Legal Studies, Vol. 36 No. 1, 2016, pp. 20–47
DOI: 10.1111/lest.12101

Humanitarian intervention after Syria

Arman Sarvarian*
University of Surrey

This paper examines the legal status of humanitarian intervention in the aftermath of the abortive military operation in Syria. In tracing the history of the doctrine up to the beginning of the Syria crisis, it asserts that the negative reaction to the abortive use of force has reinforced the unlawfulness of humanitarian intervention. In appraising in detail the legal positions of the UK, the USA, France and other states, it analyses the interplay of constitutional law and international law in the Syria crisis with reference to the role of consultations of national parliaments. It asserts that the Syrian precedent illustrates the difficulty of identifying the opinio iuris *of a state in which the input of international law through legal advice and public debate affects the output of that state through the expression of its legal position on doctrinal questions. By scrutinising the approach of the British government in consulting the House of Commons in relation to the continuing operations against Islamic State in Iraq, it argues that the National Security Strategy review in 2015 should address the concerns expressed by parliamentary committees regarding consultation of Parliament, the provision of legal advice and the lawfulness of humanitarian intervention.*

Arman Sarvarian, School of Law, University of Surrey, Guildford GU2 7XH, UK. Email: a.sarvarian@surrey.ac.uk

INTRODUCTION

In the early hours of 30 August 2013, the UK House of Commons voted by a narrow majority of 285 to 272 against the government's motion providing, inter alia, that the House: 'Notes that the use of chemical weapons is a war crime under customary law and a crime against humanity, and that the principle of humanitarian intervention provides a sound legal basis for taking action'.[1] The Prime Minister responded as follows:

> Let me say that the House has not voted for either motion tonight. I strongly believe in the need for a tough response to the use of chemical weapons, but I also believe in respecting the will of this House of Commons. It is very clear tonight that, while the House has not passed a motion, the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the Government will act accordingly.[2]

* The author is grateful to Dr Rudy Baker, Dr Kanstantsin Dzehtsiarou, Dr Maria Ioannidou and Dr Filippo Fontanelli for their comments on an earlier version of this paper.

1. *Hansard* HC Deb, vol 566, col 1426, 29 August 2013.
2. Ibid, col 1556.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

The British government subsequently announced that the UK would not participate in a mooted military operation with NATO allies (principally France and the USA) against Syria in response to an alleged use of chemical weapons in the Ghouta district of Damascus on 21 August 2013. The operation was subsequently abandoned following an agreement struck by the governments of the USA, the Russian Federation and the Syrian Arab Republic on 26 September, in which the last undertook to accede to the Chemical Weapons Convention 1993 and devised a programme to disarm its declared stockpile of chemical weapons.[3]

Against this background, this paper assesses the lawfulness of humanitarian intervention after the Syria chemical weapons precedent.[4] Whereas some commentators have asserted that humanitarian intervention is lawful, probably unlawful or unlawful yet legitimate,[5] it argues that the Syria crisis conclusively demonstrates that humanitarian intervention is unlawful.[6] In addition, the paper examines a key issue that has yet to be addressed in the literature: the role of consultative parliamentary votes in the UK, the

3. See further UNSC Res 2118 (2013).

4. For background, see eg T Franck and N Rodley 'After Bangladesh: the law of humanitarian intervention by military force' (1973) 67 Am J Int'l L 275; S Murphy *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia, PA: University of Pennsylvania Press, 1996); C Greenwood 'Humanitarian intervention: the case of Kosovo' (1999) 10 Fin Yb Int'l L 141; S Wheatley 'The Foreign Affairs Select Committee report on Kosovo: NATO action and humanitarian intervention' (2000) 5(1) J Conflict Sec L 261; S Chesterman *Just War or Just Peace: Humanitarian Intervention and International Law* (Oxford: Oxford University Press, 2001); E Decaux 'La primarité des droits de l'homme: licéité ou illicéité de l'intervention humainitaire' and J Flauss 'La primarité des droits de la personne: licéité ou illicéité de l'intervention humainitaire' in C Tomuschat (ed) *Kosovo and the International Community: A Legal Assessment* (The Hague: Kluwer, 2002) pp 65–102; J Holzgrefe and R Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge: Cambridge University Press, 2003) pp 175–272; S Breau *Humanitarian Intervention: The United Nations and Collective Responsibility* (London: Cameron May, 2006); G Evans 'From humanitarian intervention to the responsibility to protect' (2006) 24 Wis Int'l L J 703; C Gray *International Law and the Use of Force* (Cambridge: Cambridge University Press, 2008) pp 33–55; M Shaw *International Law* (Oxford: Oxford University Press, 2008) pp 1155–1158; S Zifcak 'The responsibility to protect' in M Evans (ed) *International Law* (Oxford: Oxford University Press, 2010) pp 504–527; J Crawford *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012) pp 752–757.

5. See eg H Koh 'Syria and the law of humanitarian intervention (Part II: International law and the way forward')' *EJIL: Talk! Blog* 4 October 2013, available at http://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward/ (accessed 9 October 2015); D Bethlehem 'Stepping back a moment: the legal basis in favour of a principle of humanitarian intervention' *EJIL: Talk! Blog* 12 September 2013, available at http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/ (accessed 9 October 2015).

6. A Henriksen and M Schack 'The crisis in Syria and humanitarian intervention' (2014) 1 (1) J Use Force & Int'l L 122–147 at 147. See also C Stahn 'Between law-breaking and law-making: Syria, humanitarian intervention and 'what the law ought to be' (2014) 19(1) J Conflict Sec L 25–48; C Henderson 'The UK government's legal opinion on forcible measures in response to the use of chemical weapons by the Syrian government' (2015) 64 Int'l & Comp L Q 179.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

USA and France ('the P3') as a constitutional safeguard against aggression.[7] These issues are analysed with reference to subsequent developments concerning the emergence of Islamic State ('IS') and ongoing military operations by the USA and its allies in Syria and Iraq.[8]

Humanitarian intervention is defined as the 'use of force to protect people in another State from gross and systematic human rights violations committed against them, or more generally to avert a humanitarian catastrophe, when the target State is unwilling or unable to act'.[9] It entails the right of states to use force, individually or collectively, without authorisation by the Security Council or the General Assembly. Substantive criteria that have been proposed for its application include:

> a) the existence of a humanitarian 'emergency' or 'disaster' or 'crisis' or 'catastrophe' or 'necessity' or 'tragedy', usually related to the widespread and gross or egregious violation of human rights of (a part of) the population of a State or to the commission of grave international crimes;
> b) the inability or unwillingness of the territorial State to act to address the situation;
> c) the exhaustion of all other realistically possible remedies, including all peaceful remedies and recourse to the UN Security Council (and arguably also the UN General Assembly under the 'Uniting for Peace' procedure), which are unwilling or unable to act;
> d) the acceptance of limitations (both in scope and in time) upon the use of force (as the necessary and sole available course of action), confining it to strictly humanitarian objectives that must be expected to do more harm than good, respecting the principle of proportionality.
> To these, some add a preference towards multilateral (rather than unilateral, and as second best to collective) action, as well as towards the (relative) disinterestedness of the intervening States and/or organizations.[10]

Although the application of substantive criteria is a pertinent issue,[11] this paper focuses upon the test of legality as assessed against the support of states for the doctrine. The continuing support of the UK (and Denmark) for humanitarian intervention, coupled with the fact that the UK remains one of the most militarily active states in the world, renders an evaluation of the legality of humanitarian intervention a critical issue for future use of force scenarios.

This paper first sets out the historical background of humanitarian intervention in order to establish the state of the doctrine prior to the Syria crisis in 2013. Next, it examines the legal positions articulated by states with respect to the abortive Syria operation. Finally, it compares the role of consultative parliamentary votes in the P3 with respect

7. For background, see eg J Klabbers 'Intervention, armed intervention, armed attack, threat to peace, act of aggression, and threat or use of force – what's the difference?' in M Weller, A Solomou and JW Rylatt (eds) *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015) pp 488–506; S Murphy 'The crime of aggression at the International Criminal Court' in Weller et al, ibid, pp 533–560.

8. For background, see eg C Henderson 'The use of force and Islamic State' (2014) 1(2) J Use Force & Int'l L 209–222.

9. V Lowe and A Tzanakopoulos 'Humanitarian intervention' in *The Max Planck Encyclopaedia of Public International Law* (2011) para 3.

10. Ibid, at para 39.

11. Greenwood, above n 4, at 157–158.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

to Syria in 2013 and IS in 2014–2015 as a constitutional check upon executive authority to use force unlawfully. As the main proponent of humanitarian intervention, the paper focuses upon this intersection of law and policy in the UK. The paper calls upon the British government to discontinue its support for humanitarian intervention, which the Syria episode has shown to be clearly unlawful. This change of policy should be enacted through a detailed legal framework for the use of force at the forthcoming National Security Strategy review in 2015. A statutory obligation to consult the House of Commons and independent legal advice are critical to provide a robust check on illegal wars, especially in light of the prospective entry into force of the International Criminal Court crime of aggression in 2017.

1. THE HISTORICAL DEVELOPMENT OF HUMANITARIAN INTERVENTION

The starting-point is the general prohibition on the use of force in international relations[12] and corresponding duty to resolve international disputes through peaceful means.[13] This ban is subject to two express exceptions: (1) forcible measures entailing the application or authorisation of force by the UN Security Council;[14] and (2) individual or collective self-defence.[15] The Security Council has 'primary responsibility for the maintenance of international peace and security', for which purpose the Member States 'agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.[16]

While the Security Council is the primary actor in international peace and security, it is not the exclusive actor: the General Assembly has claimed the power to act in relation to international peace and security where, due to a veto in the Security Council, the Security Council is incapable of doing so.[17] This power has been invoked on ten occasions, most recently in relation to the occupied Palestinian territories in 2003. Its lawfulness is widely accepted by states[18] and has been affirmed by the International Court of Justice ('ICJ').[19] For reasons considered below, it is nevertheless rarely employed in practice.

12. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI ('Charter') Art 2(4). See further: *Corfu Channel Case* (*United Kingdom v Albania*) (Merits) [1949] ICJ Rep 4, 34; *Military and Paramilitary Activities in and around Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, para 202. See further B Simma et al (eds) *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2012).
13. Charter, Arts 2(3), 33(1).
14. Ibid, Art 42.
15. Ibid, Art 51.
16. Ibid, Art 24(2).
17. UNGA Res 377A ('Uniting for Peace', 3 November 1950). For background, see A Carswell 'Unblocking the UN Security Council: The Uniting for Peace resolution' (2013) 18(3) J Conflict Sec L 453–480; J Krasno and M Das 'The Uniting for Peace resolution and other ways of circumventing the authority of the Security Council' in B Cronin and I Hurd (eds) *The UN Security Council and the Politics of International Authority* (London: Routledge, 2008) pp 173–195.
18. J Sloan and G Hernández 'The role of the International Court of Justice in the development of the institutional role of the UN' in C Tams and J Sloan (eds) *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013) pp 197–236 at 216. See also C Binder 'Uniting for Peace resolution (1950)' *The Max Planck Encyclopaedia of Public International Law* (August 2006) para 23.
19. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 at paras 26–32.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

An important question is whether, in the absence of amendment of the Charter to provide for a third exception to the comprehensive prohibition on the use of force, humanitarian intervention can only become law through customary international law. To adopt humanitarian intervention as custom, it must have gained general acceptance prior to the occasion in which it is invoked.[20] It must have become a 'settled practice' over time with reference to the well-known criteria of state practice and *opinio iuris*.[21] This faces the problem of 'hierarchy of norms', whereby the putative customary norm is displaced or trumped by a superior legal norm.

Accordingly, even if humanitarian intervention were to qualify a norm of customary international law, it is contended that the comprehensive prohibition on the use of force in Art 2(4) of the Charter remains a superior norm.[22] This prioritisation of norms has three potential bases in general international law: (1) the *lex specialis* rule, which prioritises more specific rules over more general rules – in this case, treaty provisions over customary norms;[23] (2) the effect of Art 103 of the Charter as a supremacy clause, prioritising Charter provisions over other norms of international law;[24] or (3) the status of the prohibition on the use of force as a *ius cogens* (peremptory or non-derogable) norm.[25] The application of these rules depends upon legal context, such as the jurisdiction of the court or tribunal applying them[26] and UN membership of the parties. Concordantly, the only avenue to add a third exception to the Art 2(4) prohibition is the Art 108 amendment procedure requiring adoption and ratification by a two-thirds majority of the General Assembly, including the Permanent Members of the Security Council.

Proponents of humanitarian intervention have contended that it is possible to 'flexibly interpret' Art 2(4) through customary law. For example, Greenwood wrote in relation to the use of force against Serbia:

> It has been argued that, because the United Nations Charter contains a prohibition of the use of force and no express exception for humanitarian intervention, there can be no question of international law recognising a right of humanitarian intervention. That is, however, to take too rigid a view of international law … While nobody would

20. In inverse, see the 'International Law Commission articles on the responsibility of states for internationally wrongful acts' in *Yearbook of the International Law Commission* (2001) vol II, pt 2, Art 13.

21. For background, see M Wood 'First report on formation and evidence of customary international law', International Law Commission, UN Doc. A/CN.4/633 (17 May 2013) at 12–17.

22. The comprehensive prohibition on the use of force should be read together with the prohibition on interference in the internal or external affairs of a state, implicit in Art 2(4), and the Art 2 (3) duty to resolve international disputes peacefully. The use of force to prevent a humanitarian catastrophe in an internal armed conflict would, absent the consent of the government, breach these duties – see eg *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) (1986) ICJ Rep 14 at 88–104 (paras 187–195). See further eg Klabbers, above n 7.

23. For background, see the analysis and scholarship cited in M Koskenniemi 'Report of the Study Group of the International Law Commission on Fragmentation of International Law: difficulties arising from the diversification and expansion of international law' ('ILC Fragmentation Report') at 39–40 (paras 66, 67) and at 45 (para 79).

24. Ibid, at 168–181 (paras 328–360).

25. Ibid, at 188, 189 (para 374).

26. Ibid, at 46 (para 82) and at 229 (para 452).

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

> suggest that intervention is justified whenever a State violates human rights, international law does not require that respect for the sovereignty and integrity of a State must in all cases be given priority over the protection of human rights and human life, no matter how serious the violations of those rights perpetrated by that State.
>
> Moreover, international law is not confined to treaty texts. It includes customary international law. That law is not static but develops through a process of State practice, of actions and the reaction to those actions. Since 1945, that process has seen a growing importance attached to the preservation of human rights. Where the threat to human rights has been of an extreme character, States have been prepared to assert a right of humanitarian intervention as a matter of last resort.[27]

This argument is unconvincing due to the fact that the change would be the *accretion* of a third exception rather than the *interpretation* of existing exceptions. However, even if this interpretive method is orthodox, the evidentiary threshold for the identification of humanitarian intervention as a norm of customary international law would be a high one: clear evidence would be required of an intention by states to add a third exception and thereby weaken the comprehensive ban on the use of force. A compelling scenario may be a proposal to amend the Charter adopted by the required two-thirds majority of the General Assembly and defeated by the deployment of a veto.

Although the doctrine of humanitarian intervention has a long history in international law scholarship,[28] it was only in the 1990s that states began to consider it as an alternative to the two Charter bases for the use of force.[29] Proponents of the doctrine[30] and a few states (eg Belgium[31]) had argued in relation to Kosovo that uses of force in Bangladesh, Kampuchea, Afghanistan, the Central African Empire, Liberia and particularly the 'no-fly zones' in northern Iraq evidenced such state support. As Gray opines, 'A certain amount of revisionism in the interpretation of past practice has proved attractive to some states.'[32] Nevertheless, as Rodley concludes:

> The condemnations by the UN General Assembly of the interventions in Bangladesh, Kampuchea, and Afghanistan are sufficient to deny these interventions the status of evidence of state practice qualifying as custom. The Ugandan intervention, justified by Tanzania on ground of self-defence and, still condemned by the OAU, at best could be offered as an example of the mitigating circumstances principle at work. The same conclusion is the better explanation of the non-condemnation of France's intervention, again not justified on the basis of a doctrine of humanitarian intervention.[33]

Thus, in evaluating state practice, two factors are particularly important to evince *opinio iuris*: (1) the subjective invocation of the state that action is motivated by a belief of lawfulness *at the time*; and (2) the expressions of support by other states

27. See eg C Greenwood 'International law and the NATO intervention in Kosovo' (2000) 49 (4) Int'l & Comp L Q 926–934 at 929.
28. I Brownlie *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963) pp 338–347. See further EC Stowell *Intervention in International Law* (Washington, DC: J Byrne, 1921) pp 51–62; Franck and Rodley, above n 4.
29. Gray, above n 4, pp 35–37. See also Henriksen and Schack, above n 6, at 134–137.
30. See eg Greenwood, above n 27, at 929–930.
31. Gray, above n 4, p 49.
32. Ibid.
33. N Rodley 'Humanitarian intervention' in Weller et al, above n 7, pp 775–796, 784.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

for that conduct on *legal* grounds. Originally, British policy was sceptical on humanitarian intervention:

> In fact, the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal … the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention for three reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope of abusing such a right argues strongly against its creation.[34]

From August 1992 the UK adopted the position that, in the event of a veto in the Security Council, individual states may unilaterally use force (subject to specific criteria[35]) to alleviate a compelling and urgent situation of extreme humanitarian distress demanding immediate relief. While the UK invoked the doctrine in the mid-1990s for Operation Safe Haven following the Persian Gulf War, the USA relied upon implied authorisation by the Security Council.[36] Yet, when confrontations with Iraqi warplanes occurred during the operation, '[t]he preference of the UK and the USA not to enter into discussion of the legal basis of the no-fly zones, but to focus where possible on claims to self-defence, indicates at least an awareness that the doctrine of humanitarian intervention remained controversial'.[37]

The aerial bombardment undertaken by NATO Members in Kosovo in 1999 was the key test case for the lawfulness of humanitarian intervention.[38] Amongst NATO Members, only the UK and Belgium invoked the doctrine to justify their uses of force.[39] Not only did other NATO Members not invoke it in the *Legality on the Use of Force* cases[40] before the ICJ, but some (eg Germany and the USA) even stated that the operation was not to be seen as a precedent for future action.[41] Russia, China and the Non-Aligned Movement ('NAM') were strongly opposed to the concept of humanitarian intervention without Security Council authorisation.[42] In 2000, the G77 declared: 'We reject the so-called "right" of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international

34. 'British Foreign Office (Foreign Policy Document No. 148)' (1986) 57 Br Yb Int'l L 614 at 619.
35. See further V Lowe 'International legal issues arising in the Kosovo case' (2000) 49(4) Int'l & Comp L Q 934 at 939–942.
36. Gray, above n 4, p 37.
37. Ibid, p 38.
38. Henriksen and Schack, above n 6, at 137.
39. Gray, above n 4, pp 42, 45.
40. See eg *Legality of Use of Force* (*Serbia and Montenegro v United Kingdom*), Preliminary Objections, [2004] ICJ Rep 1307.
41. Gray, above n 4, p 47.
42. Ibid, p 52.
43. 'Group of 77 South Summit, Havana, Cuba, 10–17 April 2000, Declaration of the South Summit', para 54; available at http://www.g77.org/summit/Declaration_G77Summit.htm (accessed 9 October 2015).

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

law.'[43] The Independent International Commission on Kosovo commissioned by Sweden concluded that 'the intervention was legitimate, but not legal'.[44]

The British government had asserted that the 'humanitarian intervention as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable'.[45] However, the House of Commons Foreign Affairs Select Committee concluded that: (i) at the very least, the doctrine of humanitarian intervention has a tenuous basis in current international customary law, and that this renders the NATO action legally questionable; and (ii) NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds.[46] These conclusions were reached with the benefit of evidence submitted by distinguished international lawyers.[47]

In the 2000s, the Canadian-inspired 'responsibility to protect' concept[48] placed a renewed emphasis upon the central role of the UN collective security system for the protection of civilians in armed conflict.[49] States declared at the 2005 World Summit:

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity … In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[50]

44. Independent International Commission on Kosovo *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000) p 289.
45. House of Commons Defence Committee *Intervention*: *Why*, *When and How*? *Government Response* 2013–2014, 14th Report of Session 2013–14, HC 952, 8 April 2014 (HMSO, 2014) p 14.
46. House of Commons Foreign Affairs Select Committee Fourth Report, HC 781, 23 May 2000, pp 132, 138.
47. Lowe, above n 35, at 938; Greenwood, above n 27, at 934; I Brownlie and C Apperley 'Kosovo crisis inquiry: memorandum on the international law aspects' (2000) 49(4) Int'l & Comp L Q 878–905 at 904–905; C Chinkin 'The legality of NATO's action in the former Republic of Yugoslavia (FRY) under international law' (2000) 49(4) Int'l & Comp L Q 910–925 at 924. See further Wheatley, above n 4.
48. For background, see eg M Vashakmadze 'Responsibility to protect' in Simma et al, above n 12 (vol II), pp 1207–1236, pp 1225, 1230; L Glanville 'The responsibility to protect beyond borders' (2012) Hum Rts L Rev, available at http://hrlr.oxfordjournals.org/content/early/2012/01/23/hrlr.ngr047.full.pdf+html (accessed 9 October 2015); C Stahn 'Responsibility to protect: political rhetoric or emerging legal norm?' 101(1) Am J Int'l L (2007) 99; S Mohamed 'Restructuring the debate on unauthorized humanitarian intervention' (2011) 88(4) N C L Rev 1275; M Matthews 'Tracking the emergence of a new international norm – the responsibility to protect and the crisis in Darfur' (2008) 31(1) B C Int'l & Comp L Rev 137; G Evans 'From humanitarian intervention to the responsibility to protect' (2006-2007) 24 Wis Int'l L J 703.
49. C Powell 'Libya: a multilateral constitutional moment?' (2012) 106 Am J Int'l L 298; M Schmitt 'Legitimacy versus legality redux: arming the Syrian rebels' (2014) 7 J Nat'l Sec L & Pol'y 139; M Sterio 'Humanitarian intervention post-Syria: legitimate and legal?' (15 January 2014) *Cleveland-Marshall Legal Studies Paper No. 14-262*, SSRN Paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379656; (accessed 9 October 2015); D Berman and C Michaelsen 'Intervention in Libya: another nail in the coffin for the responsibility-to-protect?' 14(4) Int'l Commun L Rev (2012) 337.
50. UNGA Res 60/1 ('2005 World Summit Outcome') (24 October 2005) paras 138, 139. This was affirmed in UNSC Res 1674 (28 April 2006) OP4.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

It has been argued that, as the two concepts are fundamentally distinct, the adoption of the responsibility to protect did not negate humanitarian intervention.[51]

Over the past 6 years, the Security Council has been the principal forum for collective security action – most notably in the case of Libya (2011).[52] The prospect of a massacre of rebellious citizens in Benghazi by the Libyan government persuaded a 10–0–5 majority of the Security Council, citing the responsibility to protect, to authorise Member States to take 'all necessary measures to protect civilians and civilian population areas under threat or attack'.[53] The controversial implementation of the resolution prompted suspicion amongst certain states concerning the possibility of abuse, leading to Security Council paralysis during the first 2 years of Syrian civil war.[54]

Until the Syria case, there was no attempt after Kosovo to invoke the doctrine of humanitarian intervention to justify a unilateral use of force. Commentators were divided on the question of legality at the time of the Syria crisis.[55] Some believed that the use of force would be unlawful[56] but arguably legitimate,[57] citing the hierarchy of norms and/or a lack of supporting practice.[58] Others opined that sufficient practice existed to conclude that humanitarian intervention had customary status and that Art 2(4) can be interpreted flexibly to allow for the addition of a third exception.[59]

It is averred that the use of force against Syria would have been unlawful, which by extension renders the threat of force unlawful.[60] The orthodox interpretation of Art 103

51. See eg Stahn, above n 48, at 120.
52. Vashakmadze, above n 48, at 1216–1218.
53. UNSC Res 1973 (2011), Preamble, OP 4, 6. The responsibility to protect was also cited by the Security Council in adopting targeted sanctions regarding Côte d'Ivoire – UNSC Res 1975 (2011), Preamble.
54. G Evans 'After Syria: the future of the responsibility to protect' *Global Leadership Foundation* (12 March 2014); available at http://www.g-l-f.org/index.cfm?id=62090&modex=blogid&modexval=17032&blogid=17032 (accessed 9 October 2015). See also O Courten and V Koutroulis 'The illegality of military support to rebels in the Libyan war: aspects of *jus contra bellum and jus in bello*' (2013) 18(1) J Conflict Sec L 59.
55. 'Debate map: use of force against Syria', Oxford Public International Law; available at http://opil.ouplaw.com/page/debate_map_syria/debate-map-use-of-force-against-syria (accessed 9 October 2015).
56. See eg C Lynch and K DeYoung 'U.S. explores possible legal justifications for a strike on Syria' *The Washington Post* (10 September 2013) (David Kaye), available at http://www.washingtonpost.com/world/national-security/us-explores-possible-legal-justifications-for-strike-on-syria/2013/08/28/0d9c6c08-0fe3-11e3-bdf6-e4fc677d94a1_story.html (accessed 9 October 2015); E Posner 'The U.S. has no legal basis to intervene in Syria' (28 August 2013), available at http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/08/the_u_s_has_no_legal_basis_for_its_action_in_syria_but_that_won_t_stop_us.html (accessed 9 October 2015).
57. See eg E Perez 'Obama looks to Congress to bolster legal case for Syria strike' *CNN* (3 September 2013) (R Chesney); available at http://edition.cnn.com/2013/09/02/us/obama-syria-legal-issues/ (accessed 9 October 2015).
58. See eg D Akande 'The legality of military action in Syria: Humanitarian intervention and the responsibility to protect' *EJIL*: *Talk*! *Blog* 28 August 2013, available at http://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/ (accessed 9 October 2015); 'Viewpoints: is there legal basis for intervention in Syria?' (R McCuorquodale) *BBC News* 29 August 2013, available at http://www.bbc.co.uk/news/world-23847169 (accessed 9 October 2015); P Campos 'Striking Syria is completely illegal' *Time* (5 September 2013), available at http://ideas.time.com/2013/09/05/obamas-plan-for-intervention-in-syria-is-illegal/ (accessed 9 October 2015).
59. See Koh, above n 5, and Bethlehem, above n 5.
60. *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*), [1986] ICJ Rep 14, 107–108 (para 205).

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

as applicable not only to treaty obligations but also to customary rights would preclude custom from modifying the Charter regime on the use of force without recourse to the Art 108 amendment procedure. Koh's assertion that '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'[61] overlooks the fact that there exist two legal mechanisms for collective enforcement action: (1) Security Council action or authorisation; and (2) in the event of a veto, General Assembly authorisation under the Uniting for Peace procedure (most recently employed in 2003 in relation to Palestine[62]) subject to the caveats discussed below.

Furthermore, even if custom can in principle be used as an interpretive gloss upon Art 2(4), it is argued that humanitarian intervention had failed to gain sufficient support from states by the time of the Syrian crisis.[63] On this point, Sir Daniel Bethlehem QC asserted at the time of the crisis:

> Although only few of the other NATO States that participated in the Kosovo military action in 1999 came out publicly to explain the legal basis of their action, there can be little doubt that most, if not all, considered that action to be lawful. And, absent any other legal basis for that action, it is evident that the legal basis relied upon by NATO and its participating States – even if not expressed publicly – was that of humanitarian intervention. The Kosovo precedent is therefore a much wider and more robust precedent than is often acknowledged.[64]

Sir Daniel offered no substantiation for the proposition that NATO Member States privately invoked humanitarian intervention (even if a privately expressed view can constitute *opinio iuris*[65]). Professor Harold Koh, a former Legal Adviser to the US Department of State, concurred with Sir Daniel's analysis: drawing an analogy with the customary right of self-defence,[66] he argued that Art 2(4) permits a customary norm of humanitarian intervention in order to realise the purposes of the UN. Citing a 1999 paper by Professor Adam Roberts,[67] he averred: 'Seventeen other NATO members individually satisfied themselves of the legality of their participation in the operation.'

However, both Bethlehem and Koh overlooked the fact (acknowledged in the Roberts paper[68]) that the NATO governments 'generally eschewed the opportunity' to invoke humanitarian intervention in the aforementioned *Legality on the Use of Force* proceedings. Neither Bethlehem nor Koh acknowledged the considerable opposition to humanitarian intervention expressed by non-NATO states;[69] focusing on the public pronouncements of the US and British governments, Koh criticised the omission of the Obama administration to 'issue its detailed legal opinion elaborating [the White House Counsel's] view' and yet seemingly assumed that the administration was tacitly

61. Koh, above n 5.
62. Binder, above n 18.
63. See further Henriksen and Schack, above n 6; Akande, above n 58.
64. Bethlehem, above n 5.
65. M Wood 'Second report on identification of customary international law', International Law Commission, UN Doc. A/CN.4/672 (22 May 2014) at 53–63 (paras 75–80).
66. A Randelzhofer and G Nolte 'Article 51' in Simma et al, above n 12 (vol II), pp 1397–1428, pp 1401–1406.
67. A Roberts 'NATO's "humanitarian war" over Kosovo' (1999) 41(3) Survival 102–123.
68. Ibid, at 107.
69. See eg Akande, above n 58.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

relying on humanitarian intervention.[70] His critique of '*per se* illegality' and his assertion that 'President Obama did not violate international law by threatening to use force in Syria in the face of a persistent Russian veto' primarily sought to cast doubt upon the existence of definitive law; he did not posit evidence to sustain the existence of a customary norm. He concluded:

> Syria is a lawmaking moment. It should be treated that way. International lawyers in and out of government need to discuss and define a narrow 'affirmative defense' to Article 2(4) that would clarify the contours of an emerging lawful exception to a rigid rule. The Clinton Administration's failure to articulate a clear legal rationale for its Kosovo intervention haunts us now. Continuing to threaten military action in Syria without stating a public legal rationale creates a dangerous precedent. In the future, other less-humanitarian minded states can cite Obama's threat and put their own broad spin on the legal interpretation, to use the murky concepts of humanitarian intervention and R2P for their own self-interested purposes.

This statement suggests that Koh is conscious of the fact that traditional methods of identifying customary international law through reference to state practice and *opinio iuris* undermine his apology of the US threat of force. Despite his criticism of traditional methods and of the notion of per se illegality, he inconsistently emphasises publicly expressed legal positions by governments for legislation.

Therefore, even if Koh's argument that humanitarian intervention is not per se a breach of the comprehensive ban on the use of force is correct, the absence of publicly articulated legal positions by states that humanitarian intervention is lawful defeats his ultimate argument of legality. Concurring with the report of the House of Commons Foreign Affairs Select Committee, it is consequently argued that the uses of force by NATO Members against Serbia were unlawful. Moreover, the hostile reactions of states to the doctrine confirm that, following the Kosovo operation, it had not gained sufficient support to crystallise into a norm of customary international law[71] by 30 August 2013.

An additional problem is the divergence of substantive tests for humanitarian intervention put forward by various apologists for humanitarian intervention. The British government position is that three criteria must be met for humanitarian intervention to apply:

(1) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
(2) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
(3) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (ie the minimum necessary to achieve that end and for no other purpose).[72]

70. For another view, see J Goldsmith 'Dehn on Syria and humanitarian intervention', Lawfare (6 September 2013); available at http://www.lawfareblog.com/dehn-syria-and-humanitarian-intervention (accessed 9 October 2015).
71. R Zacklin *The United Nations Secretariat and the Use of Force in a Unipolar World: Power v. Principle* (Cambridge: Cambridge University Press, 2010) p 144.
72. Below n 138.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

However, other criteria that have been proposed include the inability or unwillingness of the territorial state to act to address the situation, the exhaustion of all other realistically possible remedies (ie the UNSCUN), multilateral action only (ie no unilateral action) and 'disinterestedness' by the intervening states and/or organisations.[73] In addition, there is no consensus on the triggering event of a 'humanitarian distress/emergency/catastrophe'.[74] Even if there were sufficient state practice supporting the lawfulness of humanitarian intervention, this considerable confusion concerning its substantive criteria undermines the existence of *opinio iuris* creating a settled practice for customary law.

It should also be emphasised that the rationale for a right of states to use force to prevent a humanitarian catastrophe overlooks the existence of the aforementioned Uniting for Peace procedure. The impression that the veto power in the Security Council can utterly frustrate collective security[75]– creating a dilemma of either permitting the humanitarian catastrophe to occur or breaching the law in order to prevent it – is false. The prospective entry into force of the jurisdiction of the International Criminal Court ('ICC') concerning the crime of aggression, considered below, reinforces the attractiveness of General Assembly authorisation for forcible measures over that of an unlawful, unilateral use of force.

However, an important caveat is that the Uniting for Peace procedure, as currently formulated, only provides for recommendation of 'the use of armed force' in cases of breach of the peace or an act of aggression.[76] The rationale of averting a humanitarian catastrophe, entailing serious breaches of human rights or international crimes within a state (as opposed to an inter-state armed conflict), constitutes a 'threat to the peace' but not a 'breach of the peace' or an 'act of aggression'.[77] Although Uniting for Peace does not consequently cover the Kosovo or Syria scenarios, Andrew Carswell asserts:

> [F]rom a strictly legal perspective, it is logically absurd to suggest that the Council's failure to exercise its primary responsibility following a threat to the peace should dictate any diminishment of the Assembly's power to address that omission. On the other hand, the Uniting for Peace resolution reflects a political compromise, and it is politics, not law, that imposed such a limitation. In any event, there is no vlegal obstacle to extending the Assembly's power to recommend force to include threats to the peace.[78]

Carswell concludes that Uniting for Peace is unconstitutional in its present form and proposes that it be construed to acknowledge the primacy of the Security Council and the validity of the veto power in order to revitalise the General Assembly's secondary role in international peace and security as a means to encourage the Security Council to fulfil its primary role.[79]

73. See eg Lowe and Tzanakopoulos, above n 9.
74. See eg Stahn, above n 48, pp 50–51.
75. See eg P Webb 'Deadlock or restraint? The Security Council veto and the use of force in Syria' (2014) 19(3) J Conflict Sec L 471–488.
76. Zacklin, above n 71.
77. N Krisch 'Article 39' in Simma et al, above n 12 (vol II), pp 1272–1296, pp 1285–1287; Carswell, above n 17, at 475.
78. Carswell, above n 17, at 476.
79. Ibid, at 456, 479.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

Concurring with this assessment, the extension of Uniting for Peace to allow for authorisation of forcible measures to address threats to the peace would be a useful reform to 'internalise' the handling of situations akin to Syria within the UN system. There would be no need to resort to unorthodox legal argumentation techniques in order, as advocated by Koh, to 'stretch' the settled meaning of Art 2(4) to provide for a unilateral right to use force, legislated through custom rather than Charter amendment. Rather, states seeking to use force to prevent a humanitarian catastrophe would have a clear path towards legality: authorisation by the Security Council authorisation in the first instance, followed by, alternatively, General Assembly authorisation into circumvent the event of frustration through veto. Of course, the implementation of authorised measures is at least as important as their retention – as the controversy concerning the Libya case illustrated.

2. THE LEGAL POSITIONS OF STATES REGARDING THE SYRIA OPERATION

The critical period for states to express their positions concerning the lawfulness of the proposed use of force was from the chemical weapons attack in Ghouta on 21 August 2013 until the disarmament agreement on 21 September, during which the use of force was debated in national parliaments, in international fora and in the media. The 67th session of the UN General Assembly opened on 18 September, by which time discussion had shifted from the use of force to diplomacy. Nonetheless, legality was a factor, to varying degrees, in these debates. After examining the legal positions of the UK, the USA and France ('the P3'), the reaction of the international community is appraised.

(a) The legal positions of the P3

The first significant event was the decision by British government to seek the support of the House of Commons through a parliamentary motion. The legal position adopted by the government set out in its summary of 29 August was that the proposed use of force was lawful under humanitarian intervention. According to its two-step approach, the government initially sought the endorsement of the House of Commons of the *principle* of humanitarian intervention; following publication of a then pending UN report concerning whether chemical weapons had been used in Ghouta, it would then seek a second motion supporting its proposed *application* against Syria. As aforementioned, the unexpected rejection of the first motion on 30 August, following some 10 hours of debate, prompted the Prime Minister to abandon this plan.

Debate was also held in the House of Lords on 29 August, before which a motion was brought by the government that that House '[take] note of the use of chemical weapons in Syria'.[80] Frequent reference was made to the legal grounds for the use of force in that debate,[81] including by a former Attorney General,[82] a former head of HM's

80. *Hansard* HL Deb, vol 566, col 1719, 29 August 2013, 'Syria and the use of chemical weapons'.

81. Ibid, cols 1767–1768 (Lord Brennan), 1769 (Lord Thomas of Gresford), 1779 (Lord Phillips of Sudbury), 1780 (Lord Rathsbotham), 1782–1783 (Lord Desai), 1791–1792 (Lord Inglewood), 1800 (Lord Cormack), 1807 (Baroness Tonge), 1812 (Baroness Uddin), 1816 (Lord Triesman), 1820 (Lord Wallace of Saltaire).

82. Ibid, col 1739 (Lord Goldsmith).

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

Diplomatic Service[83] and former leaders of the Conservative Party and of the Liberal Democrats.[84] Following the rejection of the government's motion by the House of Commons, the House of Lords adjourned its debate.[85]

In the USA, the question of legality was peripheral. President Obama did not refer to it in his call for 'authorization for the use of force by the American people's representatives in Congress'[86] and Secretary Kerry likewise made no reference to it in his evidence to congressional committees.[87] However, the media reported that the Department of Justice Office of Legal Counsel had provided a legal opinion to President Obama:

> The administration's lawyers have been careful to guide the choice of words used by top officials. Obama and Secretary of State John Kerry, who made a forceful case for military action on Friday, have carefully portrayed al Assad's actions as violating 'international norms.'
> That's in part because Syria isn't among the 188 countries, including the United States, that signed the Chemical Weapons Convention, the treaty that prohibits the production and use of such weapons.[88]

The legal opinion has not been published in the Department of State's *Digest of United States Practice in International Law 2013*.[89]

On 4 September, the Senate Foreign Relations Committee passed by ten votes to seven the Senate Joint Resolution ('Authorization for the Use of Military Force Against the Government of Syria in Response to Use of Chemical Weapons'), which stated that 'the President has authority under the Constitution to use force in order to defend the national security interests of the United States'.[90] It was introduced before the full Senate on 6 September but not brought to a vote. In the Senate debates, neither humanitarian intervention nor the responsibility to protect was referenced.[91]

83. Ibid, col 1730 (Lord Wright of Richmond).
84. Ibid, col 1731 (Lord Howard of Lympne), 1734–1735 (Lord Ashdown of Norton-sub-Hampdon).
85. Ibid, cols 1825–1826.
86. 'Statement by the President on Syria' (31 August 2013); available at http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria (accessed 9 October 2015).
87. 'Opening remarks before the United States Senate Committee on Foreign Relations: John Kerry, Secretary of State' (3 September 2013), available at http://www.state.gov/secretary/remarks/2013/09/212603.htm (accessed 9 October 2015); 'Syria: weighing the Obama administration's response' (4 September 2013), available at http://www.state.gov/secretary/remarks/2013/09/213787.htm (accessed 9 October 2015).
88. Perez, above n 57. The White House Legal Counsel, Kathryn Ruemmler, was also quoted by the *New York Times* as saying that 'the president believed a strike would be lawful, both in international law and domestic law, even if neither the Security Council nor Congress approved it' – C Savage 'Obama tests limits of power in Syrian conflict' (8 September 2013); available at http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html?pagewanted=all&_r=0 (accessed 9 October 2015).
89. CLD Guymon (ed), Office of the Legal Adviser, US Department of State *Digest of United States Practice in International Law 2013*, pp 552–554.
90. Library of Congress 'Bill Text 113th Congress (2013–2014) S.J.RES.21.PCS'; available at http://thomas.loc.gov/cgi-bin/query/z?c113:S.J.RES.21 (accessed 9 October 2015).
91. *Congressional Record*, Senate, 159(117), 9 September 2013 (S6273–S6284); 159(118), 10 September 2013 (S6305–S6306, S6312–S6320); 159(119) 11 September 2013 (S6340–S6348, S6367–S6369); 159(122), 17 September 2013 (S6482–S6483). *Congressional Record*, House of Representatives, 159(117), 9 September 2013 (H5409–H5410); 159(118), 10 September 2013 (H5437–H5438, H5440–H5442); 159(119), 11 September 2013 (H5480, H5484, H5493); 159(110), 12 September 2013 (H5532).

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

In France, legality was a more prominent issue than in the USA, but less so than in the UK. On 27 August, President Hollande called for an international response, invoking 'respect for international law' as an indispensable condition for the use of force and as the best guarantee for preserving collective security:

> Yet, international law must evolve with the times. It cannot be a pretext for permitting the perpetration of mass massacres. It is why I recognise the principle of 'the responsibility to protect' civilian populations as adopted by the United Nations General Assembly in 2005.[92]

This reference to the responsibility to protect was the closest that the Hollande administration came to a publicly expressed legal justification during the crisis.[93]

Neither the then Prime Minister, M. Jean-Marc Ayrault, nor the Foreign Minister, M. Laurent Fabius, referred to legality in debates held in the National Assembly and the Senate on 4 September 2013.[94] The government reportedly furnished the National Assembly with legal advice asserting 'that, legally, they felt that they could take military action without a Security Council resolution'.[95] However, no such advice has been published.[96]

In the debate, several deputies opposed the operation due to the absence of a UN mandate.[97] One observed that the possibility existed of seeking authorisation by the General Assembly through the Uniting for Peace procedure.[98] The responsibility to protect was cited by one deputy in opposition to the use of force and in support of humanitarian assistance and diplomatic initiatives.[99] No resolution was put to a vote due to its specific preclusion by Art 35 of the constitution of France.

(b) The legal positions in the international community

92. 'Allocution du président de la République à l'occasion de la Conférence des Ambassadeurs' (27 August 2013); available at http://www.elysee.fr/declarations/article/allocution-du-president-de-la-republique-a-l-occasion-de-la-conference-des-ambassadeurs/ (accessed 9 October 2015) (author's translation).

93. No reference was made to the responsibility to protect in an interview with *Le Monde* on 31 August – 'Syrie interview du Président dans le Monde du 31 août2013'; available at http://www.diplomatie.gouv.fr/fr/dossiers-pays/syrie/la-france-et-la-syrie/actualites-2013/article/syrie-interview-du-president-dans (accessed 9 October 2015). M. Fabius likewise did not refer to it in a press conference with Secretary Kerry on 7 September – 'Recontre entre Laurent Fabius et John Kerry (Paris, 7 septembre 2013)'; available at http://www.diplomatie.gouv.fr/fr/dossiers-pays/syrie/la-france-et-la-syrie/actualites-2013/article/rencontre-entre-laurent-fabius-et-108231 (accessed 9 October 2015).

94. Assemblée nationale, XIV^{e} législature, deuxième session extraordinare de 2012–2013, compte rendu, prèmiere séance du mercredi 04 septembre 2013; Sénat, *Journal officiel des débats*, compte rendu intégral, séance du mercredi 04 septembre 2013, débat sur la situation en Syrie.

95. House of Commons Foreign Affairs Committee *Government Foreign Policy towards the United States*, oral evidence (3 December 2013) at Q168 and Q175 (Mike Gapes MP). However, Mr Gapes stated in email correspondence with the author that he had 'got his information from media reports'.

96. 'Documents parlementaires'; available at http://www.assemblee-nationale.fr/documents/index.asp (accessed 9 October 2015).

97. Ibid, M. Christian Jacob (Président du groupe Union pour un Movement Populaire), M. Jean-Louis Borloo (Union des démocrates et indépendants), M. Paul Giacobbi (Radical, républicain, démocrate et progressiste) and M. André Chassaigne (Président du groupe Gauche démocrate et républicaine).

98. Ibid, M. Jean-Louis Borloo (Union des démocrates et indépendants).

99. Ibid, M. André Chassaigne (Président du groupe Gauche démocrate et républicain).

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

NATO allies largely refrained from public comment on legality.[100] While the NATO Secretary-General called for military action, NATO Members did not adopt a common position and no proposal was made for a joint operation – reportedly due, at least in part, to the absence of a UN mandate.[101] The P3 failed to gain an EU Common Foreign and Security Policy ('CFSP') position supporting the use of force and the then EU High Representative for Foreign Affairs and Security Policy, Lady Catherine Ashton, made no public comment.[102]

At the G20 summit of 5–6 September 2013, the UN Secretary-General averred that 'any decision [to act] "should be taken within the framework of the UN Charter, as a matter of principle".'[103] The heads of government of Brazil, India, Argentina, China, South Africa and Indonesia joined President Putin to oppose as unlawful any military action without a UN mandate.[104] While 11 of the 20 participants (Australia, Canada, France, Italy, Japan, the Republic of Korea, Saudi Arabia, Spain, Turkey, the UK and the USA) signed a joint statement circulated by the White House in support of its position, that statement was 'carefully crafted to omit the controversial crux of the American plan: punitive airstrikes on Syria, to be led by the US, quite possibly without UN backing'.[105]

The Arab League called upon the UN to act as several Members reportedly opposed a military operation without a UN mandate.[106] Although the Non-Aligned Movement did not make an explicit statement on the aborted use of force in Syria,[107] at its last summit in August 2012 it reaffirmed its opposition to 'toutes actions militaires unilatérales, ou usage ou menace d'usage de la force contre la souveraineté, l'intégrité

100. See eg R Neukirch 'Military intervention: Germany caught in the middle over Syria' *Der Spiegel Online International* 2 September 2013; available at http://www.spiegel.de/international/world/german-government-takes-delicate-position-on-attack-on-syria-a-919736.html (accessed 9 October 2015). It has been noted that 'the Danish government followed the British approach in its legal justification – Henriksen and Schack, above n 6, at 127 (note 23).

101. 'Monthly press conference by the NATO Secretary-General' *NATO Newsroom* 2 September 2013); available at http://www.nato.int/cps/en/natolive/opinions_102716.htm?selectedLocale=en (accessed 9 October 2015). See also 'NATO chief calls for intervention in Syria' *Deutsche Welle* 2 September 2013; available at http://www.dw.de/nato-chief-calls-for-intervention-in-syria/a-17061245 (accessed 9 October 2015).

102. 'Statement from HR Ashton reflecting the agreed position of the European Union – all 28 Member States' (7 September 2013); available at http://www.eu2013.lt/en/news/statements/statement-from-hr-ashton-reflecting-the-agreed-position-of-the-european-unionall-28-member-states (accessed 9 October 2015).

103. 'At G20 summit, Ban, UN–Arab League Envoy push for political solution to Syria crisis' *UN News Centre* 24 September 2013; available at http://www.un.org/apps/news/story.asp?NewsID=45780&Cr=syria&Cr1=g20&Kw1=syria&Kw2=&Kw3=#.UyLUiSguPIU (accessed 9 October 2015).

104. 'G20 Syria divide: world's largest nations speak out against US-led strike' *Russia Today* 6 September 2013; available at http://rt.com/news/g20-against-syria-strike-527/ (accessed 9 October 2015).

105. B Kendall 'Syria crisis: no winner in Russia–US G20 duel' *BBC News* 7 September 2013; available at http://www.bbc.co.uk/news/world-europe-23999009 (accessed 9 October 2015). For the text of the statement, see 'Joint statement on Syria' (6 September 2013); available at http://www.whitehouse.gov/the-press-office/2013/09/06/joint-statement-syria (accessed 9 October 2015).

106. 'Arab League urges UN-backed action in Syria' *Al Jazeera* 2 September 2013; available at http://www.aljazeera.com/news/middleeast/2013/09/20139118235327617.html (accessed 9 October 2015).

107. UNGA First Committee, 68th Session, 3rd Meeting (7 October 2013) at 5–8.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

territorial et l'indépendance des pays non alignés, lesquelles constituent des actes d'agression et des violations flagrantes des principes de la Charte des Nations Unies, dont celui de la non-ingérence dans les affaires intérieures des États'.[108] In the General Assembly, a number of delegations chose to criticise the proposed operation in both direct and oblique terms;[109] some cited the responsibility to protect, emphasising the central role of the UN for the use of force.[110]

On 5 December 2013, the General Assembly adopted Resolution 68/38 (2013) by a vote of 127-5-52 (with the USA, the UK, Israel, Micronesia and Palau against) in which it, inter alia: '*Requests* the States parties to the relevant instruments on weapons of mass destruction to consult and cooperate among themselves in resolving their concerns with regard to cases of non-compliance as well as on implementation, in accordance with the procedures defined in those instruments, and to refrain from resorting or threatening to resort to unilateral actions, or directing unverified non-compliance accusations against one another to resolve their concerns'.[111] The General Assembly also adopted Resolution 68/184 (2013) by a vote of 86–36–61 in which it, inter alia: '*Reminds* the Security Council of its primary responsibility for the maintenance of international peace and security'.[112]

The reactions in the international community reveal that the UK stood nigh alone in endorsing the lawfulness of humanitarian intervention. First, neither France nor the USA invoked the doctrine. Secondly, neither allied states (save Denmark), NATO nor the EU publicly endorsed the British legal position. Thirdly, many states explicitly opposed it and others (eg in the Arab League and the NAM) implicitly did so by supporting the traditional view that the use of force is lawful only in self-defence or with a UN mandate. This is reflected in the emphasis placed upon collective security and peaceful dispute settlement in the Charter and in UNGA resolutions.

3. THE LEGAL ROLE OF CONSULTATIVE PARLIAMENTARY VOTES

Even if, contrary to the arguments considered in section 1, it is legally possible to 'amend' the UN Charter through customary international law to add a third exception

108. '16ème Sommet des Chefs d'État ou de Gouvernement du Mouvement des Pays Non-Alignés, Document Final, Téhéran, République Islamique d'Iran' at para 31.5 (31 August 2012). See also paras 24.2, 24.3, 24.6, 25.4, 27.8, 28.2, 29, 31.5.

109. 5th Meeting (24 September 2013), UN Doc. A/68/PV.5 at 10 (Brazil), 24 (Chile), 50 (South Africa), 55 (Sri Lanka); 6th Meeting (24 September 2013), UN Doc. A/68/PV.6 at 5 (Austria), 15 (Iran); 7th Meeting (24 September 2013), UN Doc. A/68/PV.7 at 2 (Switzerland), 11 (Argentina), 21 (Sweden), 40 (Italy); 9th Meeting (25 September 2013), UN Doc. A/68/PV.9 at 13 (Poland), 16 (Swaziland); 10th Meeting (25 September 2013), UN Doc. A/68/PV.10 at 12-13 (Bolivia), 21-22 (Trinidad and Tobago); 16th Meeting (27 September 2013), UN Doc. A/68/PV.16 at 7 (Saint Vincent and the Grenadines); 17th Meeting (27 September 2013), UN Doc. A/68/PV.17 at 5 (Sudan), 18 (Venezuela), 18th Meeting (28 September 2013), 7 (Mauritius), 8 (Vanuatu), 16 (Malaysia), 45 (Kyrgyzstan), 19th Meeting (28 September 2013), UN Doc. A/68/PV.19 at 8 (Ireland), 28 (Yemen); 21st Meeting (30 September 2013), UN Doc. A/68/PV.21 at 9 (Syria); 23rd Meeting (1 October 2013), UN Doc. A/68/PV.23 at 5 (Botswana), 9 (Holy See), 19 (Dominica), 25 (Ecuador).

110. See the statements of Chile, Costa Rica, Estonia, Panama, Poland, Libya, Australia, the Netherlands, Montenegro, the Czech Republic, Finland, Iceland, Botswana, the Holy See and Denmark.

111. UNGA Res 68/38 ('Promotion of multilateralism in the area of disarmament and non-proliferation', 10 December 2013) at OP6.

112. UNGA Res 68/182 ('Situation of human rights in the Syrian Arab Republic', 18 December 2013) at OP 4, 12.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

to the prohibition on the use of force, the distinct lack of support in the international community of states for humanitarian intervention in the Syria episode outlined in section 2 supports the conclusion that it has not attained the status of custom. In this context, this section considers the legal role of consultative parliamentary votes in two respects: (1) as a procedural safeguard at the domestic level against the commission of the internationally wrongful act of aggression; and (2) irrespective of the first, as an expression of the state's legal position.

The nexus for this interaction between constitutional law and public international law[113] is the putative entry into force on 1 January 2017 of the jurisdiction of the ICC over the international crime of aggression.[114] In comparing the constitutional positions of the P3, consultative parliamentary votes can play an essential role in protecting the national interest and the international rule of law as an independent check upon the executive to avert the commission of aggression. However, the ability of national parliaments to perform this function depends upon, in particular, access to independent legal advice and statutory entrenchment of consultation that is protected by judicial recourse.

(a) Consultative votes in the UK

Inquiries in the past year by the Foreign Affairs Select Committee, the Constitutional and Political Reform Committee and the Defence Select Committee, investigating the Syria episode, have questioned the modalities of parliamentary consultation and the lawfulness of humanitarian intervention following the international reaction to the Syria operation.[115] Parliamentary consultation is arguably an issue of the greatest importance for the UK of the P3, not only due to its parliamentary system of government and to the continuing political legacy of the controversial Iraq War,[116] but also to the fact that the UK and France, unlike the USA, are parties to the ICC Statute, while the UK is also the only one of the three to be party to the compulsory jurisdiction of the ICJ.[117] This leaves the UK more exposed to the possibility of an inter-state action at the ICJ and/or prosecution of its officials at the ICC for aggression.

The consultative parliamentary vote consequently assumes greater importance as a constitutional safeguard against the commission of aggression, amplified by the present

113. Constitutional law has a profound practical role in the work of governmental legal advisers – M Wood 'International law and the use of force: what happens in practice?' Unpublished paper, cited with permission.

114. ICC Assembly of States Parties Resolution RC/Res.6 ('The Crime of Aggression') (11 June 2010); available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (accessed 9 October 2015). The amendments activating the Court's jurisdiction over aggression will enter into force upon ratification by 30 State Parties and a final decision of the Assembly of State Parties. As of 7 February 2015, 22 States Parties have ratified; available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en (accessed 9 October 2015).

115. House of Commons Political and Constitutional Reform Committee *Parliament's Role in Conflict Decisions*: *A Way Forward* Twelfth Report of Session 2013–14, HC 892, 20 March 2014 (HMSO, 2014); House of Commons Defence Committee, above n 45.

116. For background, see eg M Weller *Iraq and the Use of Force in International Law* (Oxford: Oxford University Press, 2010) pp 189–232.

117. The declaration of the UK accepting the compulsory jurisdiction of the Court is available online at http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=GB (accessed 9 October 2015).

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

inability of domestic courts to adjudicate alleged crimes of aggression.[118] Should the UK become party to the jurisdiction of the ICC over the international crime of aggression and decline to amend s 50 of the International Criminal Court Act 2001 (ch 17) to empower domestic courts to adjudicate it, complementarity[119] would render accusations of the commission of the crime of aggression admissible *ipso iure* before the ICC. This would run counter to government policy to ensure the efficacy of domestic criminal procedures and thereby avoid British nationals from prosecution at the ICC for international crimes.[120] As the UK has yet to ratify the ICC Statute amendments on aggression, an open legal question is whether a State Party that has not 'opted out' of the Court's jurisdiction over aggression under Art 15*bis*(4) *and* has not ratified the amendments will be bound by it;[121] unless States Parties come to a consensus on this point, it is likely that it will have to be resolved by ICC judges in the Pre-Trial Chamber.[122] Although the UK could exercise an 'opt out' through a declaration, it stated in 2012:

> We now have a period to reflect on this issue before any amendment enters in to force, following further discussion by the ASP in 2017. In this regard, we note that all the amendments were adopted under Article 121 paragraph 5 of the Rome Statute and accordingly they will only enter into force for a State Party once it has ratified that amendment. It is not, therefore, necessary for a State that has not ratified the amendment on the crime of aggression, and which does not wish to be bound by it, to make a declaration under article 15 bis paragraph 4.[123]

This runs counter to the logic of an 'opt out' provision, which requires a declaration; rather, it is an 'opt in' or 'strictly reciprocal state-consent-based jurisdictional regime' – an approach rejected at Kampala.[124] It is also reflects discomfort with the invidious position of opting out of the jurisdiction of a court that the UK vigorously promotes.

Furthermore, the consultative vote can also play an important role in defining the legal position of the UK (its *opinio iuris*) concerning the lawfulness of a use of force. As the royal prerogative on the use of force remains intact,[125] it was open to British

118. *R v Jones* (*Margaret*) *and others* [2007] 1 A.C. 136 at 162 (para 30, per Lord Bingham of Cornhill). See further R Joseph *The War Prerogative* (Oxford: Oxford University Press, 2013) pp 110–156.

119. Statute of the ICC 1998, Art 17: 'Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.'

120. See eg 'Statement by Baroness Anelay, Assembly of States Parties to the Rome Statute of the International Criminal Court, General Debate' (11 December 2014) p 3; available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/GenDeba/ICC-ASP13-GenDeba-UK-ENG.PDF (accessed 9 October 2015).

121. See further eg C Kreß and L von Holtzendorff 'The Kampala compromise on the crime of aggression' (2010) 8 J Int'l Crim Just 1179 at 1195–1199; N Blokker 'A consensus agreement on the crime of aggression: impressions from Kampala' (2010) 23(4) Leiden J Int'l L 889 at 893–894.

122. Kreß and Holtzendorff, above n 121, at 1214–1215.

123. 'UK statement to the 10th Session of the Assembly of States Parties to the ICC' (9 February 2012) p 2; available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ICC-ASP10-GenDeba-UK-ENG.pdf (accessed 9 October 2015).

124. Kreß and von Holzendorff, above n 121 at 1203–1207, 1212–1213.

125. For background and analysis, see Joseph, above n 118, pp 44–109.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

government to proceed with its own view concerning the lawfulness of humanitarian intervention. However, the prerogative is qualified by a convention that the Commons 'should have the opportunity to debate and express its view through a vote, except where there was an emergency and such action would not be appropriate'.[126] Absent such a check, it is constitutionally possible (albeit politically far-fetched) for the monarch – who enjoys no immunity before the ICC[127] – to retain independent legal advice and thereafter reject the Prime Minister's advice to deploy the Armed Forces on grounds of illegality.[128] Parliamentarians voting in favour of aggression may also find themselves at risk of prosecution, alongside armed services chiefs, though a defence may be that they lack 'effective control' over the decision to commit aggression, which is in practice taken by the Cabinet. Both categories of persons were prosecuted for aggression at Nuremberg, with mixed results.[129]

In this context, the modalities for consultative votes continue to be a fraught constitutional problem:

> Given the absence of legal restraint on the deployment power under domestic law, the rules of international law on the use of force take on an enhanced significance as the only apparent limitation on the prerogative. Domestic legality does not pre-empt international law. In other words action, which may not be unlawful under domestic law, could be in violation of international law.[130]

Options under consideration for the clarification of Parliament's role in the use of force include the transfer of the royal prerogative to Parliament, a requirement for formal accounting of the exercise of the prerogative to Parliament, scrutiny of the exercise of the prerogative by Parliament and the subjection of the prerogative to formal

126. House of Commons Political and Constitutional Reform Committee, above n 115, p 11 (para 11).

127. ICC Statute, Art 27.

128. The monarch has the 'right to be consulted, the right to encourage, and the right to warn' (W Bagehot *The English Constitution* (London: Chapman and Hall, 1867)), which provides the possibility for a material role on the formulation of policy. Although the modern convention has been that the monarch does not exercise the prerogative in a personal capacity, since at least the nineteenth century, in practice monarchs have 'continued to play a material, if hidden, part in the direction of foreign affairs' – Joseph, above n 118, p 59. In addition, former Chief of the Defence Staff Lord Guthrie has suggested that the monarch has a reserve power to countermand the Prime Minister in the event of a 'mad' decision to deploy nuclear weapons – R Knight 'Whose hand is on the button?' *BBC Radio 4* 2 December 2008; available at http://news.bbc.co.uk/1/hi/uk/7758314.stm (accessed 9 October 2015). The possibility of criminal responsibility for the monarch has never been a factor due to the immunity of the Crown from domestic prosecution as a facet of kingship – *Halsbury's Laws of England*, vol 29 (London: Lexis Butterworths, 2014) at paras 84–86.

129. See Art 8*bis*(a) of the crime of aggression amendments to the ICC Statute, above n 114. For background on the crime of aggression with particular reference to the judgment of the International Military Tribunal at Nuremberg, see eg S Sayapin *The Crime of Aggression in the Rome Statute of the International Criminal Court* (Springer: The Hague, 2014) pp 149–160, 222–225, 290–297; K Sellars *'Crimes against Peace' and International Law* (Cambridge: Cambridge University Press, 2013) pp 113–139, 260–287; KJ Heller 'Retreat from Nuremberg: the leadership requirement in the crime of aggression' (2007) 18(3) Eur J Int'l L 477–497.

130. House of Lords Select Committee on the Constitution *Waging War*: *Parliament*'*s Role and Responsibility* 15th Report of Session 2005–06, HL 236-I, 27 July 2006, p 15 (para 30).

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

approval by Parliament.[131] However, no resolution has yet been reached on the long-term basis for Parliament's involvement in the exercise of the prerogative.[132]

Indeed, the government has seemingly sought to weaken the existing convention: 'The Government remains committed to the existing convention that before UK troops are committed to conflict, the House of Commons should have the opportunity to debate and express its view through a vote, except where there was an emergency *or* such action would not be appropriate.'[133] The use of the disjunctive 'or' replaces the conjunctive 'and' in the existing convention, which is potentially significant in providing a future government with a subjective basis to not consult the Commons. Furthermore, the government has refused to commit to publish summaries of its legal position, per the Committee's recommendation, as 'normal and best practice': 'The publication of summaries of the Government's legal position … will need to be considered on a case by case basis taking into account the confidentiality of the Attorney General's full legal advice.'[134]

It is suggested that the present convention that Parliament be consulted prior to the exercise of the prerogative (excluding emergency situations) should be enshrined in statute with the possibility of judicial review in the event of the government failing to respect it.[135] Although there are detailed problems to be solved in enacting such a reform,[136] particularly in relation to judicial review, there is a real need for a constitutional safeguard to deter future governments from committing aggression by providing for parliamentary scrutiny on 'wars of choice'. In light of the anticipated entry into force of the ICC jurisdiction over aggression, this would improve security for ministers, generals, parliamentarians and even the sovereign.

However, even if Parliament's role were to be ensured, access to legal advice is critical to ensure that Parliament's involvement is informed and effective as a check upon unlawful action.[137] In this respect, the Note published by the Office of the Prime Minister ('the Note') on 29 August 2013,[138] exemplifying the current practice of

131. Ibid, pp 26–43 (paras 60–111).
132. Ibid, pp 28–30 (paras 68–74); House of Commons Political and Constitutional Reform Committee, above n 126, pp 18–20 (paras 41–47).
133. Ibid, p 6 (para 11) (emphasis added).
134. House of Commons Defence Committee, above n 45, p 5 (para 10).
135. House of Commons Political and Constitutional Reform Committee, above n 126, pp 15, 21–22 (paras 29, 48, 50). The Committee's proposals call for enshrining Parliament's consultative role through a resolution rather than an Act, specifically to avoid the prospect of judicial review. See also the proposal for a statutory underpinning with a limited 'backstop' role for the courts in Joseph, above n 118, at 181–216.
136. Joseph proposes that 'the enactment of a statute which would require the government to obtain in the House of Commons a majority vote in support of deployment of the Armed Forces, except in identified situations; impose duties on the government to provide Parliament (and the public) with certain information about the proposed deployment; and establish a special joint committee of Parliament to scrutinize the relevant information and exercise a general oversight role over the deployment of forces' – Joseph, above n 1188, at 181. One reviewer, while approving this specific proposal, does not feel that it fully considers the problem of 'inadequate government accountability before Parliament' in the British constitution as a whole – D Jenkins 'Publication review: Joseph, *The War Prerogative*' (January 2015) Pub L 188–191, at 191.
137. For background on the legacy of the Iraq legal advice, see Joseph, above n 1188, at 208–209.
138. 'Chemical weapon use by Syrian regime: UK government legal position' ('UK government legal position'); available at https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position (accessed 9 October 2015).

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

publishing 'summaries of legal advice', is inadequate.[139] In proposing his motion to the House, the Prime Minister asserted: 'We have a summary of the Government's legal position, which makes it explicit that military action would have a clear legal basis [of humanitarian intervention].'[140]

However, the Note does not constitute 'legal advice' in the true sense of the term; namely, as an independent opinion produced by a qualified lawyer who accepts professional responsibility for its contents.[141] It was neither signed by the Attorney nor attributed to him.[142] It is consequently best treated as either the collective view of the Cabinet[143] (though there is no record of its having been discussed or voted upon in Cabinet) or as the personal view of the Prime Minister. Although it is not clear to what degree the Note is based upon confidential legal advice provided by the Attorney, its value as a definitive statement of the legal position of the UK is diminished by the fact that the Attorney (unlike in the case of Lord Goldsmith concerning Iraq and in that of Mr Grieve regarding Libya) did not assume political responsibility for it through a ministerial statement.[144] In light of the inadequacy of summaries of 'advice' and the lack of support for the idea that legal advice of Attorneys General be provided to Parliament,

139. Ms Caroline Lucas MP, Mr Edward Miliband MP and Mr James Arbuthnot MP referred to the 'summary of legal advice' in the debate to criticise its lack of detail – *Hansard*, HC Deb, vol 566, cols 1426, 1443, 1463, 29 August 2013. However, Dr Liam Fox MP, Sir Menzies Campbell MP and Mr Andrew Mitchell MP did refer to it for the purpose of substantiation – ibid, at cols 1454, 1456, 1462.

140. Ibid.

141. Although the Attorney General has a ministerial role, in the provision of legal advice he has been likened, in the words of former Attorney General Lord Morris of Aberavon, to 'a family solicitor, with the Government as his client' – House of Lords Select Committee on the Constitution, above n 130, p 29 (para 71). *Code of Conduct of the Bar of England and Wales* (9th edn, January 2014) rC15. Although Sir John Hobson was tried by his Inn of Court for professional misconduct in 1963, the Bar Standards Board found in 2003 that it lacked jurisdiction to hear a complaint of misconduct against Lord Goldsmith regarding the impartiality of his legal advice concerning the Iraq War – see A Sarvarian *Professional Ethics at the International Bar* (Oxford: Oxford University Press, 2013) pp 39–40 (n 95).

142. The Prime Minister did, however, inaccurately describe the document as 'the Attorney-General's excellent legal advice to the House' in the course of debate – *Hansard*, HC Deb, vol 566, col 1430, 29 August 2013.

143. The Cabinet is a committee of HM's Privy Council, composed of Ministers of the Crown and the collective decision-making body of the government. Constitutionally, the Cabinet advises the monarch on the exercise of her prerogative on the use of force.

144. The first question posed to the Prime Minister in the House of Commons debate was 'why [the Prime Minister] has refused to publish the Attorney-General's full advice' – *Hansard*, HC Deb, vol 566, col 1426, 29 August 2013. The Prime Minister replied: 'There had been a long-standing convention, backed by Attorney-Generals of all parties and all Governments, not to publish any legal advice at all. This Government changed that. With the Libya conflict, we published a summary of the legal advice. On this issue, we have published a very clear summary of the legal advice and I urge all right hon. and hon. Members to read it.' A ministerial statement carries with it the possibility of ministerial accountability, including the theoretical (though arguably obsolete) possibility of impeachment, last attempted in 2004 against the former Prime Minister, Tony Blair, over the Iraq War – O Gay and N Davies 'Impeachment' *House of Commons Library*, SN/PC/02666 (16 November 2011) at 4.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

the pragmatic option would be the commissioning by Parliament of its own legal advice – for example, through a joint select committee.[145]

Notwithstanding the conclusions in section 2 above, the government has demonstrated a firm commitment to continue existing policy in support of humanitarian intervention in spite of the negative international reaction and the doubts of Parliament. The Defence Select Committee concluded:

> The legal justification for military intervention will continue to be controversial. We note the Government's statement that when there is no UN Security Council Resolution for action, there is a legal basis available under the doctrine of humanitarian intervention which would permit the UK under international law to take exceptional measures in order to alleviate a humanitarian catastrophe providing certain conditions are met. We question whether the Government's position is generally accepted by the international community or the British public. The Government should set out in detail in the next iterations of the National Security Strategy and the Defence and Security Review the principles of its legal position, including its relationship with the UN Charter, international law and the concept of the Responsibility to Protect, on the deployment of UK Armed Forces for intervention operations. This would assist with providing the public with greater information on, and understanding of, the Government's position on the use of UK Armed Forces rather than waiting to the heat of debate immediately prior to a potential deployment.[146]

The government replied to the Committee's conclusion by referencing the evidence of the Right Hon Hugh Robertson MP's letter to the Foreign Affairs Select Committee:

> Nothing has changed with regard to the basis for the Government's position, which predates 2000.
>
> […] The 2005 World Summit Outcome document is in the form of a non-binding United Nations General Assembly resolution, albeit one that was agreed by consensus and adopted at a high-level political event. It simply indicates a responsibility based on existing legal norms, while going on to express a political readiness to take collective action. The Summit's adoption of the 'Responsibility to Protect' was politically significant, and one that the Government welcomed and has continued to promote. But the 'Responsibility to Protect' as set out in the Outcome Document does not in itself create new legal rights and duties or modify existing ones. And it does not address the question of unilateral State action in the face of an overwhelming humanitarian catastrophe to which the Security Council has not responded. Rather, the 'Responsibility to Protect' is aimed at making sure that the Security Council does take action.[147]

Mr Robertson further asserted that humanitarian intervention 'does not have adverse implications for the UN' and is not connected to the responsibility to protect doctrine.[148] This is reminiscent of the government's response in 2004 to similar parliamentary inquiries on the Kosovo operation.[149]

145. House of Lords Select Committee on the Constitution, above n 130, p 20 (para 47).
146. Ibid, p 29 (para 49).
147. Ibid.
148. Ibid.
149. 'Letter from the Parliamentary Relations and Devolution Department, Foreign and Commonwealth Office (July 5, 2004)' in Wood, above n 113.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

The Chairman of the House of Commons Foreign Affairs Select Committee observed that the UK is 'almost alone among UN Member States' in opining that humanitarian intervention is lawful.[150] Although there is no sign that the Foreign and Commonwealth Office and Ministry of Defence are contemplating a policy change, pressure from Parliament coupled with lack of support in the international community may prompt a review in the next National Security Strategy in 2015.[151] The Strategy should explicitly revert to the pre-1992 policy by rejecting humanitarian intervention as a legal basis for the use of force. In addition, it should set out a detailed legal framework for the use of force based on the following, orthodox grounds: (1) authorisation by the UNSC; (2) in the event of a veto, authorisation by the UNGA under the Uniting for Peace procedure; (3) individual self-defence; or (4) collective self-defence.

(b) Consultative votes in the USA

In the USA, the position is defined by the War Powers Clause in its constitution.[152] The War Powers Resolution 1973[153] requires the President to, inter alia, consult the Congress 'in every possible instance … before introducing United States Armed Forces into hostilities'. While the Resolution has been controversial, the Obama administration has acknowledged 'that Congress has powers to regulate and terminate uses of force, and that the War Powers Resolution plays an important role in promoting inter-branch dialogue and deliberation on these critical matters'.[154] An open constitutional question is whether the President has the power to proceed despite a negative vote by the Congress to authorise the use of force.[155]

In this ambiguous context, there was the clear potential for the President and the Congress to adopt conflicting positions on the lawfulness of humanitarian intervention. Nevertheless, the War Powers Resolution was an ineffective tool in the Syria crisis for the scrutiny of the legal case for the use of force. This is due to three factors: (1) the absence of reference to the doctrine in the Joint Resolution; (2) the fact that the administration declined to put forward any international law justification for the proposed use of force, including humanitarian intervention; and (3) the almost complete absence of legality as an issue in the congressional debates on the Joint Resolution. Unlike in

150. House of Commons Defence Committee, above n 45 (vol II) p 61 (Ev w58).
151. In *Securing Britain in an Age of Uncertainty*: *The Strategic Defence and Security Review* Cm 7948, October 2010, para 2.10 states the UK Armed Forces are deployed 'only … where justifiable under international law'. In *A Strong Britain in an Age of Uncertainty*: *The National Security Strategy* Cm 7593, October 2010, para 3.32 asserts: 'Our strategic interests and responsibilities overseas could in some circumstances justify the threat or use of military force. There will also be occasions when it is in our interests to take part in humanitarian interventions.'
152. Constitution of the United States of America, available at http://www.senate.gov/civics/constitution_item/constitution.htm (accessed 9 October 2015), Art I, s 8, clause 11: '[The Congress shall have Power …] to Declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.'
153. 50 U.S.C. 1541–1548.
154. H Koh 'Syria and the law of humanitarian intervention (Part I: Political miscues and U.S. law)' *EJIL*: *Talk*! *Blog* 26 September 2013; available at http://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-i-political-miscues-and-u-s-law/ (accessed 9 October 2015).
155. Ibid.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

the UK, the ineffectiveness of the Congress as a brake upon aggression is due not to a weak constitutional position but to its own disinterest in the question of legality itself.

(c) Consultative votes in France

In France, the President is vested with exclusive authority over the conduct of foreign and military affairs.[156] This was conceived by Charles de Gaulle to strengthen the Presidency at the expense of the legislature, which had had a stronger role during the Fourth Republic. By Art 35 of the constitution, the government is required to inform Parliament of a decision to have the Armed Forces intervene abroad 3 days after the beginning of the intervention and detailing its objectives; although Parliament may debate the intervention, such debate may not be followed by a vote. However, such intervention is subject to a time limit of 4 months, following which parliamentary authorisation is required for extension.

Unlike the quite explicit nature of the motion in the House of Commons espousing the *principle* of humanitarian intervention, there was no occasion for the National Assembly to express its view on the legality of the doctrine. Consequently, the legal position was defined exclusively by the government which, aside from a stray reference to the responsibility to protect, refrained from advancing a legal justification at the UN or elsewhere. The inability of the National Assembly to act as a check upon the President is due to its constitutional weakness in military affairs, precluding even a vconsultative vote.

(d) Post-Syria developments: the rise of Islamic State

In the aftermath of the abortive operation in Syria, the rapid military and territorial successes scored throughout 2014 by the armed group formerly known as the 'Islamic State of Iraq and the Levant', referring to itself since 29 June 2014 as 'Islamic State' following its declaration of a new caliphate, sparked fears of the imminent fall of Baghdad and collapse of Iraqi governmental authority. From 8 August, the US government spearheaded military operations by NATO allies (principally the UK, Belgium, Canada, Australia and France), principally comprising aerial bombardments, against IS in Iraqi territory. On 10 September 2014, the USA expanded its operations to Syrian territory. As of the time of writing, military operations are ongoing.

The USA has hitherto omitted to put forward a legal justification for its operations and the Obama administration has confirmed that congressional approval for the operations will not be sought.[157] Although congressional approval for the administration's plan to arm and train Syrian rebels was given on 19 September 2014, US constitutional lawyers remain doubtful of the compatibility of long-term military operations with the War Powers Resolution.[158] The USA has not invoked self-defence at the UN and it has not obtained the consent of the al-Assad government of Syria for its airstrikes in Syria – though it has kept it informed of its operations on Syrian territory.[159]

By contrast, and in spite of its defeat in the House of Commons the previous year, the British government opted to follow the same gambit for political backing through a

156. Constitution of 4 October 1958, available at http://www.assemblee-nationale.fr/english/ (accessed 9 October 2015), Arts 5, 8, 14, 15, 20, 21.
157. Henderson, above n 8, at 211.
158. See eg S Bomboy 'Experts ponder Obama's War Powers curveball' *Constitution Daily Blog* 12 September 2014; available at http://blog.constitutioncenter.org/2014/09/experts-ponder-obamas-war-powers-curveball/ (accessed 9 October 2015).
159. Henderson, above n 8, at 217–218.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

parliamentary motion.[160] The motion explicitly did not 'endorse UK air strikes in Syria as part of this campaign and any proposal to do so would be subject to a separate vote in Parliament'.[161] As with Syria and Libya, the Prime Minister published a 'summary of legal advice',[162] asserting that '[t]he government is satisfied that the consent of Iraq in these terms provides a clear and unequivocal legal basis for the deployment of UK forces and military assets to take military action to strike ISIL sites and military strongholds in Iraq'. Although the Prime Minister suggested in debate that there were 'a variety of legal arguments that [could] be deployed', he based the action exclusively on consent:

> The Attorney-General has given his advice on the action we propose to take. There is a clear legal base for UK military action to help Iraq defend itself from ISIL … there is no question but that we have the legal basis for action, founded on the request of the Iraqi Government.[163]

Following debate, in which legality was central,[164] the motion was carried by 524 votes to 43.

As of the time of writing, the Obama administration had submitted a written request to Congress to approve the use of force against IS under the War Powers Resolution.[165] While the resolution states that 'the United States has taken military action against ISIL in accordance with its inherent right of individual and collective self-defense', the administration has yet to publish an international law justification. Resolutions and debates in the parliaments of Canada, Belgium and the Netherlands appeared to base their justifications upon the consent of the Iraqi government.[166]

Thus, the ongoing operations against IS are not directly relevant to the question of the legal status of humanitarian intervention, as neither the USA nor the UK has invoked the doctrine.[167] Nonetheless, the differing approaches of the two governments towards consultative parliamentary votes may be attributable to a number of factors, such as:

160. *Hansard*, HC Deb, vol 585, col 1255, 26 September 2014.
161. Ibid.
162. 'Summary of the government legal position on military action in Iraq against ISIL' (25 September 2014); available at https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil (accessed 9 October 2015).
163. *Hansard*, HC Deb, vol 585, col 1263, 26 September 2014. See further the House of Commons Defence Select Committee Seventh Report *The Situation in Iraq and Syria and the Response to al-Dawla al-Islamiya fi al-Iraq al-Sham* (*DAESH*) (27 January 2015) at paras 20–23.
164. *Hansard*, HC Deb, vol 585, cols 1256, 1259, 1263–1264, 1270–1271, 1274, 1279, 1283, 1288, 1290–1293, 26 September 2014.
165. T Rupar 'Obama's request for congressional authorization to fight the Islamic State: full text' *The Washington Post* 11 February 2015; available at http://www.washingtonpost.com/blogs/post-politics/wp/2015/02/11/obamas-request-for-congressional-authorization-to-fight-the-islamic-state-full-text/ (accessed 9 October 2015).
166. R Van Steenberghe 'The alleged prohibition on intervening in civil wars is still alive after the airstrikes against Islamic State in Iraq: a response to Dapo Akande and Zachary Vermeer' *EJIL*: *Talk*! *Blog* 12 February 2015; available at http://www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/ (accessed 9 October 2015).
167. Ibid, at 220.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

(1) the legacy of the illegality of the 2003 Iraq war continues to be acute in the UK, yet is a weaker factor in US domestic politics;
(2) international law has played a greater role in political debate in the UK concerning the use of force since at least Kosovo, yet is largely invisible in US domestic politics;
(3) in a parliamentary system of government, it is theoretically easier than in a presidential system for the legislature to pressure the executive concerning the use of force (eg the fall of Lord Aberdeen's ministry through a vote of no confidence in 1855, due to the conduct of the Crimean War), particularly when the government majority is small; and
(4) there is greater war fatigue in the UK than in the USA, reflected by the greater scepticism of parliamentarians for the use of force in new crises.

Notwithstanding the Cameron ministry's continuing resistance to a permanent commitment to parliamentary consultation, as advocated by the select committees and the fact that the parliamentary motion was passed, the parliamentary consultative vote played a crucial role in restricting the use of force to the territory of Iraq. As the legality of that operation is far stronger than the Obama administration's operation in Syria, this demonstrates the potential utility of the consultative vote as a check upon illegal wars.

CONCLUSIONS

This paper has examined the lawfulness of the aborted use of force against Syria in August–September 2013 in response to the use of chemical weapons in Damascus. In section 1, it has argued that humanitarian intervention, as a matter of law, must be enacted through amendment to the UN Charter rather than customary international law due to the hierarchy of norms. Moreover, even if humanitarian intervention can be adopted through custom, the detailed survey of the *opiniones iura* of states regarding the abortive Syrian operation in section 2 underscores the lack of international support for the doctrine. As set out in section 3, consultative parliamentary votes have the potential to act as a constitutional safeguard against the commission of aggression, but their efficacy depends upon a statutory underpinning and independent legal advice in order to enable national parliaments to properly debate the legality of a proposed 'war of choice'.

The decision of the USA and France to refrain from advancing legal justifications for the proposed operation, coupled with the lack of support from NATO and EU allies, undercuts the continuing British commitment to humanitarian intervention. Numerous and explicit rejections of the lawfulness of humanitarian intervention by the BRICS and other states in the UN and elsewhere have reaffirmed their long-standing position that the use of force is lawful only with UN authorisation or in self-defence. If humanitarian intervention was legally infirm after the Kosovo episode, the Syria case has placed it on its deathbed. Although the International Law Association Committee on the Use of Force has yet to adopt a position on the lawfulness of humanitarian intervention in its pending project on aggression and the use of force,[168] early scholarly reaction to the

168. International Law Association Washington Conference (2014) Use of Force Committee, 'Draft report on aggression and the use of force' (14 March 2014) s C.1; available at http://www.ila-hq.org/en/committees/index.cfm/cid/1036 (accessed 9 October 2015). The author is a member of the Committee, but the views contained in this paper are entirely his own and do not reflect those of the Committee.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press

Syria operation supports the argument that humanitarian intervention does not have sufficient state support to become a legal basis for the use of force.[169]

The British government has remained firm in its commitment to the legality of humanitarian intervention; it stands virtually alone in the international community. The rejection of its motion on Syria, coupled with doubts expressed by parliamentary committees in subsequent inquiries, illustrates the rising tide of parliamentary disquiet over the doctrine. This paper calls upon the government to revert to its pre-1992 policy in the forthcoming National Security Strategy 2015. This should be done by setting out a detailed legal framework for the use of force based upon the widely accepted legal bases of collective security authorisation – on which the responsibility to protect is based – and self-defence.

This does not mean that collective security in response to a grave humanitarian crisis can be utterly frustrated through veto or threat of veto at the Security Council. The possibility remains (with the caveats noted above) of calling an emergency special session of the General Assembly through the Uniting for Peace procedure to seek authorisation for forcible measures.[170] It is noteworthy that, whereas forcible measures under Art 42 have been deployed by the Security Council on two occasions, the Uniting for Peace procedure has been utilised on ten occasions and has gained widespread acceptance as a lawful alternative mechanism. While the motivations for the reluctance of NATO Members to resort to the Uniting for Peace procedure in the post-decolonisation era are speculative, it is plausible that the *causa causans* is a desire to concentrate power in the Security Council, in which the power of veto is available.[171]

Consultative votes by national parliaments have the potential[172] to serve as a useful constitutional safeguard against the commission of aggression by the state through detailed, rigorous, public scrutiny of the government's legal position. Such votes should be viewed not only as a means to drum up political support for the use of force, but also as a crucial check for legality amidst the drums of war. A statutory underpinning, backed by judicial review, and the provision of independent legal advice – in light of the confidentiality of the Attorney General's advice – are key. The recalcitrance of the British government risks the exposure not only of the UK to suit at the ICJ, but also of ministers, generals, parliamentarians and even the monarch to prosecution at the ICC from 2017. The effectiveness of international law on the use of force depends not only on international mechanisms for its retrospective enforcement, but also upon national safeguards against prospective wrongdoing.

169. Henriksen and Schack, above n 6, at 147; Stahn, above n 5, at 35, 45–46.

170. Uniting for Peace, above n 17, A(1).

171. Binder, above n 18, at 455–456 ('Once the five permanent members of the Security Council ("P5") realized that the resolution was a double-edged sword – and indeed threatened their sovereign interests by potentially undermining their own respective veto powers – it was relegated to obscurity'.)

172. Yet safeguards can fail, particularly in the face of large government majorities and three-line whips: it was the House of Commons, after all, that voted by 412–149 in favour of the Blair ministry's motion to endorse the invasion of Iraq in 2003 – *Hansard*, HC Deb, col 907, 18 March 2003.

© 2015 The Society of Legal Scholars

https://doi.org/10.1111/lest.12101 Published online by Cambridge University Press