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SYMPOSIUM ON UNAUTHORIZED MILITARY INTERVENTIONS FOR THE PUBLIC GOOD

HUMANITARIAN INTERVENTION: TIME FOR BETTER LAW

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The United States' April 6, 2017 missile strikes against Syria raise three fundamental questions about how we should assess military interventions taken for humanitarian ends but without Security Council authorization: First, is unilateral humanitarian intervention per se illegal under international and domestic law—what I call the "never/never rule"? Second, were the Trump Administration's April 6, 2017 strikes per se illegal under international and domestic law? And third, going forward, can we live with the status quo, where in state practice, unilateral humanitarian intervention seems to occur regularly, without being formally justified in law?

To each of these three questions, I answer "no." With respect to unilateral humanitarian intervention, international lawyers now divide into three distinct camps: those who always consider that practice illegal and illegitimate; those who consider some forms of it "illegal but legitimate"; and those, like me, who believe we need a better law by which to evaluate its legality. A majority of international law scholars still probably fall into the first two camps, which share the belief that unilateral humanitarian intervention is always illegal. Let me argue for the third view, which I have detailed elsewhere:[1] the time has come for international lawyers to develop a better rule to evaluate the legality of unilateral humanitarian intervention: namely, an affirmative defense that would exempt from legal wrongfulness actions that meet rigorous standards.

First, is unilateral humanitarian intervention always per se illegal under both domestic and international law? The simplistic answer is "Yes. Never/never. You can never have lawful humanitarian intervention under either international or domestic law." But on inspection, this "never/never rule" exhibits the absolutist, formalist, textualist, originalist quality Americans usually associate with their late Justice Antonin Scalia. It relies on absolutist readings of text, as "originally understood": a nation may not engage in unilateral humanitarian intervention because of prohibitive wordings of Article 2(4) of the UN Charter[2] and Article I of the U.S. Constitution.[3] But this position cannot be sustained. Neither simplistic absolutist reading can be squared with state practice, U.S. interbranch practice, or the broader object and purpose of the document being interpreted.

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[1] Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUSTON L. REV. 971 (2016). Others in this third camp include Sir Daniel Bethlehem, Steven Ratner, Jane Stromseth, and Marc Weller.

[2] UN Charter art. 2(4) ("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, or in any other manner inconsistent with the Purposes of the United Nations.").

[3] U.S. Const. art. I, sec. 8, cl. 11 ("Congress shall have Power … to declare war").

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Under international law, the never/never rule is inconsistent with the object and purpose of the UN Charter, which includes "promoting and encouraging respect for human rights."[4] The absolutist position would require a reading that would require states to stand by, without meaningful recourse, even if one of the five permanent members of the UN Security Council were to commit genocide against own citizens. It seems equally inconsistent for a permanent member of the Security Council, such as Russia, to insulate from condemnation a client state like Assad's Syria when it commits war crimes and crimes against humanity against its own citizens by eight consecutive UN Security Council vetoes. To overcome the manifest rigidity of the never/never rule, state practice offers many prominent counterexamples of de facto humanitarian intervention:[5] India-Bangladesh,[6] Tanzania-Uganda,[7] Vietnam-Cambodia (Khmer Rouge), the United States and the United Kingdom creating no-fly zones over Iraq to protect the Kurds and the Shias,[8] and of course, NATO's famous Kosovo episode of the late Twentieth Century.[9] If we as international lawyers believe that international law should serve human purposes—including the protection of human rights, not just the territorial sovereignty of states—the never/never rule cannot survive as the legal rule governing unilateral humanitarian intervention in the Twenty-First Century.

As a matter of U.S. domestic law, it seems similarly inconsistent with the Constitution's design to say—in the face of a history of contrary executive branch practice—that a limited, unilateral executive strike genuinely motivated by humanitarian purposes constitutes a "war" that constitutionally, Congress must always declare. As I have chronicled elsewhere, the Framers plainly intended a strong executive operating within a strong constitutional system capable of responding effectively to emergent external threats.[10] Because of the superior institutional capacity of the executive to respond, over time, interbranch practice has inevitably shifted discretion to the President to respond in many bona fide emergency situations, eroding the domestic face of the never/never rule through institutional acquiescence.

What about the second camp: those who consider some forms of unilateral humanitarian intervention "illegal but legitimate"? That position seemed dubious nearly two decades ago—at the time of the Kosovo intervention—and seems even less acceptable now. Where else in the field of human rights do we accept "illegal but legitimate" as the final judgment of history? We did not say, for example, that regrettably, same-sex marriage or interracial marriage were "illegal but legitimate." Instead, we moved to legalize them, bringing our best lawyerly skills, craft, and commitment to bear in a concerted effort to make lawful what we believed to be morally legitimate. Not to do so simply corrodes respect for the rule of law.[11]

That leaves what I believe to be the third, correct view: "We need better law," both domestically and internationally. We cannot accept this status quo and let this moment again pass without clarifying precisely when we think unilateral humanitarian intervention is or is not legal. This is a lawmaking moment. Otherwise, this scenario will

[4] UN Charter pmbl., art. 1(1), (3).

[5] *See generally* Anne Orford, International Authority and the Responsibility to Protect (2011); Michael W. Doyle, The Question of Intervention: John Stuart Mill and the Responsibility to Protect 110 (2015) (since Kosovo, the Responsibility to Protect concept "has been invoked explicitly and implicitly, successfully and unsuccessfully, in cases ranging from Myanmar and Kenya in 2008, to Guinea in 2009, and … Libya in 2011").

[6] *See* Gary J. Bass, *The Indian Way of Humanitarian Intervention*, 40 Yale J. Int'l L. 227 (2015).

[7] *See* Daniel G. Acheson-Brown, *The Tanzanian Invasion of Uganda: A Just War?*, 12 Int'l Third World Stud. J. & Rev. 1 (2001).

[8] *See* Ryan Goodman, *Humanitarian Military Options for Syrian Chemical Weapons Attack: "Illegal But Not Unprecedented,"* Just Security (Apr. 6, 2017, 9:56 AM).

[9] *See* Koh, *supra* note 1, at 976–80.

[10] *See generally* Harold Hongju Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair (1990).

[11] *See* Rebecca Ingber, *International Law is Failing Us in Syria*, Just Security (Apr. 12, 2017, 11:06 AM).

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continue to recur because we have hesitated to tackle the legality issue head-on. If we do not, increasingly, state practice will likely deviate from the view of publicists. While we now have a majority view among academics that one way or another, unilateral humanitarian intervention is illegal—either illegal and illegitimate or illegal but legitimate—tellingly, the emerging state practice regarding the recent April 6, 2017 Syria strikes is that law-abiding states treat them as "not illegal," a position more in line with my third intellectual camp.[12]

That brings me to my second question: were the Trump Administration's April 6, 2017 strikes per se illegal under international and domestic law? The day after the strikes, I expressed my tentative view that they were not illegal, but that the Administration's harder task was to pivot from an isolated strike into a broader diplomatic strategy to solve the underlying Syrian crisis.[13] I argued that we must separate the legal issue—were the strikes lawful?—from the complex policy question—what should the United States do about Syria? And I repeated my suggested test for judging the international lawfulness of claimed humanitarian interventions:

(1) If a humanitarian crisis creates consequences significantly disruptive of the international order—including proliferation of chemical weapons, massive refugee outflows, and events destabilizing to regional peace and security—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 UN Charter Article 51); and

(2) a Security Council resolution were not available because of a 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 UN 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.

In particular, these nations' claims that their actions were not wrongful would be strengthened if they could demonstrate:

(4) that the action was collective, *e.g.*, involving the General Assembly's Uniting for Peace Resolution or regional arrangements under UN Charter Chapter VIII;

(5) that collective action would prevent the use of a per se illegal means by the territorial state, *e.g.*, deployment of banned chemical weapons; or

(6) would help to avoid a per se illegal end, *e.g.*, genocide, war crimes, crimes against humanity, or an avertable humanitarian disaster, such as the widespread slaughter of innocent civilians, for example, another Halabja or Srebrenica. To be credible, the legal analysis of any particular situation would need to substantiate each of these factors with persuasive factual evidence of: (1) Disruptive Consequences likely to lead to Imminent Threat; (2) Exhaustion; (3) Limited, Necessary, Proportionate, and Humanitarian Use of Force; (4) Collective Action; (5) Illegal Means; and (6) Avoidance of Illegal Ends.[14]

[12] Julian Ku, *Almost Everyone Agrees that the U.S. Strikes Against Syria are Illegal, Except Most Governments*, Opinio Juris (Apr. 7, 2017, 4:49 PM).

[13] For a preliminary view, see Harold Hongju Koh, *Not Illegal: But Now the Hard Part Begins*, Just Security (Apr. 7, 2017, 6:09 AM).

[14] Koh, *supra* note 1, at 1004–15.

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While it was early to judge whether the Trump Administration's April 6 actions satisfied this standard, particularly points (3) and (4), if they did, recognition of a customary international law "affirmative defense" against a claim of Article 2(4) violation would claim

> an ex post exemption from legal wrongfulness. The International Law Commission's Articles on State Responsibility recognize, for example, that extreme circumstances such as distress and necessity would preclude claims of international wrongfulness against an acting state and permit certain forms of countermeasures to stop illegal acts by others. Whether the collective action would ultimately be judged internationally lawful would then depend critically on what happened next, particularly if the Security Council condoned the action after the fact. … Reading an implied narrow exception into that rigid rule would better balance the risks of over- and under-action in the most dire situations.[15]

Nor, under analysis I offered elsewhere,[16] did the President's isolated April 6 strikes responding to Assad's chemical attacks violate domestic law. Under the Constitution, those strikes did not rise to the level of "war" in constitutional sense; nor did they continue above the level of "hostilities" in the statutory sense for two months so as to implicate the War Powers Resolution. The President should have asked Congress to endorse publicly his April 6 actions, but in this sad political climate, that did not happen.

This leads to my third point: we cannot live with this state of affairs as the continuing status quo. The never/never rule creates a *bi-level bias toward inaction* in the face of gross human rights abuses at both the international and domestic level. The consequences of that legal bias favors passivity, falls on innocent civilians, and guts the possibilities for meaningful atrocities prevention. The same bias toward passivity guts the possibilities for Richard Holbrooke-style "smart power" diplomacy—diplomacy backed by force of the kind that might motivate initiation of a "Syrian Dayton" peace process to resolve the festering Syrian crisis. Over the last five years, the only two times that Russia and Assad have been willing to engage seriously at the diplomatic table have occurred when the United States credibly threatened force: President Obama's 2013 "red line" episode (which prompted removal of a significant stockpile of chemical weapons) and now. Before the April 6 strikes, the U.S. Secretary of State had little diplomatic leverage. He could only say to Russia's President Putin and Foreign Minister Lavrov: "If you use chemical weapons on innocent Syrian civilians, we will use harsh language and introduce a UN Security Council Resolution that you can veto for the ninth time." But rendering the use of force option legally available would instead allow the Secretary of State to say credibly: "We and our allies are looking to establish a no-fly safe zone in southern Syria or a northern humanitarian corridor from Aleppo to Turkey, and we will enforce it, even against Russian planes. Because you were undeniably complicit in Assad's hiding and use of chemical weapons, we will call you out unless you stand down and agree to abstain from a UN Security Council Resolution allowing this state of affairs." To be clear: the goal is not for lawyers to provide an excuse for unconstrained use of force in places like Syria. Rather, the goal is to make legally available the option of diplomacy backed by force, which would give greater leverage to meaningful diplomacy than diplomatic talk alone.

How to respond to the counterarguments against this position? First, some claim that any President can invoke claims of treaty violation or regional instability to use unilateral executive force based on the claimed need for humanitarian intervention.[17] But surely good lawyers applying a nuanced legal rule to uncontested facts can distinguish exceptional situations from pretextual justifications. At this point, there can be little doubt that Syria presents a situation of unusual and exceptional severity: the strikes were invoked against a violation of a century-old

[15] *Id.* at 1010.

[16] *Id.* at 1015–16.

[17] *See, e.g.*, Jack Goldsmith, *The Constitutionality of the Syria Strike Through the Eyes of OLC (and the Obama Administration)*, LAWFARE (Apr. 7, 2017, 7:31 AM).

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global prohibition against the use of chemical weapons in a situation where European and Middle Eastern stability have been genuinely threatened by the Syrian civil war and the ensuing refugee crisis.

A second counterargument is that legally permitting unilateral humanitarian intervention in exceptional circumstances will lead down a slippery slope. But the slippery slope runs both ways. As noted above, it currently runs heavily in favor of a bi-level policy bias toward passivity in the face of gross abuses. Again, able lawyers should be capable of developing narrow legal tests that hold harmless red-light-running by ambulance drivers, without granting ambulance chasers broad license for abuse.

The third, perhaps most serious, counterargument comes from those international lawyers, in America and elsewhere, who don't trust Donald Trump and his administration to get this right. Sadly, I share this skepticism. But in the international order, there is only one United States, and whoever is President, the United States plays a critical role as a balance wheel of the international system. What the first six months of the Trump Administration have shown—particularly, the blocked travel ban and the unconsummated threats to withdraw from the Iran nuclear deal and parts of the UN system—is that the United States is much bigger than Donald Trump. Donald Trump has amply shown that he is willing to shift his stated foreign policy aims, if subjected to enough political pressure.

As an international lawyer, I intend to keep the Trump Administration's feet to the fire, to demand a *Syrian policy and strategy*, not just a set of military strikes, and to seek a pivot to a broader smart power diplomacy that might resolve the Syrian crisis. If America's President is truly serious about pursuing such diplomacy, he would be wise to withdraw or relax his offensive Muslim Ban; to do a better job talking and listening to our allies and working with critical organizational partners like NATO and the European Union; and to be more careful about telling the truth and respecting our intelligence agencies, so that listeners will actually believe our government when, for example, we accuse Russia of complicity in Assad's April 6 chemical weapons strike.

This is a lawmaking moment. Let's not squander it. It is a time for international law to serve human needs, not simply to repeat "the never/never rule is a rule is a rule." Going forward, will we live with a never/never rule that promotes paralysis in the face of gross atrocities, or will we seek to fashion a better law? This is our challenge as international lawyers. If we do not seize this moment, make no mistake: history will not and should not judge us well.

In closing, it is high time for international lawyers to debate what might constitute a better law of humanitarian intervention. I have offered my own test, but feel free to offer your own. But please, let us seriously engage the debate. Years later, I remain haunted by the prescient words of Louis Henkin after Kosovo: "Is it better [for us] to leave the law alone, … turning a blind eye (and a deaf ear) to violations that had … moral justification? Or should [these incidents] move us to push the law along … closer to what [it] ought to be?"[18]

[18] Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AJIL 824, 827 (1999).

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