res. 1511, ¶¶ 13–14, U.N. Doc. S/RES/1511 (Oct. 16, 2003). *See also* M. Cherif Bassiouni, *Legal Status of US Forces in Iraq from 2003-2008*, 11 CHI. J. INT’L L. 1, 3-8 (2010).

4. *See generally e.g.*, GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* (2008) (describing a key doctrine of humanitarian intervention).

5. *See infra* texts accompanying notes 69–71; Amos N. Guiora, *Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration*, 44 CASE W. RES. J. INT’L L. 251, 272–73 (2011).

Given the obvious fact that world powers are not eleemosynary institutions, it should be expected that states will react in terms of their own interests rather than an overarching theory of law.<sup>6</sup> Again, such considerations do not result from legal assessments, but the political realities that govern the conduct of interveners. Thus, for instance, in the United States, Barack Obama campaigned in a sense as the anti-George W. Bush candidate, promising to reverse a number of Bush-era policies in foreign relations. The truth, however, is that, once elected, and once the responsibility of governing became his, President Obama adopted many of the Bush Administration's policies, albeit perhaps sub silentio.<sup>7</sup> This confluence of policy occurred with respect to the much-lambasted doctrine of preventive war proposed by the Bush Administration.<sup>8</sup> Though the doctrine was generally rejected by even the closest allies of the United States with respect to Iraq, the Obama Administration embraced the approach in respect to Syria, even though it decided—for political reasons—not to act there.

Section IA considers the international intervention in aid of the revolution in Libya. Section IB assesses the failure of the international community to intervene in the Syrian revolution, which has been a much more violent and blood-soaked civil conflict than Libya was at the time of the intervention there. Section II analyzes a legal argument put forth by a distinguished international lawyer, Harold H. Koh, former Legal Advisor in the U.S. Department of State, in favor of humanitarian intervention in Syria without Security Council authorization. Section III considers the Iraq conflict in light of relevant Security Council resolutions adopted after the commencement of hostilities, and in light of the generally favorable response of the international community to the Kosovo intervention,

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6. For a similar argument in the context of international criminal law, see David P. Forsythe, *The UN Security Council and Response to Atrocities: International Criminal Law and the P-5*, 34 HUMAN RIGHTS Q. 840 (2012).

7. Many of the Bush Administrations international security policies, heavily criticized by Barack Obama prior to the elections, were later adopted by the Obama administration. See Elia Groll, *Harold Koh's Oxford Union speech: a Rorschach test for the war on terror*, FOREIGN POL'Y (May 9, 2013), [http://blog.foreignpolicy.com/posts/2013/05/09/harold\\_koh\\_s\\_oxford\\_union\\_speech\\_as\\_a\\_rorschach\\_test\\_for\\_the\\_war\\_on\\_terror](http://blog.foreignpolicy.com/posts/2013/05/09/harold_koh_s_oxford_union_speech_as_a_rorschach_test_for_the_war_on_terror).

8. See *infra* text accompanying notes 82–86; Robert J. Delahunty & John Yoo, *The "Bush Doctrine": Can Preventive War Be Justified?*, 32 HARV. J. L. & PUB. POL'Y 843, 844–45 (2009) (explaining the concept of the doctrine of preventive war).

where the Security Council gave its imprimatur to the political settlement after the intervention.<sup>9</sup> Though the Council did not authorize the intervention itself, it has been argued in the case of Kosovo that the war, if technically illegal, was nonetheless legitimate, endorsing a view that, after all, “[i]t is sometimes necessary to break the law to change it.”<sup>10</sup> In the case of Iraq, where very similar facts can be adduced, the scholarly commentary is largely negative respecting the intervention, seemingly based more on political than legal grounds. Finally, Section IV analyzes the political, in contrast to the legal, considerations whereby the Security Council allowed itself to deadlock recently on a Chapter VI resolution respecting the Russian annexation of Crimea, through Russia’s use of its veto,<sup>11</sup> which occurred notwithstanding that Russia, as a party to the dispute, was bound by the Charter to abstain from voting.<sup>12</sup>

#### I. TO INTERVENE, OR NOT TO INTERVENE, THAT IS THE QUESTION

On its face, it would appear that interventions in the internal affairs of the Member States of the United Nations are strictly outlawed except to the extent that the Security Council authorizes such interventions. To begin with, the Charter states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”<sup>13</sup> It should be noted that the Charter does not merely require states to refrain from the use of force as an instrument of international relations; it requires them also to refrain

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9. See *infra* text accompanying notes 114–137; S.C. Res. 1244, U.N. Doc. S/RES/1244, at 1–2 (June 10, 1999) (welcoming the political solution and agreement between Kosovo and the Federal Republic of Yugoslavia).

10. Richard Falk, *Legality and Legitimacy: The Quest for Principled Flexibility and Restraint*, 31 REV. INT’L STUDIES 33, 42 (2005) (quoting Anne-Marie Slaughter).

11. See *infra* Section IV; see also Somini Sengupta, *Russia Vetoes U.N. Measure on Crimea; China Passes*, N.Y. TIMES, Mar. 16, 2014, at A13 (noting that Russia was the only country that voted against a U.N. Security Council resolution that declared the referendum on secession in Crimea illegal).

12. U.N. Charter art. 27, para 3.

13. *Id.* at art. 2, para. 4.

from the threat to use force.<sup>14</sup> The clear implication, therefore, is that it is illegal to threaten to use force where it would be illegal actually to use force. As expected, however, the Security Council has the power to authorize the use of force, in derogation of the principle of non-interference.<sup>15</sup> The UN Charter states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>16</sup>

At a bare minimum, therefore, where the Security Council finds that an internal conflict constitutes a threat to international peace and security,<sup>17</sup> it may, consistent with the Charter, authorize Member States to undertake actions that would otherwise be regarded as purely internal—i.e., “within the domestic jurisdiction” of another state.<sup>18</sup>

To be sure, it would be far too simplistic to say that the matter ended there. Obviously, the history of the world over the past several decades is replete with examples of UN Member States that have intervened militarily in other states without UN authorization. Kosovo is the paradigmatic case, where NATO conducted a humanitarian intervention in the absence of UNSC authorization.<sup>19</sup> Yet the absence of such authority has not generally led to much criticism of the intervention in the literature. Even a UN-sponsored

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14. *Id.* (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”).

15. *See id.* at arts. 39, 41, 42 (stating that when the Security Council determines that there has been “any threat to the peace, breach of peace, or act of aggression,” it may take measures that include authorizing the use of force).

16. *Id.* at art. 2, para. 7.

17. A determination that a breach or threat to international peace and security has occurred is the predicate for the Council to act pursuant to its Chapter VII powers. *See id.* art. 39.

18. *Id.* at art. 2, para. 7.

19. Susan L. Woodward, *The Council and the Former Yugoslavia*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR* 406, 438–439 (Vaughn Lowe et al. eds., 2008).

report that advocated for collective military action to occur only under the auspices of the Security Council criticized the Council for failing to authorize action in Kosovo, while praising NATO for intervening militarily without such authority.<sup>20</sup> Sections A and B will consider the manner in which these issues developed in the context of Libya and Syria.

### A. *The Case of Libya*

In the days immediately prior to the rise of international calls to intervene in its civil war in 2011, the Great Arab Libyan State-of-the-Masses<sup>21</sup> appeared to be a reasonably respected, reasonably well-integrated member of the international community. Its days of isolation, principally due to its role in the bombings of Pan Am 103 over Lockerbie<sup>22</sup> and UTA 772 over Ténéré, were behind it.<sup>23</sup> After those bombings, a series of resolutions were put into place by the Security Council, ultimately resulting in the imposition of Chapter VII sanctions, which were to last for a decade.<sup>24</sup> Finally, Libya

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20. See Chairman of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 87, U.N. Doc. A/59/565 (Dec. 2, 2004) (noting that the United Nations, at times, failed to intervene in cases of genocide, which led other parties, such as NATO, to intervene). For a discussion of this report, especially in the context of the Iraq war, see Feisal Amin Istrabadi, *The High-Level Panel and the Use of Force in Iraq in 2003*, 4 NW. U. J. INT'L HUM. RTS. 146 (2005).

21. The word *jamāhīrīyah* is a neologism coined by Muammar Gadhafi and usually translated as “state-of-the-masses.”

22. At least one seasoned journalist believes there is reason to question whether Libya was responsible for the Lockerbie bombing, suggesting the existence of evidence purportedly inculcating Iran for the bombing in retaliation for the U.S. having shot down an Iranian civilian airliner in 1988. See Patrick Cockburn, *Three Years After Gaddafi, Libya Is Imploding into Chaos and Violence*, INDEP. (London) (Mar. 16, 2014) <http://www.independent.co.uk/voices/commentators/three-years-after-gaddafi-libya-is-imploding-into-chaos-and-violence-9194697.html>.

23. See generally Jonathan B. Schwartz, *Dealing with a “Rogue State”: the Libya Precedent*, 101 AM. J. INT'L. L. 553 (2007) (explaining how the approach taken by the United States regarding Libya after the bombings of Pan Am 103 and UTA 772 resulted in Libya taking responsibility for the bombings, compensating the victims of the bombings, and as a result having its U.S. designation as a state sponsor of terrorism rescinded).

24. See S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992) (condemning the destruction of Pan Am flight 103 and UTA flight 772, urging Libya to respond to

cooperated, discharging the obligations imposed by the Council, resulting in the lifting of all sanctions in 2003.<sup>25</sup> At about the same time, Libya began co-operating with the International Atomic Energy Agency in eliminating its nascent nuclear weapons program, although whether it was prompted to do so by the removal of Saddam Hussein is unclear.<sup>26</sup>

Libya's reintegration into the family of civilized nations was not long in coming. British Prime Minister Tony Blair flew to Tripoli to meet with the Libyan strongman Muammar Gadhafi in 2004.<sup>27</sup> After Blair left office, he would make six more visits in the three-year period from 2007-2010.<sup>28</sup> Condoleezza Rice made an official visit to Libya in 2008, the first U.S. Secretary of State to do so in fifty

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requests to cooperate, and urging all states to encourage Libya to cooperate); S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) (requiring Libya to comply with resolution 731 and to cease support of any terrorist activity, and implementing sanctions to prevent flights to and from Libya, limit sales and trade with Libya, and hinder the travel of Libyan nationals); S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993) (reaffirming all parts of resolutions 731 and 748, and implementing sanctions which to freeze all financial resources owned or controlled by Libya, eliminate Libyan Arab Airline operations outside of Libya, and further hinder business with Libyan companies and nationals); S.C. Res. 1192, U.N. Doc. S/RES/1192 (Aug. 27, 1998) (reaffirming all parts of resolutions 731, 748 and 883, and encouraging the trial of two persons charged with the bombing of Pan Am flight 103).

25. See S.C. Res. 1506, ¶ 1, U.N. Doc. S/RES/1506 (Sept. 12, 2003) (lifting the sanctions implemented in resolutions 748 and 883); see also generally Bruce W. Jentleson & Christopher A. Whytock, *Who "Won" Libya? The Force-Diplomacy Debate and Its Implications for Theory and Policy*, 30 INT'L SECURITY 47 (2006) (analyzing the different forms of diplomacy used with Libya during the past thirty years and hypothesizing as to what led or contributed to Libya's cooperation).

26. *Libya: Overview*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/libya/> (last updated Oct. 2003). There is reason to doubt that the war in Iraq had much to do with Libya's decision to disarm of weapons of mass destruction. See Jentleson & Whytock, *supra* note 25, at 48. See also Ronald Bruce St John, "Libya Is Not Iraq": *Preemptive Strikes, WMD, and Diplomacy*, 58 MIDDLE EAST J. 386, 396-400 (2004) (noting and refuting President George W. Bush's claims that the Iraq war was instrumental in Libya's disarmament).

27. Adrian Croft, *UK's Blair: No regrets about befriending Gaddafi*, REUTERS, (Sep. 9, 2011), <http://www.reuters.com/article/2011/09/09/us-britain-blair-idUSTR E78827P20110909>.

28. Robert Mendick, *Tony Blair's Six Secret Visits to Col Gaddafi*, TELEGRAPH (London) (Sept. 24, 2011), <http://www.telegraph.co.uk/news/politics/tony-blair/8787074/Tony-Blairs-six-secret-visits-to-Col-Gaddafi.html>.



years.<sup>29</sup> Perhaps most oddly, Italian Prime Minister Silvio Berlusconi kissed the hand of the Libyan tyrant at a 2010 summit meeting.<sup>30</sup>

The international community itself, acting through the United Nations, could have done no more to welcome home one of its own.<sup>31</sup> A former Libyan foreign minister and minister of African Union affairs was elected president of the sixty-fourth session of the United Nations General Assembly (UNGA) in 2009.<sup>32</sup> A year later, in 2010, the UNGA elected Muammar Gadhafi's Libya to the United Nations Human Rights Council.<sup>33</sup> It should be recalled the U.N. Human Rights Council was created as a successor to the U.N. Human Rights Commission, because the latter body was perceived as having lost credibility by electing too many members that were themselves gross violators of human rights.<sup>34</sup> These considerations did not bar Libya's election to the successor body. For good measure, the Human Rights Council produced a report in January 2011—virtually on the eve of the Libyan civil war—in which most members waxed rhapsodic about Libya's improving human rights record.<sup>35</sup> It must have been

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29. Elise Labott, *Rice Meets with Libya Leader*, CNN (Sept. 5, 2008), <http://www.cnn.com/2008/WORLD/africa/09/05/libya.us/>.

30. *See Berlusconi's Gaddafi About-Face: Italian Prime Minister Shifts Libya Stance*, HUFFINGTON POST (Aug. 25, 2011), [http://www.huffingtonpost.com/2011/08/25/berlusconi-gaddafi-libya-stance-\\_n\\_936603.html](http://www.huffingtonpost.com/2011/08/25/berlusconi-gaddafi-libya-stance-_n_936603.html) (reporting that Berlusconi, the then Italian Prime Minister, changed his opinion and views of Gaddafi to the point that he kissed his hand during a summit). In response to Berlusconi's flip-flop, opposition politician Italo Bocchino said, "After having kissed a hand dripping with blood, now he should kiss the hand representing those whose blood was shed." *Id.*

31. For a discussion of the early period of Libya's reintegration into the state system, see DIRK VANDEWALLE, *LIBYA SINCE 1969: QADHAFI'S REVOLUTION REVISITED* 220–30 (2011).

32. Press Kit, Biography of H.E. Dr. Ali Abdussalam Treki, President of the 64th Session of the United Nations General Assembly (last visited Apr. 14, 2014), <http://www.un.org/ga/president/64/presskit/president.shtml>.

33. Press Release, General Assembly, General Assembly Fills 14 Seats on Human Rights Council; Approves Funds for Higher UN Troop, Police Levels in Haiti; Sets Date for Communicable Diseases Meeting, U.N. Press Release GA/10939 (May 13, 2010).

34. *UN Creates New Human Rights Body*, BBC NEWS (Mar. 15, 2006), <http://news.bbc.co.uk/2/hi/europe/4810538.stm>.

35. *See* Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Libyan Arab Jamahiriya*, ¶ 5, U.N. Doc. A/HRC/16/15, at 3 (Jan.

quite an embarrassment for the UNGA that, by March of that year, it had to suspend Libya's membership from the human rights body because of its brutal suppression of anti-government demonstrations.<sup>36</sup> If any delegation was red-faced by these facts, none took the time to record its embarrassment.

By September 2011, opponents fighting the Libyan regime claimed that the number of those killed in the Libyan civil war approached 30,000, with an additional 50,000 wounded.<sup>37</sup> Yet these numbers failed to stand up to scrutiny, and the high casualty estimates were very quickly discredited as gross exaggerations. Journalists who consulted Libya's morgues and international organizations could confirm deaths at a rate of hundreds, perhaps into four figures, not the tens of thousands claimed by regime opponents.<sup>38</sup> These are not numbers to be dismissed lightly; they are horrific in their own right. Still, as these types of events usually unfold, it is not the mass slaughter of civilians to which the international community has seemingly become inured since the middle of the last century.

The Security Council took its initial action in Libya toward the end of February 2011, before UNGA's action suspending Libya from the Human Rights Council. The Council referred the Libyan matter to the International Criminal Court (ICC) for acts committed since February 15, 2011.<sup>39</sup> It also imposed a sanctions regime that included, *inter alia*, an arms embargo, and froze the assets of, and banned travel by, certain named individuals.<sup>40</sup> The result, perhaps

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4, 2011) (reporting that numerous countries commended Libya for its commitment to upholding human rights).

36. Press Release, General Assembly, General Assembly Suspends Libya from Human Rights Council, U.N. Press Release GA/11050 (Mar. 1, 2011).

37. *See, e.g.*, Karin Laub, *Libya: Estimated 30,000 Died In War; 4,000 Still Missing*, HUFFINGTON POST, Sept. 8, 2011, [http://www.huffingtonpost.com/2011/09/08/libya-war-died\\_n\\_953456.html](http://www.huffingtonpost.com/2011/09/08/libya-war-died_n_953456.html) ("At least 30,000 people were killed and 50,000 wounded in Libya's six-month civil war").

38. *See, e.g.*, Rod Nordland, *Libya Counts More Martyrs than Bodies*, N.Y. TIMES, Sept. 16, 2011, at A1 (noting that, although reports stated that the number of casualties were in the tens of thousands, the number of actual bodies in the morgues and the number of those reported missing were in the hundreds).

39. S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

40. *Id.* ¶¶ 9–21.

predictably, was an increase in violence.<sup>41</sup> On the same day that the Security Council would vote to authorize military action, Gadhafi threatened to massacre rebels in the eastern city of Benghazi.<sup>42</sup> On March 17, 2011, the UNSC passed a resolution authorizing Member States and regional organizations to use all necessary measures “to protect civilians and civilian populated areas under threat of attack.”<sup>43</sup> It did not take long for NATO and its allies from a few Arab states to commence military operations. By the end of the month, NATO’s aerial bombardment had begun.<sup>44</sup>

Whatever the members of the Security Council thought they were voting for, it became rather obvious early on that the actual policy being followed by the coalition “protecting civilians” in Libya was one of regime change.<sup>45</sup> The White House let slip that it was seeking to install a democratic regime in Libya, but had to deny that regime change was its policy later the same day.<sup>46</sup> There certainly could be no doubt that regime change was the policy after NATO bombed Gadhafi’s motorcade, resulting in the leader’s capture by anti-government forces.<sup>47</sup> Gadhafi was immediately bayoneted,

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41. See e.g., *The Crisis in Libya*, INT’L COALITION FOR RESP. TO PROTECT 7–10, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya?format=pdf> (last visited April 14, 2014).

42. David D. Kirkpatrick & Kareem Fahim, *Qaddafi Warns of Assault on Benghazi as U.N. Vote Nears*, N.Y. TIMES (Mar. 17, 2011), <http://www.nytimes.com/2011/03/18/world/africa/18libya.html>.

43. S.C. Res. 1973, *supra* note 2, ¶ 4.

44. See *Operation Unified Protector: Responding to the United Nations’ Call*, N. ATL. TREATY ORG. (Mar. 22, 2011), [http://www.nato.int/cps/en/natolive/topics\\_71652.htm](http://www.nato.int/cps/en/natolive/topics_71652.htm); See also e.g., *Libya: US, UK and France Attack Gaddafi Forces*, BBC NEWS, Mar. 20, 2011, <http://www.bbc.co.uk/news/world-africa-12796972> (noting that the United States, United Kingdom, and France began firing missiles at pro-Gaddafi forces attacking Benghazi).

45. Ian Black, *Libya Regime Change Is West’s Goal, but Doubts Remain Over How to Achieve It*, GUARDIAN (London) (Apr. 15, 2011), <http://www.theguardian.com/world/2011/apr/15/libya-regime-change-analysis>.

46. Sam Youngman & Jordan Fabian, *White House Denies Regime Change Is Part of Libya Mission*, THE HILL, (Mar. 22, 2011), <http://thehill.com/homenews/campaign/151191-white-house-suggests-regime-change-is-goal-of-libya-mission>.

47. See e.g., *Death of a Dictator*, HUM. RTS. WATCH (Oct. 17, 2012), <http://www.hrw.org/node/110724/> (detailing the last moments of Gaddafi’s life including his attempt to flee, the bombing of his motorcade, and his death).

dying of exsanguination later.<sup>48</sup> The others captured with him, including one of his sons, were also killed.<sup>49</sup> That the killing of prisoners constitutes a violation of international humanitarian law is beyond cavil.<sup>50</sup> Regardless of the horrors he inflicted upon the people over whom he ruled so brutally for forty-two years, it was an inauspicious beginning for the “democratization” of Libya.

On its face, the foregoing example of an international intervention in Libya appears to be a paradigmatic case for such interventions. A tyrant, who had ruled for forty-two years, was bent upon the wholesale massacre of his own people, who had risen to demand their basic human rights. The international community, acting through the Security Council, attempted a step-by-step approach, increasing pressure with each step. These steps included a referral to the ICC, along with a series of sanctions, obviously designed to compel the regime to engage with its own citizens. When those efforts failed, the Council authorized the use of force to protect the Libyan civilian population. Viewed from this perspective, the Libyan example sets a salutary legal precedent of a “collective response” to a common threat to international peace and security.

Closer examination of the facts raises skepticism, however. Libya in 2011 could hardly be thought of as an example of an ongoing mass atrocity. Without belittling the deaths of several hundred people, these are not the typical numbers of a mass atrocity. By contrast, the International Tribunal for the Former Yugoslavia (ICTY) found that Srebrenica’s 40,000 Bosnian Muslims were

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48. *Id.*

49. *Id.*

50. See Rome Statute of the International Criminal Court art. 8, §2(b), July 17, 1998, U.N. Doc. A/CONF.183/9 (encompassing the “[k]illing or wounding [of] a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion” within the definition of a war crime). Reference to the Rome Statute is particularly apposite, in light of the Security Council’s referral of the situation in Libya to the ICC earlier in the year. *Supra* note 39; see also e.g. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 3, 12, 13, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 7, June 8, 1977, 1125 U.N.T.S. 609; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 10, Dec. 10, 1984, 1465 U.N.T.S. 85.

targeted by Bosnian Serb forces for genocide.<sup>51</sup> Some 8,000 civilians—men, women, and children—were killed in that embattled city alone.<sup>52</sup> Recalling that even these appalling losses were insufficient to compel international intervention, it appears difficult to draw out of Libya the larger legal proposition that the international community will not tolerate abuses such as those visited by Gadhafi on his people. Gadhafi's abuses simply pale by comparison to much graver breaches of human rights and humanitarian norms where the international community simply did nothing.

Indeed, at least one Security Council permanent member, shortly after NATO began its aerial bombardment of Libya, asserted that the campaign in Libya was an abuse of Council resolutions, notwithstanding the humanitarian circumstances. Ambassador Viatly Churkin, representing the Russian Federation, explained:

The demand for a quick ceasefire turned into a full-fledged civil war, the humanitarian, social, economic and military consequences of which transcend Libyan borders. The situation in connection with the no-fly zone has morphed into the bombing of oil refineries, television stations and other civilian sites. The arms embargo has morphed into a naval blockade in western Libya, including a blockade of humanitarian goods. Today the tragedy of Benghazi has spread to other western Libyan towns—Sirte and Bani Walid. These types of models should be excluded from global practices once and for all.<sup>53</sup>

Admittedly, the Russian explanation of vote, made in reference to its veto of the first Syrian resolution, was deeply cynical. Churkin suggested, in effect, that the Russian Federation was surprised that Resolution 1973 was used to bomb Libya's governmental and economic infrastructure. He said that NATO and its Arab allies abused the intent of Resolution 1970 calling for a cease-fire and a no-fly zone. He elided wholly the fact that NATO and allied action in

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51. Prosecutor v. Krstić, Case No. IT-98-33-A, Appellate Judgment, ¶ 15 n. 25 (Apr. 19, 2004).

52. *Id.* ¶ 2.

53. U.N. SCOR, 66th Sess., 6627th mtg. at 4, U.N. Doc. S/PV.6627 (Oct. 4, 2011) (emphasis added).

Libya occurred pursuant to Resolution 1973, not 1970, and that Russia voted to authorize the use of force. Still, he insisted that action in Libya did not constitute a legal precedent, but an aberration.

Yet an even more cynical reading of the Council's actions in Libya suggests itself. The fact is that Muamar Gadhafi had spent much of his tenure as the dictator of Libya with the status of an international pariah.<sup>54</sup> As noted, above, he had caused Libya to come under a decade of sanctions because of his support for terrorist activities.<sup>55</sup> Indeed, his history of being accused of terrorism dates at least to the days of the Reagan Administration, which bombed Libya for its apparent involvement in the 1986 bombing of a discotheque frequented by U.S. servicemen in Berlin.<sup>56</sup> While it is true that Western powers were beginning, to varying degrees, to seek economic ties with Gadhafi's Libya and its large oil reserves, there had been a long history of deep tensions with the regime. Even the Russian Federation made clear it had its own relatively tense relationship with Gadhafi.<sup>57</sup>

Still, in this context, it is instructive to consider what has become of Libya in the aftermath of the international intervention. The

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54. See generally JOHN OAKES, *LIBYA: THE HISTORY OF GADDAFI'S PARIAH STATE* (2011) (explaining the history of Libya under Gadhafi).

55. See *Gaddafi's 41-Year-Long Rule*, WASH. POST (Feb. 23, 2011), <http://www.washingtonpost.com/wp-srv/special/world/gaddafis-rule-timeline/> (detailing sanctions from 1992 to 2003).

56. See Nathalie Malinarich, *Flashback: The Berlin Disco Bombing*, BBC NEWS (Nov. 13, 2001), <http://news.bbc.co.uk/2/hi/europe/1653848.stm>.

57. U.N. SCOR, 66th Sess., 6627th mtg., *supra* note 53, at 4 (denying the existence of "special ties" between Russia and Libya, and noting that "a number of States represented at this table"—read the western powers—"had warmer relations" with Libya than did Russia).

course in Libya over the past three years has not run smooth.<sup>58</sup> The state is faltering and is teetering on utter failure.<sup>59</sup> The judiciary is in imminent collapse, with courts suspended and prosecutions frozen.<sup>60</sup> Militias roam the country and they are gaining, not losing, power.<sup>61</sup> Old rivalries between Tripolitania and Cyrenaica, the western and eastern parts of the country, have erupted again, and it is not clear that the country can actually hold together.<sup>62</sup> A renewed civil war is a realistic imminent threat at this writing.<sup>63</sup> In the meantime, violations of international humanitarian law continue. A Human Rights Watch report documents a “crime against humanity of mass

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58. There were warnings even before the death of Gadhafi that early elections, before the country was ready for them, could result in chaos and a renewed civil war. See, e.g., Dawn Brancati & Jack L. Snyder, *The Libyan Rebels and Electoral Democracy: Why Rushing to the Polls Could Reignite Civil War*, FOREIGN AFF. (Sept. 2, 2011), [http://www.foreignaffairs.com/articles/68241/dawn-brancati-and-jack-l-snyder/the-libyan-rebels-and-electoral-democracy?cid=rss-rss\\_xml-the\\_libyan\\_rebels\\_and\\_electora-000000](http://www.foreignaffairs.com/articles/68241/dawn-brancati-and-jack-l-snyder/the-libyan-rebels-and-electoral-democracy?cid=rss-rss_xml-the_libyan_rebels_and_electora-000000) (the “proposal to hold elections within 18 months is imprudent”). In fact, ten months later, the first set of elections were held. David D. Kirkpatrick, *Election Results in Libya Break an Islamist Wave*, N.Y. TIMES, Jul. 9, 2012, at A1. Further elections for a constituent assembly were recently held in February 2014. Carlotta Gall, *Disillusionment in Libya Over Vote on Charter Assembly*, N.Y. TIMES (Feb. 19, 2014), <http://www.nytimes.com/2014/02/20/world/africa/disillusionment-in-libya-over-vote-on-charter-assembly.html>.

59. Osama Al Sharif, *Libya on the Verge of Disintegration*, ARAB NEWS (Nov. 20, 2013), <http://www.arabnews.com/news/480086>.

60. See *Global Insider: Justice System on the Brink of Collapse in Libya's Security Vacuum*, WORLD POL. REV. (Mar. 20, 2014), <http://www.worldpoliticsreview.com/trend-lines/13642/global-insider-justice-system-on-the-brink-of-collapse-in-libya-s-security-vacuum>; *Libya: Government Institutions at Risk of Collapse*, HUM. RTS. WATCH (Mar. 7, 2014), <http://www.hrw.org/news/2014/03/07/libya-government-institutions-risk-collapse>.

61. See *Libya Lurches Toward Collapse After Tripoli Bloodbath*, UNITED PRESS INT'L (Nov. 18, 2013), [http://www.upi.com/Top\\_News/Special/2013/11/18/Libya-lurches-toward-collapse-after-Tripoli-bloodbath/UPI-95751384796521/](http://www.upi.com/Top_News/Special/2013/11/18/Libya-lurches-toward-collapse-after-Tripoli-bloodbath/UPI-95751384796521/) (describing “[t]he persistent violence and the growing power of the unruly militias spawned by the 2011 civil war”); Cockburn, *supra* note 22.

62. Andres Gorzewski, *Power Vacuum Threatens Libya*, DEUTSCHE WELLE (Mar. 3, 2014), <http://www.dw.de/power-vacuum-threatens-libya/a-17493245>.

63. *Libya Lurches Toward Collapse After Tripoli Bloodbath*, *supra* note 61.

forced displacement,” in that 40,000 residents of Tawergha, removed from their homes in 2011, have yet to be allowed to return.<sup>64</sup>

Economic collapse is also imminent. Of course, oil is Libya’s principal export, and this sector has hardly fared better.<sup>65</sup> Oil production is currently down to approximately 20% of Libya’s peak, pre-civil war production capacity.<sup>66</sup> Cyrenaican militiamen are selling oil illicitly, in open defiance of the government in Tripoli.<sup>67</sup> A U.S. Navy SEAL team recently intervened to seize an oil tanker loaded with an illicit oil shipment, as the Libyan government was impotent to stop it.<sup>68</sup> Several days later, the UNSC passed yet another resolution allowing Member States to use force in assisting the Libyan Government to prevent illicit shipments of its oil.<sup>69</sup> The result of these latter developments has been to thrust Libya into even further chaos.<sup>70</sup>

No crocodile tears will be shed here for the demise of Muammar Gadhafi, a brutal tyrant who terrorized his own country for forty-two years. That he has been deposited into the same ashcan containing the unmourned remains of Saddam Hussein is, to be sure, a positive. Yet it is all too glib to say that Libya is better off now without its dictator. Other than the defeat of one dictator, by what measure can the international community say convincingly that its intervention has improved the lives of Libyans? It is true that there is at least hope for

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64. *Libya: End Impunity, Reform Repressive Laws*, HUM. RTS. WATCH (Jan. 21, 2014), <http://www.hrw.org/news/2014/01/21/libya-end-impunity-reform-repressive-laws>.

65. *See U.N. Resolution Authorizes Force Against Illicit Libyan Oil*, UNITED PRESS INT’L (Mar. 20, 2014 8:49 AM), [http://www.upi.com/Business\\_News/Energy-Resources/2014/03/20/UN-resolution-authorizes-force-against-illicit-Libyan-oil/UPI-17161395319776/](http://www.upi.com/Business_News/Energy-Resources/2014/03/20/UN-resolution-authorizes-force-against-illicit-Libyan-oil/UPI-17161395319776/) (estimating production at 346,000 barrels per day, down from a pre-civil war peak of 1.6 million barrels per day)

66. *See id.* Other estimates, however, show that production is unstable at best, and, over the same period, dipped to 230,000 barrels per day. Yousef Gamal El-Din, *Libya’s Oil Output Goes from Bad to Worse*, CNBC (Feb. 25, 2014), <http://www.cnbc.com/id/101444323>; *Libya*, OBSERVATORY OF ECON. COMPLEXITY, <http://atlas.media.mit.edu/profile/country/lby/> (last visited Apr. 14, 2014).

67. David D. Kirkpatrick, *Libyan Militia Selling Oil, Defying the Government*, N.Y. TIMES, Mar. 9, 2014, at A10.

68. David D. Kirkpatrick, *SEAL Team Raids a Tanker and Thwarts a Militia’s Bid to Sell Libyan Oil*, N.Y. TIMES, Mar. 18, 2014, at A4.

69. S.C. Res. 2146, S/RES/2146 (Mar. 19, 2014)

70. David D. Kirkpatrick & Clifford Krauss, *Libya’s Prime Minister Ousted in Chaos Over Tanker*, N.Y. TIMES, Mar. 12, 2014, at A10.



a better future, a likelihood foreclosed by Gadhafi and his plan for one of his sons to succeed him.<sup>71</sup> But the vague hope of a better future, perhaps in the distant future, must be rather slim consolation for living in a country currently in the throes of utter collapse.

In a real sense, Gadhafi was an easy political call. His Libya had a history of being thought a bad actor. Ten years of sanctions were adequate proof of that proposition. It had no patron in any of the capitals of the permanent members of the Security Council, even if it had rehabilitated itself largely before the wider international community. To be sure, the Council said that it acted in terms of upholding international legal norms defending civilians from the heinous excesses of their own government. Gadhafi was making threats to inflict mass casualties on his civilian population—an obnoxious threat, but his regime had not yet actually carried it out. But the truth is that Libya's lack of a powerful state willing to defend it at the UNSC made the international action in the country viable. It was not the legal imperatives that compelled intervention. This point can be definitively illustrated in the case of Syria, which represents a genuine humanitarian crisis involving grave breaches of international humanitarian norms—including the use of poison gases—yet where the international community has utterly failed to act to protect civilians.

### *B. The Case of Syria*

As the above-described events were unfolding in Libya, it was not surprising that, as the Syrian civil war began to exact a heavy toll on its population, calls for intervention in Syria arose.<sup>72</sup> At this writing, the death toll in Syria is estimated to be approximately 140,000, half of whom are civilians, including some 7,000 children.<sup>73</sup>

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71. Ian Black, *Libya Leader Muammar Gaddafi Will Leave No Obvious Successor if He Goes*, GUARDIAN (Feb. 21, 2011), <http://www.theguardian.com/world/2011/feb/21/libya-leader-muammar-gaddafi>.

72. See sources cited *supra* notes 4–5.

73. See Khalil Ashawi, *Syria's Death Toll Now Exceeds 140,000: Activist Group*, REUTERS (Feb. 15, 2014), <http://www.reuters.com/article/2014/02/15/us-syria-crisis-toll-idUSBREA1E0HS20140215>; Noah Rayman, *Report: More Than 146,000 People Killed in Syrian Civil War*, TIME (Mar. 13, 2014), <http://www.time.com/24077/syria-death-toll/>.

Yet, as the numbers of dead were mounting in late 2011, the Security Council refused to authorize any humanitarian relief under Chapter VII of the Charter. Western countries on the Council tabled an early draft resolution authorizing the use of force, similar to Resolution 1973 on Libya, to avert the ongoing humanitarian catastrophe, but China and Russia vetoed the measure.<sup>74</sup>

Other attempts by the Western powers on the Council to use the Council's Chapter VII powers to solve the Syrian crisis met with equal resistance. Early in 2012, the Security Council tabled a draft resolution that would have condemned the Syrian president, Bashar Assad, for causing large numbers of civilian deaths.<sup>75</sup> The Russian Federation and China also vetoed this resolution.<sup>76</sup> In the summer of 2012, Russia and China again vetoed a resolution that would have imposed sanctions on the Syrian regime for failing to implement a peace initiative sponsored by the United Nations.<sup>77</sup> Even a peace initiative that had the imprimatur of the world body itself could not move Russia and China to refrain from exercising a veto. Finally, literally as this article was in the process of its final editing, China and the Russian Federation vetoed a resolution that sought to refer the situation in Syria to the ICC for violations of international human rights norms by all parties to the Syrian conflict.<sup>78</sup>

The tone of the UNSC members' deliberations was remarkable, and, in the experience of this author, quite unprecedented, at least in the post-Cold War period. The U.S. Permanent Representative, Ambassador Susan Rice, expressed her government's being "disgusted" by what she characterized as Russia's and China's continuing to prevent the Council from fulfilling its role in bringing peace to Syria.<sup>79</sup> Other members of the Council expressed similar

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74. See U.N. SCOR, 66th Sess., 6627th mtg., *supra* note 53, at 4; *Russia and China Veto Draft Security Council Resolution on Syria*, UN NEWS CENTRE (Oct. 4, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39935#.U3X-KF64m8w>.

75. S.C. Res. 538, U.N. Doc. S/2012/538 (July 19, 2012).

76. U.N. SCOR, 67th Sess., 6711th mtg. at 2, U.N. Doc. S/PV.6711 (Feb. 4, 2012).

77. U.N. SCOR, 67th Sess., 6810 mtg. at 2, U.N. Doc. S/PV.6810, (July 19, 2012); S.C. Res. 538, U.N. Doc. S/RES/538 (July 19, 2012); *see also* Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES, July 20, 2012, at A8.

78. Somini Sengupta, *China and Russia Block Referral of Syria to Court*, N.Y. TIMES, May 23, 2014, at A3.

79. U.N. SCOR, 67th Sess., 6711th mtg., *supra* note 76, at 5.

sentiments, also couched in rather undiplomatically blunt terms, expressing frustration at the Sino-Russian veto of a resolution on Syria. They expressed thinly veiled outrage at the Council's inability to protect civilians in a conflict targeting them by the tens of thousands.<sup>80</sup> The exchange between the representatives of the five permanent members, again, was extraordinary and unlike anything witnessed by the author in his eight-year diplomatic career. The British, French, and American ambassadors, respectively, described the veto as "appall[ing] . . . ghastly, dangerous and deplorable."<sup>81</sup>

For their part, the Russian and Chinese ambassadors reciprocated in kind. Ambassador Churkin described the Western powers as "Pharisees . . . pushing their own geopolitical intentions, which have nothing in common with the legitimate interests of the Syrian people."<sup>82</sup> The Chinese ambassador, normally staid and an exemplar of diplomatic correctness, accused his Western counterparts of engaging in "old tricks" and of being "eager to interfere in the internal affairs of other countries, to fuel the flames and to sow discord."<sup>83</sup> It would be difficult to imagine a clearer evocation of the Western powers' intervention in Libya.

With an actual, ongoing humanitarian calamity unfolding in Syria, the UNSC was thus in absolute deadlock.<sup>84</sup> From a strictly legal perspective, there should have been at a minimum a similar intervention in Syria that occurred in Libya. After all, where the dead numbered in the hundreds in Libya, they numbered in the tens of thousands in Syria. Yet no intervention occurred because two Council members absolutely refused to allow so much as even criticism of the Assad regime to issue from the UNSC. To the extent that Libya may be cited as a legal precedent in international law in support of humanitarian intervention, then the non-intervention in Syria must equally constitute a legal precedent in its own right. Yet, events would break the deadlock on the Council insofar as dealing with Syria is concerned.

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80. U.N. SCOR, 67th Sess., 6810th mtg., *supra* note 77, at 2–5, 9–10.

81. *Id.* at 2–3, 10.

82. *Id.* at 8.

83. *Id.* at 14.

84. Rick Gladstone, *After Council's Deadlock, Syria Is Criticized at U.N.*, N.Y. TIMES, Aug. 4, 2012, at A7.

The critical event, of course, was the use of chemical weapons in the battlefield in the summer of 2013. Though more than 100,000 people killed in the broader conflict by that point, the chemical attack itself led to only 1500 deaths.<sup>85</sup> This event gained added significance because President Obama had made it clear that he regarded even the movement of chemical weapons by the regime in Syria as a “red line” that would provoke a response from the United States.<sup>86</sup> One might have been forgiven for assuming the American president would act accordingly.

Indeed, for a period of time, it appeared that the United States was preparing to take military action to punish the Syrian regime. Susan Rice, by then the U.S. National Security Advisor, put forward the Administration’s case to the American public respecting the need for intervention. She stated:

Assad’s escalating use of chemical weapons threatens the national security of the United States. And the likelihood that, left unchecked, Assad will continue to use these weapons again and again takes the Syrian conflict to an entirely new level—by terrorizing civilians, creating even greater refugee flows, and raising the risk that deadly chemicals would spill across borders into neighboring Turkey, Jordan, Lebanon, and Iraq. Obviously, the use of chemical weapons also directly threatens our closest ally in the region, Israel, where people once again have readied gas masks.

Every time chemical weapons are moved, unloaded, and used on the battlefield, it raises the likelihood that these weapons will fall into the hands of terrorists active in Syria, including Assad’s ally Hezbollah and al Qaeda affiliates. That prospect puts Americans at risk of chemical attacks targeted at our soldiers and

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85. Joby Warrick, *More than 1,400 Killed in Syrian Chemical Weapons Attack*, *U.S. Says*, WASH. POST (Aug. 30, 2013), [http://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5\\_story.html](http://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5_story.html).

86. Peter Baker, et al., *Off-the-Cuff Obama Line Put U.S. in Bind on Syria*, N.Y. TIMES, May 4, 2013, at A1.

diplomats in the region and even potentially our citizens at home.”<sup>87</sup>

The argument Rice advanced for a military response was couched in terms of the threat that the use of chemical weapons posed to the vital security of the United States, even though there was no allegation that Syria had any intent whatsoever to attack the U.S. itself. Rather, Rice made the case that such weapons could be proliferated to non-state actors, and it was this latter group that might presumably constitute a direct threat to the United States. She also raised the specter that the use of such weapons constituted a threat to regional allies, especially Israel. These arguments, advanced in late 2013, had a particularly familiar tone.

In the late 1990s, the Project for a New American Century, a neoconservative think tank, issued a statement advocating the overthrow of Saddam Hussein. This call to arms could have served as a source for Rice’s remarks:

As a result, in the not-too-distant future we will be unable to determine with any reasonable level of confidence whether Iraq does or does not possess such weapons. Such uncertainty will, by itself, have a seriously destabilizing effect on the entire Middle East. It hardly needs to be added that if Saddam does acquire the capability to deliver weapons of mass destruction, as he is almost certain to do if we continue along the present course, the safety of American troops in the region, of our friends and allies like Israel and the moderate Arab states, and a significant portion of the world’s supply of oil will all be put at hazard.<sup>88</sup>

Indeed, President George W. Bush himself exhorted the graduating cadets at West Point, saying:

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87. Press Release, Susan E. Rice, National Security Advisor, White House (Sept. 9, 2013), <http://www.whitehouse.gov/the-press-office/2013/09/09/remarks-prepared-delivery-national-security-advisor-susan-e-rice>.

88. Letter from Elliott Abrams et al., Project for the New Am. Century, to William J. Clinton, President of the United States (Jan. 26, 1998), <http://zfacts.com/zfacts.com/metaPage/lib/98-Rumsfeld-Iraq.pdf>.

We cannot defend America and our friends by hoping for the best. We cannot put our faith in the word of tyrants, who solemnly sign non-proliferation treaties, and then systemically break them. If we wait for threats to fully materialize, we will have waited too long — Our security will require transforming the military you will lead — a military that must be ready to strike at a moment's notice in any dark corner of the world. And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.<sup>89</sup>

It is difficult to distinguish between these three statements. The latter two constitute what was to become the doctrine of preventive war, whereby the United States would not wait for imminent threats to develop before reserving the right to engage in what it regarded as self-defense.<sup>90</sup> This doctrine, which was largely rejected by the international community during the Bush Administration,<sup>91</sup> nonetheless appeared to live again in the Obama Administration's initially bellicose pronouncements about the use of chemical weapons in Syria.<sup>92</sup> Significantly, a senior Obama Administration official had endorsed and adopted one of the four pillars of the Bush Doctrine, that of preventive war.<sup>93</sup> Of course, the United States did not go to

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89. President George W. Bush, Graduation Speech at West Point (June 1, 2002).

90. *See sources cited supra* note 7.

91. *See* MARC WELLER, *IRAQ AND THE USE OF FORCE IN INTERNATIONAL LAW* 143 (2010). Even the United Kingdom, America's closest ally and its partner in the war in Iraq in 2003, rejected the doctrine of preventive war. *See* Attorney General, *Attorney General's Advice on the Iraq War Iraq: Resolution 1441*, 54 INT'L & COMP. L. Q. 767, 768 (2003).

92. *See* Paul D. Shinkman, *Robert Gates: Obama's Red Line for Syria a Serious Mistake*, U.S. NEWS (Jan. 16, 2014), <http://www.usnews.com/news/articles/2014/01/16/robert-gates-obamas-red-line-for-syria-a-serious-mistake>; Glenn Kessler, *President Obama and the "Red Line" on Syria's Chemical Weapons*, WASH. POST (Sept. 6, 2013), <http://www.washingtonpost.com/blogs/fact-checker/wp/2013/09/06/president-obama-and-the-red-line-on-syrias-chemical-weapons/>.

93. *See* National Security Council, *Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction in THE NATIONAL SECURITY STRATEGY* 13–16 (2002) *available at* <http://www.state.gov/documents/organization/63562.pdf>. *See also* Robert Jervis, *Why the Bush Doctrine Cannot Be Sustained*, 120 POLITICAL SCIENCE Q. 351, 351 (2003) ("A third major element of

war in Syria after the violation of Obama's red line. Instead, the Security Council passed Resolution 2118, under Chapter VI—with the agreement of the Syrian government—requiring Syria to disgorge its chemical weapons stockpiles, but containing no enforcement provisions.<sup>94</sup>

In the period after the Syrian regime used its chemical weapons but before the UNSC acted, both the United States and the United Kingdom appeared headed toward a military response in Syria.<sup>95</sup> Yet the British prime minister submitted the matter for a vote by the House of Commons—a step not required by the British constitution.<sup>96</sup> The House refused to authorize the use of force even in light of the chemical attack.<sup>97</sup> That left the United States by itself, but, in time, it became unnecessary to act militarily, as the Russians brokered the agreement that resulted in Resolution 2118.<sup>98</sup>

It is simply unsustainable to argue that considerations of humanitarian intervention or the responsibility to protect have played any genuine role in Syria. No state has, for instance, invoked the precedent of Kosovo to justify an intervention in Syria,

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the Bush Doctrine is that deterrence and even defense are not fully adequate to deal with these dangers and so the United States must be prepared to take preventive actions, including war, if need be”).

94. S.C. Res. 2118, U.N. Doc. S/RES/1325 (Sept. 27, 2013).

95. See Andrew Osborn et al., *Iraq War Ghosts End UK Plans to Take Part in Syria Action*, REUTERS, Aug. 30, 2013, <http://www.reuters.com/article/2013/08/30/us-syria-crisis-britain-idUSBRE97R1BD20130830>.

96. The constitutional power of the British prime minister to commit troops to war without parliamentary approval derives from the ancient privilege of the king as sovereign and commander-in-chief, though only parliament has the constitutional power to allocate funds for war. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 197-218 (1996). See also Oren Dorell & Kim Hjelmgaard, *Britain Will Not Join USA in Strike on Syria*, USA TODAY (Aug. 30, 2013), <http://www.usatoday.com/story/news/world/2013/08/29/syria-united-kingdom-debate/2725999/> (describing how the House of Commons “voted against military action in [sic] Syria”).

97. Mark Landler et al., *Obama Set for Limited Strike on Syria as British Vote No*, N.Y. TIMES, Aug. 29, 2013, at A1.

98. See Martin Chulov, *Syria Chemical Weapons Claims Need Referral From State Body, Say Inspectors*, GUARDIAN (Apr. 11, 2014), <http://www.theguardian.com/world/2014/apr/11/syria-chemical-weapons-inspection-team-probe-attack>.

notwithstanding that the humanitarian crisis in Syria eclipses that in Kosovo (and Libya).<sup>99</sup> Quite the contrary, the absence of UNSC approval has apparently caused the states that had advocated action to freeze. Indeed, what caused the western powers to contemplate taking military action in Syria was not the 140,000 dead in two years; instead, it was the use of chemical weapons.

More precisely, what caused the United States to threaten military action was almost certainly the fear that chemical weapons could proliferate in a dangerous region. The rationale appears to have been that, in the Middle East, too many non-state actors lurk, actors whose agendas are hostile to the U.S. These are perfectly legitimate policy considerations. The United States perceived a comparatively remote threat, and considered undertaking action to eliminate that threat. This consideration is not a legal one because the threat is too remote (though it could rise to becoming one if the threat were imminent). But it is a valid a policy consideration. It was thus policy that dictated the apparent resolve of the United States (and the Government of the United Kingdom) to face down the Syrian regime after it used chemical weapons, and it was politics in the rawest sense of the word that dictated the backing away of these powers from the use of force. Military interventions had become particularly unpopular in both the United States and the United Kingdom, two countries that, to varying degrees, had been at war since 2001, and whose populations wanted no more.<sup>100</sup> Law simply has not been the primary motivation respecting the decisions policymakers have made hitherto in Syria.

Russia's position is also quite interesting. One Russia expert, Roy Allison, maintains that there are several reasons for Russia's steadfast support of the Syrian regime.<sup>101</sup> First, he notes that there

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99. For a discussion of Kosovo see *infra* Part II.

100. See Richard Norton-Taylor, *Afghanistan War Has Cost Britain More than £37bn, New Book Claims*, GUARDIAN (May 29, 2013), <http://www.theguardian.com/world/2013/may/30/afghanistan-war-cost-britain-37bn-book> (detailing the variety of losses endured by the United Kingdom resulting from its involvement in the Afghanistan intervention); see also Editorial, *Britain's Syria Vote in Perspective*, N.Y. TIMES, Sep. 4, 2013, A22 ("Parliament's vote reflected British public opinion, which, as in most of Europe, does not favor any military involvement in the Syrian civil war"); Mark Landler & Megan Thee-Brenan, *Survey Reveals Scant Backing for Syria Strike*, N.Y. TIMES, Sep. 10, 2013, at A1.

101. Roy Allison, *Russia and Syria: Explaining Alignment with a Regime in Crisis*, 89 INT'L AFFAIRS 795, 801 (2013).



has been a long-standing alliance between Syria and the Soviet Union, dating from 1970.<sup>102</sup> Russian President Vladimir Putin may be reluctant to appear to be undermining a regime with which Russia has had so long-standing an alliance, lest other leaders, especially in the former Soviet Central Asian Republics, become leery of Moscow's friendship.<sup>103</sup> Russia is also concerned that, should the Assad regime fall, chaos might ensue, resulting in the emergence of a radical Islamist threat in Russia's backyard, as it were.<sup>104</sup> Significantly, Putin is also highly skeptical of foreign interventions in aid of revolutions against long-lived regimes, believing that the discourse of democratization and the establishment of the rule of law "are all little more than contrivances that allow the West to control weaker nations."<sup>105</sup> The Russians may state their objections to action in Syria in terms of legal principles; however, Allison makes a convincing case that they are playing a hardball game of *Realpolitik* of the first order.

For what it is worth, the Russians apparently believe—or at least say they do—that Western powers are doing the same. Allison quotes Russian Foreign Minister Sergei Lavrov as saying that his Western counterparts are not interested in Assad per se, but, rather, "They openly say that it is necessary to deprive Iran of a very close ally."<sup>106</sup> There may be some validity to this view. What is clear, in any event, is that the Western powers on the Security Council have not been particularly vocal about affairs in Syria since the chemical weapons issue was resolved with the Syrian regime. Resolution 2118 has reduced the threat of proliferation of these weapons from Syria. It may be entirely coincidental that the silence of Western powers about Syria occurred at almost the same time that their diplomatic relations with Iran began to thaw.<sup>107</sup>

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102. *Id.*

103. *Id.* at 804.

104. *Id.* at 809, 816.

105. *Id.* at 815 (footnote omitted).

106. *Id.* at 808 (footnote omitted).

107. Barak Ravid, *Kerry to meet Iranian counterpart on sidelines of UN General Assembly*, HAARETZ, (Sep. 22, 2013), <http://www.haaretz.com/news/middle-east/1.548534>.

## II. ASSESSING A LEGAL CASE FOR INTERVENTION IN SYRIA

Amongst the most prominent advocates of military intervention in Syria is Harold H. Koh, a former U.S. State Department legal advisor. In his view, a sufficient humanitarian crisis obtained such that Security Council authorization is not required for the United States to initiate a humanitarian intervention. Koh's assessment is not driven, in the first instance, by an overarching legal theory. He justifies his view thus:

On reflection, a “per se illegal” rule [i.e., in the absence of Council approval] is plainly overbroad. If no self-defense considerations arose, such a rule would permanently disable any external collective action, for example, to protect the population of any U.N. permanent member state from genocide. By treating the veto alone as dispositive, the per se position denies any nation, no matter how well-meaning, any lawful way to use even limited and multilateral force to prevent Assad from intentionally gassing a million Syrian children tomorrow. In the name of fidelity to the U.N. and this rigid conception of international law, leaders would either have to accept civilian slaughter or break the law, because international law offers no lawful alternative to prevent the slaughter. The question not asked is whether preventing that slaughter would further the purposes of international law and the U.N. system far more than a rigid reading of Article 2(4) that privileges one systemic value—territorial sovereignty—over all others.<sup>108</sup>

At best, Koh balances competing legal interests. On the one hand there is a world legal order that is antithetical to the use of force in the absence of consensus of the world's major powers on the Security Council, and, on the other, a legal architecture that

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108. See Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013), <http://justsecurity.org/2013/10/02/koh-syria-part2/>; see also Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16 (describing Mr. Koh's support, in spite of plentiful dissent, for intervention in Libya).

ostensibly protects the basic rights of individuals against gross abuses of fundamental human rights.<sup>109</sup> The twin doctrines of humanitarian intervention and the responsibility to protect have grown from the latter, and Koh weighs in on the side of these humanitarian considerations in advocating for intervention in places such as Syria.<sup>110</sup> This is a predilection dictated by policy, not legality. An analyst, eschewing the chaos that could ensue from allowing individual states to determine where and when to intervene based upon their understanding of the customary international law on interventions, could articulate as sound an argument against non-authorized interventions.<sup>111</sup> Again, these are policy debates: no sound legal principle impels the follower of the debate in one direction or another.

While Koh's analysis involves several dimensions, he sets forth an initial three-prong test for determining whether an intervention in Syria would constitute a lawful military action, absent Council authorization. The test is:

[1] If a humanitarian crisis creates consequences significantly disruptive of international order—including proliferation of chemical weapons, massive refugee outflows, and events destabilizing to regional peace and security of the region— that would likely soon create an imminent threat to the acting nations (which would give rise to an urgent need to act in individual and collective self-defense under Article 51);

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109. Perhaps Koh belongs to the group of scholars who do not see the two bodies of law as distinct and in competition, but who instead see ever-increasing “complex connections between security and humanitarianism.” MICHAEL N. BARNETT, *THE INTERNATIONAL HUMANITARIAN ORDER* 4 (2010).

110. See Koh, *supra* note 108.

111. See, e.g., Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 541–542 (2006) (“...we must stay with the status quo, which means tolerating humanitarian crises, even genocide, on the ground that unilateral intervention would make long-term aggression more likely.”); DAVID CHANDLER, *FROM KOSOVO TO KABUL AND BEYOND: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION* (new ed. 2006) (critiquing the development in human rights discourse).

[2] a Security Council resolution were [sic] not available because of persistent veto; and the group of nations that had persistently sought Security Council action had exhausted all other remedies reasonably available under the circumstances, they would not violate U.N. Charter Article 2(4) if they used

[3] limited force for genuinely humanitarian purposes that was necessary and proportionate to address the imminent threat, would demonstrably improve the humanitarian situation, and would terminate as soon as the threat is abated.<sup>112</sup>

Each of Koh's three prongs is problematic.

Koh's first prong requires the existence of a situation that is "significantly disruptive of the international order."<sup>113</sup> The difficulty Koh has with this prong is that it appears to be a mere re-characterization of the phrase "breach or threat to international peace and security."<sup>114</sup> Of course a determination of the existence of the latter is, par excellence, within the competence of the Security Council in the exercise of its Chapter VII enforcement powers. Merely describing such a threat with different words cannot avoid this basic fact, nor can it strip the Council of its prerogatives. It is one thing to claim for individual states the right to make determinations that are variants of the inherent right of self-defense enshrined in Article 51 of the Charter.<sup>115</sup> It is another thing entirely

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112. See Koh, *supra* note 108.

113. *Id.*

114. The U.N. Charter at art. 39 states: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. See also Christine Gray, *The Charter Limitations on the Use of Force: Theory and Practice*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR 86 (Vaughn Lowe et al. eds., 2008); The Legal Department of the Ministry of Foreign Affairs of the Russian Federation, *Legal Assessment of the Use of Force against Iraq*, 52 INT'L & COMP. L. Q. 1059, 1062 (2003).

115. U.N. Charter art. 51 states in pertinent part:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

simply to arrogate to each state the right to second-guess the Council, making its own determination as to what constitutes a threat to the world order, even where the Security Council cannot perceive (at least collectively) such a threat. And it is yet another matter altogether simply to declare doing so legal, the Charter's provision to the contrary notwithstanding.

The second prong involves the right of states to take unilateral action where the Council is deadlocked due to a veto and such states have exhausted other remedies.<sup>116</sup> In such circumstances, Koh asserts that states would not violate the Charter by acting without Council sanction. Fundamentally, Koh appears to regard the existence of a persistent veto as somehow representing a failure of the Charter system. Yet it is by design that the Council can authorize action *only* where sufficient political agreement amongst the permanent members exists, such that none of them exercises the veto.<sup>117</sup> Moreover, the fact that a resolution has not issued from the Council does not mean that the Council has not acted. It is equally plausible to conclude that the Council has considered whether a situation constitutes a threat to international peace and security, and that it has found that it does not. A refusal of the Council, even through the exercise of a veto, to authorize action is not a failure of the U.N. Charter system. It is in fact the way the system was intended: the Charter dictates that action should only occur when the permanent members (plus four other states) can forge a sufficient political consensus that a situation constitutes a threat to peace and security.

Koh's third prong deals with the use of proportionate force for a humanitarian purpose that "would demonstrably improve the humanitarian situation."<sup>118</sup> To begin with, "demonstrably" improving the humanitarian situation can surely be measured only in retrospect. As such, it is a doctrine of dubious utility in judging the legality of an intervention prospectively. Koh cites the Libya example as a salutary one for the removal of a despot threatening his people.<sup>119</sup> Yet the results in Libya have been, in one perspective at

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116. Koh, *supra* note 108.

117. See U.N. Charter art. 27, para. 3.

118. Koh, *supra* note 108.

119. *Id.*

least, utterly disastrous. Other than the removal of a despotic regime itself, Libya seems far worse off by many measures.<sup>120</sup> Who can gainsay that chaos might actually be worse than tyranny?

The international community has neither unlimited resources nor unlimited capacity to devote to the well-being of peoples recently liberated from the depredations of long-lived tyrannical regimes. Citizens of intervening states have limited patience and often an equally limited inclination to expend their taxes on institution-building on a large scale in foreign countries.<sup>121</sup> These considerations must surely play a role in assessing the capacity the international community and individual states have in ensuring a demonstrable improvement in the humanitarian exigencies of states such as Libya and Syria. If Koh can cite Kosovo as a successful intervention in support of his three-prong test, he must also acknowledge the profound fiasco in Libya, amongst other places.

Though Koh is clearly a publicist for the notion that Kosovo stands for the legality in some circumstances of foreign interventions in the absence of Security Council authorization, he cannot demonstrate convincingly that such a legal principle is in fact cognizable as a matter of customary international law. Two of his three prongs, indeed, contain strong policy arguments: exhaustion and demonstrable improvement. This fact underscores that Koh very quickly reaches the limits of law and encroaches on policy and politics in international affairs. It is not surprising that that should be so. The current international system, however it may appear to be sophisticated, is still developing, having been created in 1945. Moreover, arguments respecting humanitarian intervention and the responsibility to protect have barely been extant for two decades, and remain controversial in the legal academic literature, let alone in policy circles.<sup>122</sup> Furthermore, in the absence of an efficient international policing power, states—especially the powerful—still calculate their respective self-interest at least as often as legality in their foreign affairs. Legality, then, offers no greater a limit in this arena than do politics and policy; indeed, it may offer far less, as the Syria example shows.

### III. LEGALITY AND POLITICS IN IRAQ

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120. See *supra* text accompanying notes 56–67.

121. See sources cited *supra* note 100.

122. See sources cited *supra* note 111.

In Iraq, of course, the original intervention led by the United States and the United Kingdom in 2003 was extremely controversial from a legal (and political) perspective. Many trees have been felled to publish denunciations of that war as “illegal,” especially under the UN Charter.<sup>123</sup> It is true that the UN Security Council did not re-authorize the use of force to enforce its demands that Iraq disarm itself to the satisfaction of weapons inspectors.<sup>124</sup> It did, however, in advance of the 2003 conflict and acting under Chapter VII of the Charter, find, that Iraq was in “material breach of its obligations” to disarm itself of weapons of mass destruction under prior Security Council resolutions.<sup>125</sup> This finding, made in November 2002, gave the “coalition of the willing” at least some ostensible authority to commence hostilities to enforce the disarmament resolutions.<sup>126</sup> Indeed, as late as May 2003—the ninth week after the commencement of hostilities—the Security Council re-affirmed Iraq’s Chapter VII obligation to disarm itself of weapons of mass destruction.<sup>127</sup> Notwithstanding the foregoing, it remains that the Security Council staunchly refused to re-authorize the use of force in Iraq.

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123. See, e.g., David Krieger, *The War in Iraq as Illegal and Illegitimate*, in *THE IRAQ CRISIS AND WORLD ORDER* 381 (Ramesh Thakur & Waheguru Pal Singh Sidhu, eds., 2006); Hans Corell, *Authorization for State-Building Missions: Legal Issues Related to Their Creation and Management*, 99 AM. SOC’Y OF INT’L L. PROC. 31, 35 (2005) (citing the violation of the Charter by two Security Council members); Harold Hongju Koh, Address at the Oxford Union: How to End the Forever War? (May 7, 2013), <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf> (citing the invasion of Iraq as being amongst the acts that were “foolish, illegal or inconsistent with American values”) *analyzed in* Groll, *supra* note 7.

124. See Press Release, Security Council, Security Council Holds Iraq in ‘Material Breach’ of Disarmament Obligations, Offers Final Chance to Comply, Unanimously Adopting Resolution 1441 (2002), U.N. Press Release SC/7564 (Aug. 11, 2002) [hereinafter Security Council Holds Iraq in ‘Material Breach’].

125. S.C. Res. 1441, ¶ 1, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

126. See Security Council Holds Iraq in ‘Material Breach,’ *supra* note 124 (“The representative of the United States noted that, while primary responsibility rested with the Council for the disarmament of Iraq, nothing in the resolution constrained any Member State from acting to defend itself against the threat posed by that country, or to enforce United Nations resolutions protecting world peace and security.”).

127. S.C. Res. 1483, ¶11, U.N. Doc. S/RES/1483 (May 22, 2003).

Still, the Security Council did formally recognize post hoc the occupation forces in Iraq.<sup>128</sup> It charged them with specific duties,<sup>129</sup> though it also reminded them of the “temporary nature of the exercise . . . of the specific responsibilities, authorities, and obligations” granted in resolution 1483.<sup>130</sup> Perhaps more significantly, as a nascent insurgency first began by October 2003, the Security Council, acting under its Chapter VII powers, authorized the creation of a multinational force (MNF-I) “to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”<sup>131</sup> The MNF-I was to be under a “unified command,” effectively a euphemism for the U.S. command structure.<sup>132</sup>

The UNSC did not merely authorize this function for the states that had already invaded and occupied Iraq. Rather, it expressly urged other U.N. Member States to contribute military forces under “this United Nations mandate.”<sup>133</sup> The MNF-I mandate was extended in 2004,<sup>134</sup> 2005,<sup>135</sup> 2006,<sup>136</sup> and 2007.<sup>137</sup> It finally expired at the end of 2008,<sup>138</sup> by which time the United States and Iraq signed a bilateral agreement allowing U.S. forces to remain in Iraq through the end of 2011.<sup>139</sup>

It is interesting to compare the intervention in Iraq with that of the NATO intervention in Kosovo. To date history continues to treat the latter much better, and not just because the Iraq war has failed to engender stable political and legal institutions or even a diminution in

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128. *Id.* at 2.

129. *Id.* ¶¶ 4–6, 13.

130. S.C. Res. 1511, ¶ 1, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

131. *Id.* ¶ 13.

132. *Id.*

133. *Id.* ¶ 14.

134. S.C. Res. 1546, ¶ 9, U.N. Doc. S/RES/1546 (June 8, 2004).

135. S.C. Res. 1619, ¶ 1, U.N. Doc. S/RES/1619 (Aug. 11, 2005).

136. S.C. Res. 1723, ¶ 1, U.N. Doc. S/RES/1723 (Nov. 28, 2006).

137. S.C. Res. 1790, ¶ 1, U.N. Doc. S/RES/1790 (Dec. 18, 2007). For a discussion of the Security Council’s annual extensions of the MNF-I mandate, see M. Cherif Bassiouni, *supra* note 3, at 3–9.

138. See S.C. Res. 1859, U.N. Doc. S/RES/1859, at 2 (Dec. 22, 2008) (noting that the mandate of the MNF would expire as on December 31, 2008).

139. Strategic Framework Agreement for a Relationship of Friendship and Cooperation, U.S.-Iraq art. 24, Nov. 17, 2008, TIAS 09-101.1. See also Bassiouni, *supra* note 3, at 9–15.



violence rates.<sup>140</sup> Legal scholars argue, at a minimum, that the intervention in Kosovo was legitimate if not legal, but others have gone further.<sup>141</sup> No less an authority than Harold Koh has argued that the Security Council's passage of Resolution 1244 has a significant post hoc legal effect.<sup>142</sup> He maintains that once the UNSC approved the political settlement in Kosovo, it "effectively ratif[ied] the NATO action under international law."<sup>143</sup>

It is unlikely that supporters of this line of reasoning, on the other hand, would argue that post hoc action by the Council constitutes a ratification of the 2003 war in Iraq. Yet the UNSC did more than merely create a mandate for the MNF-I and renew it annually over a period of half a decade. It also repeatedly endorsed the unfolding political processes both during and after the legal occupation of Iraq. A thumbnail sketch of the Council's actions follows.

To begin with, the Council made specific provisions for the political and legal reconstruction of the country, tasking the Special Representative of the Secretary-General (SRSG), "in coordination with the [occupation] Authority," to undertake certain specific tasks.<sup>144</sup> It also welcomed the establishment of the Iraqi Governing Council (IGC), appointed by the U.S. Administrator in Iraq, as an advisory body.<sup>145</sup> When the IGC appointed a cabinet, the Security Council endorsed the appointment and determined that the IGC and its cabinet temporarily embodied the sovereignty of Iraq, pending the establishment of an internationally recognized representative

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140. At the time of the author's final edit of this article, the state of Iraq appears in imminent collapse as a coalition of insurgent groups has overtaken large swaths of the country north of Baghdad, the Iraqi Army collapsed in those areas, Shii militias are ascendant again, and the Iraqi Kurdistan region appears poised on the verge of declaring its independence.

141. See David Wippman, *Kosovo and the Limits of International Law*, FORDHAM INT'L L. J. 129, 130 (2001) (explaining that some scholars see intervention in Kosovo as technically illegal because the Security Council did not authorize it, while others justify the intervention under humanitarian or emergency law).

142. S.C. Res. 1244, S/RES/1244 (June 10, 1999).

143. Koh, *supra* note 108.

144. S.C. Res. 1483, *supra* note 127, ¶ 8.

145. S.C. Res. 1500, ¶ 1, U.N. Doc. S/RES/1500 (Dec. 18, 2007).

government.<sup>146</sup> The Security Council later endorsed the formation of the first post-2003 sovereign Iraqi Interim Government.<sup>147</sup>

Aside from the political developments and providing for Iraq's security, the Council also became deeply enmeshed in protecting the economic resources and development of the country. Within weeks of the occupation of the country, the Council lifted "all prohibitions related to trade with Iraq and the provision of financial or economic resources."<sup>148</sup> Using its Chapter VII powers, it created the Development Fund for Iraq (DFI)<sup>149</sup> and immunized its assets from levy or other attachment or garnishment.<sup>150</sup> It required the occupation authority to sell Iraq's petroleum and natural gas products pursuant to prevailing international best practices and also protected the proceeds from levy by requiring their deposit into the DFI.<sup>151</sup> As with the case of the MNF-I, the Council repeatedly extended these protections over the years.<sup>152</sup>

Thus, as in the case of UNSC action with respect to Kosovo, it appears that the Council fully and repeatedly over the years endorsed the "settlement" in Iraq, even though it did not authorize the initial use of force in 2003. Yet no legal analyst to the author's knowledge has argued that such post hoc action by the Council legitimated the United States and United Kingdom and allied action in Iraq. The legal distinctions between the two cases seem rather minimal. What more probably distinguishes them is the political assessment of the desirability of the action taken. The Kosovo action was thought to have been a moral good, a salutary precedent for future analogous situations. Iraq is seen as the opposite, a hyperpower throwing its weight around, with a few countries willing to go along, but without

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146. S.C. Res. 1511, *supra* note 130, ¶¶ 3–4.

147. S.C. Res. 1546, *supra* note 134, ¶ 1.

148. S.C. Res. 1483, *supra* note 127, ¶ 10.

149. *Id.* ¶ 12.

150. *Id.* ¶ 22. The initial period of immunity was until 31 December 2007. *Id.*

151. *Id.* ¶ 20. There was an exception requiring Iraq to pay 5% of the proceeds of the sale of its petroleum products to discharge the judgments entered against it in the United Nations Compensation Commission (UNCC). *Id.* ¶ 21. The UNCC was a tribunal commission established to compensate victims who alleged they had suffered economic harm as a consequence of Iraq's illegal invasion and occupation of Kuwait. S.C. Res. 687, ¶ 16–18, U.N. Doc. S/RES/687 (Apr. 8, 1991).

152. S.C. Res. 1790, *supra* note 137, ¶ 3; S.C. Res. 1859, *supra* note 138, ¶ 1; S.C. Res. 1905, ¶ 1, U.N. Doc. S/RES/1905 (Dec. 21, 2009). The immunities terminated on 31 December 2010 and were not renewed.

justification. Perhaps the legal proposition reduces to the aphorism that “there is nothing either good or bad, but thinking makes it so.”<sup>153</sup>

As a final and perhaps tangential consideration, Koh also notes the fact the nineteen members of the North Atlantic Treaty Organization believed that its actions in Kosovo were legal.<sup>154</sup> To Koh, this is evidence of the legality of the actions in Kosovo as a matter of customary law, notwithstanding the lack of Security Council authorization. Taking the point, at least forty-nine nations participated in one way or another, becoming members of the “coalition of the willing” in Iraq.<sup>155</sup> Of the forty-nine states, eighteen were current or future members of the expanded NATO.<sup>156</sup> Other members of the coalition included Australia, Japan, and South Korea.<sup>157</sup> While other long-standing members of NATO such as France and Germany did not share this assessment of the legality of the actions in Iraq, both actively supported (for Germany, while it was on the Council, at least) the long litany of resolutions passed in support of the occupation and its aftermath.<sup>158</sup>

Though some commentators argue that Kosovo, though illegal, was legitimate because a mass slaughter was stopped, similar arguments are rarely if ever made in Iraq, where a maniacal tyrant at least was overthrown. In fairness, it may well be that the end result in Iraq—the chaos and bloodshed that has ensued over the years, the

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153. WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2.

154. Koh, *supra* note 108.

155. Press Release, The White House, Operation Iraqi Freedom: Coalition Members (Mar. 27, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030327-10.html> [hereinafter Operation Iraqi Freedom: Coalition Members].

156. These countries included Albania (2009), Bulgaria (2004), Czech Republic (1999), Denmark, Hungary (1999), Iceland, Italy, Latvia (2004), Lithuania (2004), the Netherlands, Poland (1999), Portugal, Romania (2004), Slovakia (2004), Spain (1982), Turkey (1952), and, of course, the United Kingdom and the United States. *Member Countries*, N. ATL. TREATY ORG., [http://www.nato.int/cps/en/natolive/topics\\_52044.htm](http://www.nato.int/cps/en/natolive/topics_52044.htm) (last visited Apr. 17, 2014). The years in parentheses indicates the year of entry into NATO of the non-original members. The Organization now has twenty-eight members. *Id.*

157. Operation Iraqi Freedom: Coalition Members, *supra* note 154.

158. Germany happened to be an elected member of the Security Council in 2003 and 2004. U.N. Security Council, Countries Elected Members of the Security Council (last visited May 14, 2014), <http://www.un.org/en/sc/members/elected.asp>.

violence and concomitant apparent imminent collapse of the state that are underway at this writing—perhaps contributes to the sense of illegitimacy. But if, as Koh holds, subsequent action by the Council confers legality on Kosovo, it is difficult to articulate a reasoned argument why subsequent action by the Council does not have the same salutary effect on the invasion in Iraq. The intervention in Iraq, it seems was always—and perhaps will always be—politically anathema.

#### IV. AN EXCURSUS FROM THE MIDDLE EAST: THE CRIMEA AFFAIR

That politics trump legality could not have been more clearly demonstrated than in the recent dispute over the Russian Federation's occupation and annexation of Crimea.<sup>159</sup> Forty-two UN Member States submitted a draft resolution for action by the Security Council.<sup>160</sup> The draft, *inter alia*, recognized the sovereignty and territorial integrity of Ukraine, and called upon “all parties to pursue immediately the peaceful resolution” of the dispute.<sup>161</sup> It also declared the hastily-arranged referendum in Crimea invalid, but called upon the Ukrainian government “to continue to respect and uphold its obligations under international law and to protect the rights of all persons in Ukraine, including the rights of persons belonging to minorities.”<sup>162</sup> Predictably, the Russians vetoed the draft resolution, which garnered thirteen votes (and a Chinese abstention).<sup>163</sup>

Significantly, the draft resolution was brought under Chapter VI of the UN Charter. The peaceful resolution of disputes called for in the text is, *par excellence*, the exercise of the Council's powers under Chapter VI.<sup>164</sup> Such an exercise of the Council's prerogatives is in

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159. See Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, N.Y. TIMES, Mar. 18, 2014, at A1.

160. Draft Security Council Resolution on Ukraine and Crimea, in draft dated Mar. 15, 2014, U.N. Doc S/2014/189 (Mar. 15, 2014)

161. *Id.* at 1.

162. *Id.* at ¶ 3.

163. See U.N. SCOR 69th Sess., 7138th mtg. at 3, U.N. Doc S/PV.7138 (Mar. 15, 2014)

164. U.N. Charter art. 33 (the first article of Chapter VI, “Pacific Settlement of Disputes”) states:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation,

marked contrast to the mandatory nature of Chapter VII resolutions.<sup>165</sup> In vetoing this Chapter VI resolution, the Russian permanent representative took the floor to declare that the Russian Federation would “vote against the draft resolution.”<sup>166</sup> None of the Council member who spoke following the vote challenged Russia’s right to veto the draft resolution. They should have: the UN Charter makes clear that Russia should not have been allowed to vote at all. Article 27 of the Charter states in relevant part:

Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; *provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.*<sup>167</sup>

The *travaux preparatoires* of Clause 2 of this article (in italics) makes clear that a Council member that is a party to a dispute must abstain from voting on a Chapter VI resolution. The genesis of the principle was the proposal of the United Kingdom, made at the Dumbarton Oaks Conference of 1944 that resulted in the ultimate establishment of the United Nations the following year. The British advanced the view that, where a Security Council member is a party to a dispute, that member must abstain from voting on *any* resolution before the Security Council respecting that dispute.<sup>168</sup> The Soviet position, in opposition, was that Council unanimity must be strictly maintained, rejecting any requirement of abstention.<sup>169</sup> The U.S.

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arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

165. U.N. Charter art. 39, in contrast, empowers the Council to mandate a resolution to disputes that, in its judgment, constitute a threat to international peace and security.

166. U.N. SCOR 69th Sess., 7138th mtg. at 2, U.N. Doc S/PV.7138 (Mar. 15, 2014)

167. U.N. Charter art. 27, para. 3 (emphasis added). Article 52(3) involves the use of regional organizations in the pacific settlement of disputes.

168. See Andreas Zimmerman, *Article 27, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 880 (Bruno Simma, et al., eds. 2012).

169. *Id.*

position set the compromise: where the Council is considering an enforcement action, i.e., a Chapter VII resolution, every Council member would vote; however, parties to a dispute must abstain where the Council contemplates the pacific resolution of the dispute, “ie under what is now Chapter VI.”<sup>170</sup> This agreement was incorporated into the Yalta formula and the San Francisco Declaration.<sup>171</sup>

The resultant language ultimately incorporated into the Charter, quoted above, applies to substantive decisions under Chapter VI.<sup>172</sup> That is to say, the “obligation to abstain applies, first and foremost, to all measures expressly provided for in Arts 33, 34, 36, and 38.”<sup>173</sup> The obligation to abstain from voting on a decisions arising under Article 52(3) is “[p]arallel to measures under Chapter VI.”<sup>174</sup> That is because “mutatis mutandis, the very same considerations apply to measures taken exclusively under Chapter VI (rather than under Chapter VI in conjunction with Art. 52(3)).”<sup>175</sup>

There are thus two independent circumstances in which Clause 2 of Article 27(3) of the UN Charter requires a Security Council member that is also a party to a dispute to abstain from voting. The first circumstance is where the Council tables a resolution exclusively under any of the substantive provisions of Chapter VI. The second circumstance is where a resolution under Article 52(3) is tabled. In order to require abstention, therefore, a resolution need only be made exclusively pursuant to Chapter VI, not both Chapter VI and Article 52(3). This much is obvious both from the plain text of the provision, as well as from the *travaux*. Both circumstances involve the Security Council seeking to resolve the dispute through pacific means, outside its enforcement powers.

Obviously the other permanent members, three of whom (the U.S., the U.K., and France) tabled the resolution on Crimea, are as able as are legal scholars to read the text of Article 27(3) and to

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170. *Id.*

171. *Id.* at 880–881. Zimmerman notes that the Yalta formula used the term “should” in lieu of “shall” that was used in the Charter itself. *Id.* at 880.

172. *Id.* at 919.

173. *Id.* at 920 (emphasis added). Zimmerman observes that, legalities aside, this principle has no *de facto* relevance to Article 38, which requires the consent of all parties to a dispute to apply. *Id.*

174. *Id.* at 922.

175. *Id.*

access its *travaux préparatoires*, in whose creation each of them participated. All delegations that addressed the issue inferentially regarded Russia as a party to the dispute, and one named it so explicitly.<sup>176</sup> Yet none of them objected to the Russian veto. None of them suggested—at least publicly—that the Russian Federation, which had sent forces into Crimea and was about to annex the territory, had no right to vote on this draft resolution brought under Chapter VI of the Charter. Indeed, the US permanent representative expressly conceded that Russia had the right to veto the draft resolution.<sup>177</sup> Why?

A definitive answer to this question will not be available until governments disclose their archives reflecting the deliberations in each capital at the time. With respect to the three permanent members that voted for the resolution, however, it is easier to form impressions of their motivations. The simple historical fact is that the U.S., the U.K., and France have been far more likely to use military force—with or without Security Council authorization—than either China or the Russian Federation have since the end of the Cold War (the U.S. and the U.K. even more so than France). Each of these three powers, for instance, participated in the war in Kosovo, and two of them occupied Iraq. Neither of these operations enjoyed the sanction of the Security Council. It does not require great imagination to conclude none of these powers wished to set a precedent over Russia's then-impending annexation of Crimea that might someday be used against them, requiring them to abstain from vetoing a resolution aimed at them. The legal arguments set forth above might have been available, but *Realpolitik* considerations would dictate a different course.

It should be noted parenthetically that state praxis on the Security Council could conceivably overcome the text of the Charter on this point, though a study of whether this situation has occurred would be far beyond the scope of this article. The effective

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176. The Lithuanian permanent representative accused the Russian Federation of violating “the core tenets of the Charter,” including Article 2(4) requiring states to refrain from the use or threat of the use of force in their international relations, and Article 33(1), requiring the “parties to a dispute” to resolve such disputes peaceably. U.N. SCOR, 69th Sess., 7138th mtg. at 6, U.N. Doc S/PV.7138 (Mar. 15, 2014)

177. *Id.* at 3.

abnegation of the language of the Charter through praxis has obtained, for instance, with respect to abstentions or absences from voting by the five permanent members of the Security Council. The plain text of clause 1 of Article 27(3) states unequivocally that non-procedural decisions require the actual consensus of each of the five permanent members for a resolution to pass, since it requires, “the concurring votes of the permanent members.”<sup>178</sup> Still, since 1946, “it has been the consistent practice of the Security Council to interpret a voluntary abstention by a permanent member as not tantamount to a veto.”<sup>179</sup> If states serving on the Council have routinely voted on Chapter VI resolutions concerning disputes to which they are parties, such a practice would trump the wording of the Charter. Perhaps the most famous negative vote cast by a non-permanent party to a dispute was Rwanda’s vote—the sole negative vote—on the resolution establishing the International Criminal Tribunal for Rwanda.<sup>180</sup> That resolution, however, was a Chapter VII resolution,<sup>181</sup> thus not subject to the abstention requirement of Clause 2 of Art. 27(3).

#### CONCLUSION

On the eve of the First World War, the world’s powers—many of them reluctantly—gathered at the invitation of the Tsar at the 1899 peace conference in The Hague.<sup>182</sup> The German statesman, Friedrich von Holstein, instructed his delegation, “For the state there is no aim superior to the protection of its interests . . . In the case of great powers these will not necessarily be identical with the maintenance of peace.”<sup>183</sup> How far has the international order progressed from that rather grim assessment? The above digest of the interventions in

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178. U.N. Charter art. 27, para. 3 (emphasis added). *See also* Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513, 540 (2009) (noting that Article 27(3) of the Charter on its face requires unanimity of the permanent members).

179. Constantin A. Stavropoulos, *The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, Paragraph 3, of the Charter of the United Nations*, 61 AM. J. INT’L L. 737, 742 (1967). *See also* The Editors, *Introduction*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR* 19 (Vaughn Lowe et al. eds., 2008) (noting at least five other areas in which U.N. practice has gone beyond the Charter’s express language).

180. *See* U.N. SCOR, 49th Sess., 3453d mtg., at 3, U.N. Doc S/PV.3453 (Nov. 8, 1994) (wherein China abstained.)

181. S.C. Res 955, ¶ 2, U.N. Doc. S/RES/955 (Nov. 8, 1994).

182. MARGARET MACMILLAN, *THE WAR THAT ENDED PEACE: THE ROAD TO 1914* 300 (2013).

183. *Quoted in id.* at 301.



Libya and Syria suggest not nearly as far as advocates of humanitarian interventions wish.

True, the international community intervened to remove Muammar Gadhafi, a brutal tyrant who had terrorized his population over forty-two years and was threatening to renew his barbaric mistreatment of his own citizens in light of the revolution against his rule. Yet the brutality of his reign had hardly caused him to be a pariah in the international order, once he discharged his obligation in respect to the Lockerbie and Ténéré bombings. Quite the contrary, Libya could only be regarded as a respected member of the international community by early 2011, weeks before the start of the revolution. What changed in terms of the Western calculus to intervene was not the actual reality of mass atrocities, but the *prospect* of such atrocities. While that may appear to be a salutary precedent for proponents of humanitarian intervention, given subsequent events in Libya, the opposite may well be the case.

It was relatively easy, after all, for the international community to intervene from the air to help the revolutionaries bring down the Gadhafi regime. In the words of the by-now trite cliché, there were no international “boots on the ground”, only an aerial bombardment. Once the regime fell, however, there have been no calls for military intervention to save the Libyans from an ongoing humanitarian exigency, one in which the state itself is collapsing, with militias roaming the streets of the major cities and towns. It must presumptively be gauged by the beholder whether utter chaos constitutes a higher or lower humanitarian ontological status as compared with living under tyranny. Regardless, there have been no international advocates for precipitating the rule of law in Libya through the use of international peacekeepers. It remains, of course, that Muammar Gadhafi had a personal history with most of the world’s major powers (at least four of the permanent five members of the Council) that made it politically feasible to remove him from power.

In the event, the failure of the world to intervene in Syria appears to be a blow to humanitarian intervention as a doctrine of international law. In contrast to Libya, where the humanitarian crisis was impending, in Syria the regime was in the act of barbarously crushing its opponents. Yet the world powers only looked on, unwilling to relieve an ongoing humanitarian catastrophe, apparently

because the Security Council was deadlocked. A more cynical reading of the events would suggest, as noted above, that war-weary populations in the United States and the United Kingdom simply could not countenance another intervention—even where chemical weapons were used by the regime.

In the case of Syria, the Russian Federation has been protecting an old and faithful ally. It, together with China, has also been checking the Western powers on the Council. While this is *Realpolitik* of the first order, it does not speak in favor of the viability of the doctrine of humanitarian intervention. It is, perhaps, telling that an observation made by one scholar nearly a decade ago may still be valid today. While a right of humanitarian intervention may not yet exist, given state praxis of interventions over the past several decades and coupled with a growing *opinio iuris* in that direction, it is possible that the world is in the midst of such a right “crystalliz[ing] into a doctrine of customary international law.”<sup>184</sup>

The world may have progressed rather from the admonition with which von Holstein left his delegates. It is unlikely that a senior official of a major power would today phrase his terms of reference so crudely. Yet the examples of the recent interventions discussed in this article suggest that not enough has changed in terms of the modern practice of states. While law may be the expected language of international relations at the United Nations, political realities are still, as a rule, a more important determinant for state action than law.

At the conference that gave rise to this paper, the moderator, Prof. Maxwell O. Chibundu of the Carey School of Law, University of Maryland, asked whether, in the absence of law, politics can play a role to moderate the use of force by states. It was an outstanding question, one not easily answered. At one level, one could say that domestic politics certainly moderated against the use of force in Syria with respect to the United States and the United Kingdom. That answer, however, is glib and too subject to the vagaries of a particular historic moment after each country had been at war for twelve years. It is also true that the politics of the international order act as a preventive to the use of force: For obvious reasons, there has been no suggestion of a military intervention to defend Ukraine against a naked use of force by Russia.

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184. SUSAN BREAU, HUMANITARIAN INTERVENTION: THE UNITED NATIONS AND COLLECTIVE RESPONSIBILITY 254, 271–274 (2005).

Yet it is also difficult to see that law has been an efficient counterbalance to the use of force, either. Law may matter in the marginal case or in some countries, but the law is flexible and unsure enough to allow countries to justify all but their most obviously nakedly aggressive acts. To those who believed the Iraq war to be illegal, action by the US and the UK and their allies was a case of naked aggression. Yet both governments produced legal justifications for the use of force, just as Harold Koh can adduce doctrinal arguments supporting the use of force in Syria, even in the absence of Council authorization. That the legal order is so weak and flexible is hardly desirable. It would be far better for a stable and enforceable international legal order to exist, one that closely regulates the use of force, and one by which the world's powers agree to be bound. Such an international order, however, is not yet extant.