the relevant practice may reasonably be taken. This is based on the fact that permission to provide arms to help defend a civilian population under lethal attack is consistent with important broader developments in international law. The human right to life is now firmly embedded in international law, and it has also come to be accepted that the concept of sovereignty is not just that of supreme authority over territory, but one that entails the duty of the state to protect its civilian population from crimes under international law.

At such a stage of legal development, it is no longer consistent for international law to provide a government which poses a lethal threat to part of its civilian population with an absolute sovereignty shield, unless the Security Council takes action. I believe that the idea of consistency is relevant to the interpretation of developing state practice, and it is in this spirit that I support the motion as specified.

Noam Lubell

Thank you. We've heard the two arguments for, both managed within the allotted time, to give a fairly detailed and spanning a wide range of points, so it will be interesting, now to hear the arguments against. Sean, the floor is yours.

Remarks by Sean Murphy

Thank you very much. I was fascinated listening to our learned opponents' arguments, because I'm trying to find what resolution they're talking about. It's not the resolution before us here, that's for sure. Basically, the only way that Harold Koh and Claus Kreß are able to put together some kind of argument is to rewrite the resolution that's on the table here. This resolution is not a resolution that says, as Harold would have it, that international law absolutely forbids, in all circumstances and under any scenario—such as when the Security Council authorizes something—sending weapons to a rebel movement.

That's not this resolution. This resolution says that international law permits the provision of arms and other assistance to a rebel movement fighting against an abusive regime. That is an extraordinarily broad statement. I assume we could all agree it's not okay to send chemical weapons to a rebel movement. That would be illegal. You can't send depleted uranium. That would be illegal. You can't send nuclear weapons. In short, there are all sorts of illegalities lurking amidst this resolution, and it is so broad that you have to vote it down just on that basis.

Consider the aspect that relates to assistance to a ''rebel movement.'' As I understand what Harold and Claus are saying, they assume it is the godliest rebel movement of all time, as if they took Boy Scout training and Girl Scout training. But our resolution just says ''a rebel movement,'' so why not view it as including the Taliban? Why not Al Qaeda? Consider the aspect that relates to ''fighting against an abusive regime.'' Our opponents are interpreting those words as necessarily implying the dark lord of some kind, the Darth Vader of the world. But that's not what the resolution says. It just says ''an abusive regime.'' I'm paying taxes in three days to my government, and as I go through these forms, I feel abused, but I don't think that's what we have in mind when we talk about the possibility of sending weapons somewhere!

The resolution also says ''international law permits,'' full stop. It doesn't say ''permits but only if one of 15 scenarios exists,'' or whatever it is that's being pressed by our opponents. If you follow their analysis, you have to check off 20 different ''ifs,'' ''ifs,'' ''ifs'' before we can get to the point where, maybe, there's some level of practice that supports a different

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resolution that they're concocting. So you really do have to knock down this resolution just on that ground.

Turning away from the text of the resolution and to the status of international law, obviously Article 2(4) is in play here. One UN member state is not supposed to use force against another UN member state. The *Nicaragua* case stands for the proposition that assistance to rebels in the form of weapons or logistical or other support may be regarded as a threat or use of force, or amount to intervention in the internal affairs of other states. It is clearly the case that in some situations sending weapons to rebels is going to constitute a use of force. It may not constitute an armed attack, interestingly, but it may well constitute a use of force and, consequently, there are going to be many situations where it violates Article 2(4).

There is also the principle of non-intervention, which the *Nicaragua* case also talks about. If you look at the 1965 Declaration on the Inadmissibility of Intervention, it's quite clear. Paragraph 1 provides: ''No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of another State.'' Paragraph 2 provides: ''No State shall assist or finance subversive or armed activities directed towards the violent overthrow of the regime of another State.'' That's pretty clear, I think, on the proposition that you're not supposed to be supporting rebel movements.

The 1970 Declaration on Principles of International Law Concerning Friendly Relations carries that idea further. Among other things, it provides that there is a duty to refrain from assisting or participating in acts of civil strife in another state, or acquiescing in organized activities within its territory, directed against the commission of such acts.

We haven't, by the way, limited this resolution to assisting rebels that are only located in the country where they're fighting their abusive government. These rebels could be in your own territory. You're providing weapons to them, and then they're doing things across a border. Moreover, there's nothing in the resolution that says the ''rebels'' have to possess territory, such as a half or a third of the country. Rather, this could be five guys camped out in some little piece of the country or in some other country entirely, who are the ''rebel'' movement fighting against the abusive government. It clearly runs afoul of the principle of non-intervention.

So the question might be—and I think our opponents suggested—whether prior practice suggests a different rule. Somehow it is suggested that 1776 is relevant, such that we should talk about assistance to rebels back during the Revolutionary War, or assistance to the French Resistance during the Second World War. Well, there is a thing called the UN Charter that has happened since those situations. We're living in a new day. We don't want to go back to what we had in the 1700s, the 1800s, even the early 1900s, which entailed two world wars. We don't want to go back to the rules that characterized those times. What we care about is today, and we know what the Court said in *Nicaragua* in 1986 when interpreting the UN Charter. We also know that the Court said it's a very high burden to argue that, based on state practice, the Charter has somehow changed since 1945. Remember that the rule expressed in the UN Charter, as everybody pretty much agrees, has the character of *jus cogens*. So it's going to be a heavy lift to change this norm by reference to erratic state practice.

But the same is true of the principle of non-intervention. In the *Nicaragua* case, the Court was looking specifically at the question of whether state practice has altered the way we should think about non-intervention since the time when those two General Assembly resolutions I mentioned were adopted. The Court noted that there have been, in recent years, a number of instances of foreign intervention for the benefit of forces opposed to the government of

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another state. The Court then considered whether this practice illustrated a belief in a general right for states to intervene directly or indirectly, with or without armed force, in support of an internal opposition in another state, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified.

Hence, the Court was thinking about exactly what Harold and Claus are talking about, and asking, does state practice support this? The Court acknowledged that reliance by a state on a novel right or an unprecedented exception to the principle of non-intervention might, if shared, in principle, by other states, tend towards a modification of the customary rule. In fact, however, the Court found that states have not justified their conduct, by reference to a new right of intervention or new exception to the principle of its prohibition. And, therefore, the Court found that the United States had violated the principle of non-intervention by providing weapons and other assistance to the rebel forces in Nicaragua.

You could then ask, well, wait a minute, that's 1986. It's now 2014. What about state practice since then? I would submit that it doesn't support a change in these basic rules. You want to talk about Libya? There was a Security Council resolution in that instance authorizing the use of force. I don't see the resolution we're talking about here saying anything about the Security Council authorizing the provision of the weapons. So take that one off the table.

What about weapons to the Syrian rebels? Okay, Claus wants to talk about that. Of the twenty-eight states of the European Union, only two of them support sending weapons to the rebels: the U.K. and France. That's it. He mentioned Austria making public its legal argument as to why you can't arm rebels, and they did. It's really interesting to read. That statement in Principle 1 says: ''The supply of arms to the Syrian opposition would amount to a breach of the customary principle of non-intervention and the principle of non-use of force under Article 2(4) of the Charter.'' That's the public position of the government of Austria. That's the position that's attracted 26 of the 28 EU states, if you believe things like the U.K. *Guardian*, which gave a report of the acrimonious meeting that took place last year on this issue. So I think it's not right to say that state practice has changed the relevant legal rules.

I'll finish by just noting that our very able moderator noted that the ILA Use of Force Committee has done a draft report on this topic, but I would submit that he didn't quite read out everything that's in that report. The report does recognize that there is some ambiguity in state practice, but then it says, and I'm quoting, ''It is generally prohibited to forcibly intervene on behalf of a rebel movement,'' citing to Malcolm Shaw and Christine Gray. So I would submit, in light of this, in light of the court's decisions, the relevant treaties, like the Charter, the resolutions adopted by the General Assembly, state practice, and the views of scholars, you should oppose this resolution.

Remarks by Christine Chinkin

I think my colleague has done a very good demolition job on our opponents' interpretation and gross expansion of the resolution in question. Sean has also dealt with the issues of non-intervention and use of force, so I'll turn to whether the situation that's posited in the resolution comes within any of the exceptions to the prohibition against the use of force. The one that has been concentrated upon most was the humanitarian intervention/responsibility to protect-type framework. Neither of those concepts exists in any global treaty. Yes, there is a reference in the AU constitution, but that is the exception.

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In looking at the state practice relating to non-intervention, Sean has also just indicated that state practice does not, in fact, create any precedent for accepting an exception relating to the responsibility to protect or humanitarian intervention with respect to supply of weapons. Even the two EU states, including my own, that apparently support the notion of supplying weapons to the Syrian opposition, haven't done so, and it seems that actions (or omissions) speak quite loudly.

To go back to the ICJ again: we've talked about *Nicaragua*. The Court also said in that case that the protection of human rights, a strictly humanitarian objective, cannot be compatible with training, arming, and equipping of the Contras, i.e., rebels. Now, we might say that this was in 1986, so before Kosovo, before the enunciation of the responsibility to protect. But when the Court came back to the issues in *DRC v. Uganda*, it made no reference to any exception relating to human rights.

The Security Council has adopted a number of thematic resolutions, post-1999 and post-Kosovo, on the particular issue of protection of civilians. In not one of those resolutions is there ever a reference to provision of weapons to those who are fighting oppressive regimes as a means to protect civilians. Further, they concentrate a great deal on the importance of DDR (disarmament, demobilization, and reintegration) regimes subsequent to the conflict, which seems to be completely at odds with the idea of sending weapons in first, only to have to disarm those involved afterwards.

So in the absence of a specific Chapter 7 Security Council resolution authorizing the use of all necessary means, any notion of supplying weapons to rebels on the basis of protection of human rights remains a moral or political choice. The motion is that arming rebels is allowed by international law, not that it might ever be considered a moral or legitimate choice. But even if this were not the case, the responsibility to protect, for example, simply doesn't cover this situation. We're told only that it's an abusive regime. The responsibility to protect applies only to protect against very specific wrongs—genocide, ethnic cleansing, crimes against humanity, war crimes—not to mere governmental abuse, as we have in the motion. So, again, it's simply too broad a resolution, and Sean's given a number of indications as to what could flow from accepting such a broad resolution as a proposition of international law.

But I also want to refer, very briefly, to three other areas of law that haven't yet been mentioned, and I'll argue that taken both separately and together, they all indicate the impermissibility of provision of arms to rebels—international humanitarian law, human rights law, and weapons law. Together they provide a growing amount of evidence to support the proposition that there's an overarching norm based on the fundamental obligations of these three areas of law, and I think they're all fueled by the realization of what happens to civilians when weapons are distributed, or there is a wide transfer of weapons.

So, very quickly, we have Common Article 1 of the Geneva Conventions, requiring states to respect and ensure respect for the Conventions in all circumstances. There are also a number of specific instruments that specifically exclude the transfer of arms where there are substantial risks of violation to international humanitarian law, including, interestingly, the ECOWAS Small Arms Convention, the OSCE, the EU—again a broad spread of similarly accepted restrictions from different states.

We've also recently had the adoption of the Arms Trade Treaty (ATT). This treaty is a response to the disasters that happen when weapons are widely circulated. The ATT requires states to assess whether arms could be used to commit a serious violation of IHL or human rights law and not to authorize the export if the assessment shows that there is an overriding

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risk. I might also note that the treaty also says that the assessment must take into account the risk of arms being used to facilitate serious gender-based violence against women and children.

This notion has been picked up by the CEDAW Committee and also by the Human Rights Council. The Human Rights Council has expressed great concern that arms transfers to those involved in armed conflicts may seriously undermine the human rights of civilians, and has again noted that such arms transfers can seriously negative the human rights of women and girls.

The UN Secretary-General has pointed out that this risk is real and that states cannot pretend that they do not know that there is a risk of violations of IHL and human rights law when they transfer arms to rebels, particularly given the very broad notion of rebels that we've been talking about. The Secretary-General, for example, has noted that experience over the last four years has shown that the more coercive the tool, the less often it has been used to protect populations; in other words, it's used for the opposite of protecting populations.

So I would argue that taken together, these various different regimes of international law build up to a state practice and assertion of *opinio juris* that are *against* any emerging customary international law that allows for the transfer of weapons to rebels, which, taken with the lack of any explicit rule allowing for it, or state practice supporting it, completely supports our rejection of the motion.

Sean has already mentioned that some weapons are clearly prohibited—chemical weapons, nuclear weapons, etcetera. The Security Council has also pointed out that the transfer of weapons to rebels may run the risk of indirectly supplying them to terrorists, in violation of Security Council Resolution 2083, and that that is absolutely and strictly prohibited.

So, to conclude, since the starting point of contemporary international law is non-intervention and the non-use of force—after all, we have the UN Charter, as Sean has pointed out—it's up to the proposers to show the legality of any such proposed action. I would argue that, on the contrary, the *jus ad bellum*, the *jus in bello*, human rights law, and weapons law all lead in precisely the same direction—against any such general blanket proposition that international law allows the provision of weapons to rebels acting against an abusive government. Acceptance of such a blanket proposition—that the delivery of weapons is okay—is likely to open the door to further escalation of violence. For instance, Russia may decide to provide arms to the rebels against the government in Ukraine, in Donetsk this week. Are we really happy with the rule of international law that says, yes, that would be fine?

Delivery of arms in particular instances is likely to fuel destabilization in what is, by definition, an unstable area, i.e., rebels acting against a government. I think it's very telling that the peace, security, and cooperation framework of the Great Lakes area, including the Democratic Republic of Congo, an area that knows a lot about what happens when rebels are armed, includes a commitment to ''neither to tolerate nor provide assistance or support of any kind to armed groups.''

Kosovo gets cited constantly as an example that goes the other way. The circulation of arms in Kosovo led, in the immediate aftermath of the conflict, to so-called reverse ethnic cleansing and still quite high levels of violence and instability. It seems that legal transfer of weapons of this sort serves, in the end, only to escalate the arms trade in the particular area; it serves to provide further money and so on to arms manufacturers, and generally to develop the instability of the world.

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And, again, as has already been hinted at, what happens if these rebels, at some time in the future, turn the weapons back on those whom we regard as our allies? Supplying weapons to the Mujahideen in the 1980s didn't really turn out that well for us, did it?

Noam Lubell

Thank you very much. That was an equally detailed and robust set of arguments against the motion. We are now going to have five minutes from each team to provide some rebuttals.

Harold Hongju Koh

Nice try, guys. You were good, but—

[Laughter]

I love, Sean, in particular, originalist, textualist, beating up the straw man, because the motion is ''International law *permits* the provision of arms and other assistance to a rebel movement fighting against an abusive regime.'' There are three possible answers:

(1) Always. Did you hear us say ''always''? Of course not always. Chemical weapons. Did you hear us say that international law tolerates the provision of chemical weapons? Of course not.

(2) Answer number two. Yes, sometimes. And, by the way, your answer—international law permits the provision of arms and other assistance for a rebel movement fighting against an abusive regime—when two Security Council resolutions authorize it, like in Libya, is ''yes, sometimes.'' But you give the third answer:

(3) No, no, absolutely no, which I read to be, ''never.'' ''Never'' means what part of ''no'' don't you understand? It is never permitted.

[Laughter]

And then, I hear, ''What about the escalation of violence? It didn't work out so well in these cases.'' Those are nice policy considerations. I am concerned about those things, too, but that doesn't go to the question of legal availability. Is this option ever legally available? Yes, sometimes, under extremely narrow circumstances. So then you respond to the case of Marquis de Lafayette—there's the wonderful thing called the UN Charter. Well, there's also a wonderful thing called Kosovo, and there's a wonderful reality, which is that the law is not frozen. It does evolve, and violence does not always spin out of control. Sometimes violence should have happened, like in Rwanda, that would have prevented that situation from spinning out of control. Sometimes it did happen, like in Kosovo, which actually worked. So I think you need to think about the fact that we are not calling for intervention here. The quotes you read to us are about intervention, not provision of assistance that might support the internal use of force.

So unless you are ready to defend the proposition, ''Never,'' you are then accepting the proposition, ''Yes, sometimes,'' and then the answer regarding the resolution on the floor is pro, we win.

[Laughter]

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Claus Kreβ

I did not write this motion, and to make it very clear, we can only have an exciting debate about this motion if we interpret it in an enlightened manner, as Harold and I have done.

[Laughter]

Because with much you have said, I entirely agree. This is why I have made a very, very specific case. I have given a very specific meaning to this motion, because I'm convinced that only within this exceptional scenario can a credible case be made. For this I have produced arguments and state practice, and on this I would like to engage in a debate.

Sean Murphy

Again, I think that our opponents are basically running away from the text of the motion. The motion is very broad. It says ''International law permits—permits—the provision of arms to rebels.'' It doesn't say ''permits after you go to the Security Council and don't get the decision you like.'' It doesn't say ''permits sending it to the best rebel movement we've ever seen in the world.'' It doesn't say ''permits only weapons that are at a relatively low level, such as body armor and maybe a sidearm or something.'' Nothing like that exists in the resolution. They want to rewrite the resolution so that you'll feel comfortable voting for it.

The problem is the world doesn't really work that way. The resolution, if it's adopted, isn't limited to their unique set of circumstances that presents the perfect situation of providing weapons to the perfect people, fighting the worst government in the world. If you approve the resolution, you open the door to a wide range of possibilities for sending weapons to a wide range of rebel groups that are claiming that they're being abused by their government.

Our opponents mentioned Kosovo several times here. NATO, at no point, provided weapons to the Kosovo Liberation Army. There is no precedent coming out of Kosovo that directly speaks to this resolution. They want instead to say, ''Well, wait a minute, there was an armed intervention by a bunch of countries that involved bombing Serbia, and that somehow supports this particular resolution about providing weapons to a rebel movement.'' You can't connect those dots. That's one problem with Kosovo.

The other problem with Kosovo is that it's a pretty contested precedent. It's not as if NATO bombed Serbia to protect Kosovo, and everybody said, ''Great. Perfect. We all see how this works. It fits Article 2(4). It fits the non-intervention principle.'' NATO's intervention was actually a pretty contested situation, so much so that many countries, including the United States, did not articulate that this was permissible as a form of humanitarian intervention. Certainly nobody said that the intervention was permissible based on some sort of legal theory that it's okay to intervene in all situations where you've got rebel movements fighting against an abusive regime.

And, likewise, with any other precedent that one might bring to bear, whether it's ECOWAS or whatever else, such precedents simply are not this motion. This motion is one that really is not supported, unless you can dress it up with bells and whistles to make it a different kind of a motion. That's fine. Let's rewrite it. Let's put in Harold's ten points and Claus's additional five points, and come up with a text of three or four or five pages, and then, at that point, we'll have a vote on that particular motion. But what I would suggest is, we should maybe write it into a treaty first, and maybe get full-blown agreement on it before we purport to change one of the most fundamental norms in international law, which is

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embedded in the UN Charter, and has been repeated in many instances, in many fora, since 1945. This particular motion is not within that narrative.

Christine Chinkin

Okay. I'll take just one minute. My only comment would be that I've been accused of arguing on policy grounds. What have they been doing? It seems to me that their whole argument has been on the basis of policy. And I would argue that there are many issues of policy that underscore serious developments in law, across treaty law, across state practice, across the human rights bodies, across those who are concerned about compliance with international humanitarian law, all of which lead in the same direction and all of which emphasize the undesirability, backed by these various legal instruments, of allowing transfer of arms to rebels.

Noam Lubell

The ''for'' team is requesting to use the 30 seconds that they didn't use.

[Laughter]

I'll allow it, but you've also got 30 seconds left, so then you're going to have another 30 seconds.

Harold Hongju Koh

If you answer the proposition ''no,'' it means ''never.'' It is never permitted. If you answer the proposition ''yes,'' it can mean ''always'' or ''yes, sometimes,'' and we have answered it ''yes, sometimes.'' I think that's just basic reading. Secondly, Sean, think about Kosovo. No, maybe they didn't give arms, but for 78 days they bombed. Does the notion that ''the greater includes the lesser'' or ''a fortiori'' have any meaning here?

And, finally, is the whole issue policy? No. The whole issue is: Is the UN Charter simply about sovereignty 30 years after Lou Henkin said, ''Down with the S-word?'' Or is the object and purpose of the UN Charter now also about prevention of slaughter and human rights violations through civilian populations, which is one of the reasons we want international law to be effective?

Sean Murphy

Well, I would recall that the Kosovo Liberation Army, until 1998, was classified by the United States as a terrorist organization, so, no, the lesser doesn't always include the greater, and that's not a particularly compelling point on that issue. What I would submit is that our opponents are asserting here that there is a way that we might want to rethink an existing norm to add all sorts of bells and whistles, and that maybe that new norm would be preferred law. Maybe so.

Maybe there's a better world out there that we could try to grope for. We might try to sit down as a collective community of 193 states and generate a different set of rules that try to take account of a lot of different things. I'm not opposed to that. It's just not the world we live in right now. If you start making arguments that there's some broad norm that allows

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you to go off and do these kinds of things whenever there is a situation of rebels fighting a government, that's going to lead to a lot of chaos and confusion. I would submit, for that reason, you need to oppose this motion.

Noam Lubell

Thank you to all the speakers for the presentations and rebuttals. I noticed that quite a few of the arguments centered around the meaning of the resolution, and if you want to turn to the travaux préparatoires and the intention of the drafters, that would, in part, be me . . .

[Laughter]

I can say that the intention was precisely to leave a certain amount of ambiguity so as to generate this debate. So, in that sense, the motion has worked.

What we're going to do now is to open the floor to questions, and when we've had the questions and answers, we will then take the final vote from the audience. I don't think we've been given a roving microphone, which would be difficult anyway, in this room. So, those near the front can certainly use a microphone. Those in the back might have to shout their question and I'll repeat it in the microphone.

Benjamin Ferencz

Thank you for the microphone. My name is Benjamin Ferencz. I'm 95 years old. I was a prosecutor at Nuremberg, the only one now left alive, and this is an interesting debate by highly competent attorneys—

[Applause]

Save your applause for the end. All of the attorneys here, most of them are my friends, highly competent, and what does it prove? It proves that this whole area is subject to different interpretations. Well, how do you interpret it? I'm drawing on the lessons of Nuremberg, which were hailed at that time as a great innovation. First of all, the crimes are committed by individuals. They're not committed by groups. They're not committed by governments. There are individuals who are responsible and who will be held responsible in a court of law for the crimes listed, such as aggression—which I won't mention anymore because it hasn't been defined adequately—for crimes against humanity. This is clear, but who decides?

That's the key question. Is it the victim that decides, or is it the perpetrator that decides whether it's legal? Or their allies? Under the present system, each country seems to decide for itself. If they can't reach agreement, they send young people out to kill other young people, whom they don't even know, for reasons they don't understand, in a country they don't even recognize. That's the current system. So you cannot continue that system in the dangerous world that we have today.

What is an obvious answer, it seems to me, is you go to an international court, a fair court, to determine and ascertain the facts. If they're really such an exceptional situation that it justifies interpreting the laws broadly, they're authorized to do that under the current statutes, their own statute, for example, which was overwhelmingly accepted by the people present—unfortunately, not by the United States, for its own reasons.

It's clear. The judges and the prosecutor must take all of the circumstances into account. They take them into account and they decide whether or not to bring the case, and having

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brought the case, if they say, ''Well, we're bound by the law,'' they are also authorized to take it into account in the sentencing, and they could give them a modest sentence. So the instrumentalities are there, without running the risk that because we failed to build the institutions, we're going to send all the people out to die and be killed, because one group of fine, dedicated people thinks that's what they ought to do to save mankind, and the other group of fine, dedicated people thinks you can't do that, that you'll end up killing a lot of innocent people, while those who are responsible sit back in their chairs and either laugh or cry.

So my conclusion for all of this is, dear friends, you've got to take a step forward. Turn these issues over to a court. We have difficulties doing that now with the Security Council being required to get permission, or deciding to submit the case to the court, but I would stretch the law there a little bit and say it's a procedural matter. It doesn't require unanimity of the five powers. I know I'm stretching it, but it's time to stretch it a little bit in that direction. That doesn't risk the life of anybody. It relies upon courts, and upon lawyers, and if I'm not mistaken, this is a meeting of the American Society of International Law, together with the International Law Association, so behave like lawyers and turn it over to the courts to decide before you send these young kids out to be killed.

I was a combat soldier, and I have, all my life, worked to save the lives of young kids like you, and I can only think of it through the rule of law. Thank you.

[Applause]

Harold Hongju Koh

Thank you, Ben. Since you're all going to have to vote, let me ask you this question: Does the law of District of Columbia ever permit you to run a red light? If your answer is ''yes, sometimes,'' then the question would be answered ''yes.'' If the answer is ''no, never, ever, even if your wife is pregnant and you're running a red light, even if there's a crisis,'' then you vote no.

[Laughter]

Audience Member

Thank you. Kubo Macak, University of Exeter. Wow, that's a big audience. My question relates to something that Professor Murphy mentioned, and it also goes to the definition of the motion, actually. Professor Murphy referred to the report of the ILA that forms the basis of this discussion, and he supplied the quotation that was given in the beginning, so let me build on that. That quotation ends with a footnote citing Professor Malcolm Shaw's book. Professor Murphy, you quoted it to support the position of your team, that it would be generally prohibited to provide aid to the rebels.

However, if we go to Professor Shaw's book, he speaks explicitly of the situation in which the provision of aid to rebels might be justified on account of a previous illegal intervention. So, in fact, that citation seems to go against the opposing team, and it's a scenario that has not been covered so far. So in situations when there was a prior illegal intervention—and Professor Shaw speaks of the example of Afghanistan, where this argument was made by a number of states—the intervention in response, by providing aid to the rebels fighting such a government might be, indeed, legal. So that would be my question.

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Sean Murphy

Thanks for the question. What Professor Shaw says in his treatise is exactly as was stated. The way I think it should be understood is that Professor Shaw thinks, as a general matter, that it is unlawful under international law to provide weapons to a rebel movement. What he opens the door to is the possibility that a foreign state could provide weapons to a rebel movement when the insurgency has risen to a level where there's rough equality as between the rebel movement and the government, and the government is receiving weapons from foreign countries.

That's the idea of counter-intervention: that once the rebel movement rises to a level of co-belligerency, under classic international law, no one was supposed to be providing support to the co-belligerents, but if somebody does provide support to government, then it's okay to provide support to the rebel movement as well. That's the context. So I would submit it supports our position—that Malcolm Shaw, as a general matter, is saying you can't provide rebels with support unless perhaps you have that unusual circumstance of a counter-intervention scenario.

Now, if we want to write a new resolution to say something along those lines, then we can have a vote about that, but Harold keeps trying to rewrite this resolution, and he can't. He can't any more than anyone else could try to do it. This resolution basically says international law permits, permits, full stop, providing this support.

Harold Hongju Koh

Sometimes. Sometimes, Sean.

Sean Murphy

Where is ''sometimes'' in there, Harold? I'm looking at the resolution. I don't see that it says ''sometimes.''

Harold Hongju Koh

Read my lips—''generally prohibits'' means ''yes, sometimes it permits it.''

Sean Murphy

Okay, ''generally.'' There is no word ''generally'' in this resolution.

Harold Hongju Koh

You were reading Shaw. He said ''generally prohibits,'' i.e., ''sometimes, yes.'' Run a red light? Generally prohibited, but sometimes, yes.

Sean Murphy

No, Shaw is being quite clear that it's prohibited, but notes in passing this one example. You're trying to read the resolution as saying that if there are any circumstance whatsoever where assistance may be provided to rebels, like pursuant to a Security Council authorization,

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then this resolution is acceptable, but that's not the way you can read this resolution. It says without caveat that ''international law permits'' this action, which it does not, and that's the problem for you.

Harold Hongju Koh

Nobody is asking anybody here to vote for the proposition ''always.''

Sean Murphy

That's what you keep running into.

Harold Hongju Koh

No one is asking anyone to vote for ''yes, always.'' All we're asking you to vote for is ''yes, sometimes.''

Sean Murphy

He's running away from it.

[Laughter]

Harold Hongju Koh

Doesn't ''no'' mean ''absolutely prohibited,'' not ''generally prohibited''? That's what ''no'' means, Sean.

Audience Member

I hate to say this, but I feel that you are reading the word ''always'' into it. I'm Grace Kang, and I'm a writer on issues related to this. Maybe it's a matter of timing, as, really, what's going on here, that for the world we live in now, I would say that the interpretation offered by this side is the most helpful, given the very special limited circumstances already discussed, and weighing the risks of arms proliferation against the benefits when innocent people are being slaughtered. The way our trade system works is: if one country violates a trade rule, the way to get relief is the other country retaliates. Unfortunately, that's what appears has to be done in the world as it is today, but, ultimately, of course, and sooner rather than later, the use of a court to resolve such disputes would be the right situation, and where your interpretation would be the ideal. Or is it just timing?

Christine Chinkin

I'll just make one very quick response to that. We have had the Court. The ICJ has been absolutely clear, in the *Nicaragua* case and in the *DRC v. Uganda* case, and they've spoken. They've said no.

Sean Murphy

I also think you have to introduce those words like ''innocents are being slaughtered'' in order to get to a place where you feel comfortable with the resolution. The problem is the

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breadth of the resolution, and the problem is that it's not limited to the kind of scenario you seem to have in mind. There are all sorts of ways that states might grab a hold of a norm of this type and use it for things that you're not thinking about. So if you don't limit it to the kinds of things that you're thinking about, then you should have a real problem with this resolution.

Harold Hongju Koh

In contentious cases, an ICJ judgment is binding between the parties, and when they don't have a case that involves the slaughter of innocents of this nature, that is a case that they have not yet reached, and if they were to answer that question yes, having answered the previous case no, then the answer is ''yes, sometimes,'' not ''always prohibited.''

Audience Member

Thanks. Nigel Rodley, University of Essex. I started out voting for Sean and Christine. I was almost won over by the clever debating tactics of Harold and Claus, but in the end, not quite, and it was Harold who maybe gave us the way in. The law may well say that you can't jump a red light, at all. In many countries, it does. It doesn't bother to build in exceptions, but you might be going to try and save somebody's life. You might be going to try to save your own life. You might be trying to prevent your house burning down. You will jump the light. What will happen? You'll go to court, you'll be found guilty, and you'll be given an absolute discharge. No fine, no record, no problem—and that, actually, is how we need to approach this issue. It's the mitigating circumstances argument.

The law is too weak. The law against the use of force is too weak to sustain exceptions easily. Self-defense is enough of a problem. It may be important, ultimately, to intervene in favor of rescuing populations more than oppressed, but ravaged by their own governments, but brigading that exception into something you can really define in law is pretty impossible. So I think we should maintain the general prohibition, but recognizing that occasionally, if the circumstances Harold and Claus are talking about, are there, they get off without even a General Assembly resolution against them. Thank you.

[Applause]

Harold Hongju Koh

Nigel, what you said is a totally respectable position, which could be we have an absolute prohibition which is broken, and then someone's violated it but not grievously. In tort law, we have things called affirmative defenses, where it turns out you haven't violated the duty. So the question is, is it more like one or like the other? Your view is we must have the absolutist rule because it prevents bad interventions, or bad giving of weapons.

On the other hand, bad things happen the other way, too, if you are too inflexible about the rule, like people being slaughtered without force being able to be used because of incomplete doctrines of humanitarian intervention, and because you cannot even equalize the table for people to get to the table to do diplomacy, which is exactly what Secretary Kerry and Samantha Power—who are no softies on this issue, or about international law—are arguing for.

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Claus Kreβ

Nigel, there is a long tradition in the debate about the use of force to deal with hard cases, methodologically, in the manner you have suggested, and very many concepts have been invented to do so—secondary levels of legal inquiry, gray areas, excuse, legitimacy, and so forth. As Harold said, it is a respectable way to deal with these hard cases, but, ultimately, I tend to think it is an evasive approach. I do not find that defining the exceptional situation, which I have circumscribed, poses substantially more problems than to define the difficult border lines of the right of self-defense. Let's not pretend this firmly recognized exception from the prohibition of the use of force in case an armed attack against a state occurs is without ambiguities. Here we struggle as well to properly define the limits. Is it categorically more difficult to define an armed attack on a civilian population as the trigger for the customary exception in question? And let me add one practical consideration from the perspective of a government advisor. It will be very difficult for a government advisor to tell the minister: ''Well, it's illegal under hard international law, but the matter is different 'on a secondary level of inquiry.' You will be excused; you will receive mitigating circumstances or the like.'' This is why I plead for a clear choice also in these hard cases—as difficult as that is. And these hard cases are the only ones I've talked about. I'm not so much concerned, I must say, about the mysteries of the travaux préparatoires of this motion.

[Laughter]

Instead, I wanted to make a strictly limited case. My case is based on an enlightened interpretation of this motion. Otherwise, it would not be worth discussing the motion, because otherwise it's obvious that this motion cannot be supported.

Sean Murphy

I think we clearly do need to look at travaux préparatoires quite closely on this. I take Nigel's comment as reminding us that when we approach the issue of the use of force in international law, we are concerned about opening the door to various things. We are concerned about allowing exceptions and loopholes and carve-outs from a norm that has served us very well since 1945. The reason why over the past 67 years we have not seen emerge a well-settled doctrine on humanitarian intervention, or a well-settled doctrine allowing weapons to go to rebel groups, is that there can be very pernicious side effects of going down that path.

Yes, there are going to be hard cases, in national law and international law as well, and we try to figure out a way of dealing with those cases. One way we've tried to do that is through the Security Council. We have a mechanism. It's not a perfect mechanism, and that is unfortunate, and we should think about ways of trying to fix it. There's a lot of talk about regional organizations, and ECOWAS was used as an example of a sub-regional organization, or about collectives of states, such as NATO in the context of Kosovo.

We are grappling for ways of dealing with situations in which the Council is not willing to act, but to open the door to potentially systematic supplying of weapons and other assistance to rebel movements—because of a purported claim by somebody that there's some level of abusive activity going on—that's opening a door that the international community has not been willing to open for the past 60 or 70 years, and there's a very good reason for that. It leads you down a road that we've been on before. It's a movie we've seen before. It's a

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pre-1945 movie that didn't turn out so well. And when Harold says the International Court isn't really thinking about situations involving slaughter, I beg to differ. I think in the *Congo* case there was plenty of slaughter at issue, and the Court, looking at the issue, says, ''We cannot tolerate a norm that goes down this path.''

So the reason to oppose the motion isn't because you favor the slaughter of innocents. The reason to oppose the motion is to preserve the integrity of our general approach to these issues. We can always strive to do better, and we should strive to do better, but it needs to be done in a way where there's buy-in by the international community, generally, and I would submit that right now we do not have that buy-in on the notions set forth in this resolution.

Harold Hongju Koh

If I can speak from the perspective of the government legal advisor, because it somewhat resonates with me, there are two issues here. When do lawyers take incredibly difficult policy issues off the table by making legal gray areas black and white? That's problem number one. Problem number two (and Sean used the crucial words ''the use of force'') is: Are provision of arms and other assistance always the equivalent of a ''use of force''? Are there situations in which it's less than a use of force or an issue of international law, and thus does not engage international wrongfulness? We're talking about real life and death here, and to claim the kind of prohibitory clarity of the law to policymakers who are trying desperately to make these very difficult decisions is something that we all need to really consider. To say law takes it off the table because international law exalts sovereignty and doesn't really care about humanitarian issues nearly as much is, to me, going back to a time that we have passed.

Noam Lubell

Unfortunately, I think, we're going to run out of time for more questions. We can take one quick question, and there was someone here closer to the front.

Audience Member

Michelle Jacobs. I teach an international humanitarian survey course. I just want to say that, of course, as lawyers, we all know that the language, the drafting of the language is problematic, as it is in most international agreements if you look at them after the fact. And I just want to say, from the perspective of non-European people, that while the system may work well for the diplomats and the policymakers who are arguing over it, it doesn't really work well for the hundreds of thousands of people who get killed in any series of conflicts that you can look at since 1945. I mean, that was the point of the Nuremberg Tribunals. We were trying to keep millions of people from being slaughtered again, in the hopes that would never happen again. But it happens every year, and it's been more than those six million people in the 60 years past Nuremberg.

So it's not the point about whether the language of the resolution is drafted well, because it's not, but I think that for the people who are continuing to get killed, the system that we have now maybe is not working that well.

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Christine Chinkin

I'll just add two things at the end. In response to the last speaker, yes, we all realize very clearly the level of deaths, desperation, and devastation that is associated with this—the fact that whole continents are simply awash with weapons, and particularly awash with small weapons that are being supplied to people, often without any responsibility as to how they're going to be used. And, from that point of view, I think, actually, the resolution is irrelevant. As you pointed out, it's a very, very imperfect world, which means we do have to come back, as we've got it, to what the law is.

Sean has just said that at over 67 years, the law has not been changed on this, that we're holding on to the integrity of the law. I would add that there have been multiple opportunities to reconsider the law—the High-Level Panel, the In Larger Freedom, the General Assembly Outcome Document. Those are just occasions in the 1990s and 2000s. And amidst concerns about these issues of not being able to determine, with any clarity, alternative approaches, they come back and reiterate strongly the Charter, and reiterate strongly the processes that are included within the Charter, with respect to the Security Council and so on.

Yes, it needs reforming. There's nothing in this resolution that says that we are rejecting the notion of reform of international law. What we are asserting is that, as it stands, this is the state of international law, and any change to that must be done in a principled and fully holistic manner, not just an ''oh well, there might be a precedent here, there might be a precedent there,''-type approach.

Noam Lubell

Thank you. We're reaching the end of time, so I'm going to take the final vote before we close. Let's see what happens now, if there's any change or not. First, those voting for the motion of the legality of arming rebels, the whole resolution. I'll read it: ''International law permits the provision of arms and other assistance to a rebel movement fighting against an abusive regime.'' Votes for, please.

Okay, and votes against?

Interestingly, the voting pattern has moved around the room with a number of people switching sides as a result of the debate. Nonetheless, the overall division of votes with a majority of votes against has remained the same.

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