THE UK GOVERNMENT'S LEGAL OPINION ON FORCIBLE MEASURES IN RESPONSE TO THE USE OF CHEMICAL WEAPONS BY THE SYRIAN GOVERNMENT

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Abstract On 29 August 2013, the UK government published a memorandum setting out its 'position regarding the legality of military action in Syria following the chemical weapons attack in Eastern Damascus on 21 August 2013'. While other States had contemplated some form of military action, most notably the US, none had been as clear and candid as to the legal basis upon which this would be launched. It might seem in this respect perhaps a little surprising that the UK decided in its relatively brief opinion that 'the legal basis for military action would be humanitarian intervention'. As this article will attempt to highlight, this basic justification is far from uncontroversial. This short article will seek to be clear as to what the UK's legal position exactly was, whether and how this position can be reconciled with the *lex lata* governing the use of force for humanitarian purposes and its immediate impact upon it, and finally offer some reflections upon the contribution the opinion and its central legal argument has made to future legal argumentation in this area.

Keywords: chemical weapons, humanitarian intervention, Syria, UK Government, use of force.

I. INTRODUCTION

On 29 August 2013, the UK government published a memorandum setting out its 'position regarding the legality of military action in Syria following the chemical weapons attack in Eastern Damascus on 21 August 2013'.[1] It appeared from the publication of this document, and from the reaction of certain other States that were willing to take action,[2] that any prospective use of force would be in punishment for the use of chemical weapons on this occasion or as a reprisal to enforce future compliance.[3]

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[1] Chemical Weapon Use by Syrian Regime: UK Government Legal Position (29 August 2013) <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version> (hereinafter 'UK Legal Opinion'). The full opinion is appended at the end of this article.

[2] See section IV.

[3] See C Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment: On "Red Lines" and "Blurred Lines"' (2013) 11 JICJ 955 and S Darcy, 'Military force against Syria

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Yet in its relatively brief opinion the UK took the position that 'the legal basis for military action would be humanitarian intervention'.[4] While other States had contemplated some form of military action, most notably the US, none had been as clear and candid as to the legal basis upon which this would be launched.[5] As this article will attempt to highlight, the UK's position is far from uncontroversial.

Although interventions that have had a positive humanitarian outcome have been undertaken during the era of the United Nations but without the authority of this body, none have been accompanied by an express and unqualified justification based upon a legal doctrine of humanitarian intervention.[6] However, although the UK's express reliance on this legal basis in 2013 is out of step with general State practice in this area, the UK has form in this respect. Indeed, the UK might be described as *the* 'norm entrepreneur' for a right of humanitarian intervention.[7] As such, this short article will seek to be clear as to what the UK's legal position exactly was in its 2013 memorandum, whether and how this position can be reconciled with the *lex lata* governing the use of force for humanitarian purposes and its immediate impact upon it, and finally offer some reflections upon the contribution the opinion and its central legal argument have made to future legal argumentation in this area.

II. THE LEGAL OPINION: WHAT EXACTLY DID THE UK CLAIM?

The opinion was clear that '[t]he use of chemical weapons by the Syrian regime is a serious crime of international concern, as a breach of the customary international law prohibition on use of chemical weapons, and amounts to a war crime and a crime against humanity'.[8] Yet, the UK did not claim to base any possible military action upon the necessity of enforcing legal norms or obligations, perhaps along similar lines as its justification for the use of forcible measures against Iraq in 2003 to enforce Iraq's disarmament obligations.[9] Instead, the UK was clear that 'the legal basis for military action would be humanitarian intervention'.[10] The rise to prominence of the Responsibility to Protect (R2P)[11]—a concept that has been described as an 'emerging norm'[12]—has been accompanied by a continuing debate as to whether the law now

would be a reprisal rather than humanitarian intervention, but that doesn't make it any more lawful' (EJIL *Talk!*, 1 September 2013) <http://www.ejiltalk.org/author/sdarcy/>.

[4] UK Legal Opinion (n 1) para 2. Humanitarian intervention can be described as the use or threat of force by one or more States or an international organization to protect individuals in the target State from grave suffering or deprivation of fundamental human rights. See SD Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (University of Pennsylvania Press 1996) 11–12.

[5] For more on this see section IV of this article.

[6] See section III.

[7] As Finnemore and Sikkink point out: 'The characteristic mechanism of . . . norm emergence is persuasion by norm entrepreneurs. Norm entrepreneurs attempt to convince a critical mass of States (norm leaders) to embrace new norms.' M Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 IntlOrg 894, 895. See also section IV.

[8] UK Legal Opinion (n 1) para 1.

[9] See 'Attorney General's Advice on the Iraq War: Resolution 1441' (2005) 54 ICLQ 767.

[10] UK Legal Opinion (n 1) para 2.

[11] This concept was first introduced in Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (December 2001) <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

[12] See High-Level Panel on Threats, Challenges, and Change, *A more secure world: our shared responsibility*, 2 December 2004, UN Doc A/59/565, para 203. It has also been described as 'soft

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provides for a unilateral right of humanitarian intervention *in extremis*.[13] It was, in this light, somewhat surprising that the UK did not even mention R2P, let alone utilize it—along with the general increase in the international community's expressed revulsion at internal repression—as a means of bolstering its legal position. Instead, in claiming that any force used would be more simply both 'necessary' and 'proportionate' it seemed to be drawing on customary international law principles governing the resort to force perhaps more typically associated with the law on self-defence.[14]

However, in this case these two principles seemed to provide the overarching framework to the three conditions that the UK claimed needed to be met before humanitarian intervention became an option.[15] The first of these was that there must be 'convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief'.[16] With the report of the UN mission investigating the Ghouta attack not published at the time,[17] the UK did not, and arguably could not, provide anything to suggest that this was the clear position of the international community. Instead, in apparently arguing that this was a case of such extreme humanitarian distress the UK claimed that

> [t]he Syrian regime has been killing its people for two years, with reported deaths now over 100,000 and refugees at nearly 2 million. The large-scale use of chemical weapons by the regime in a heavily populated area on 21 August 2013 is a war crime and perhaps the most egregious single incident of the conflict.[18]

Yet, with Russia and China representing two States that clearly did not take the position that the attack in Ghouta was the responsibility of the Assad regime, it was unconvincing for the UK to claim that the extreme humanitarian distress created by the attack provided a basis upon which to launch a forcible response against this party to the conflict.

Secondly, the UK claimed that 'it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved'.[19] No guidance was provided as to how this objective clarity was to be identified. Yet given the clear opposition by many States in the context of the Syria crisis to the use of force in the absence of the imprimatur of the UN Security Council (UNSC) it was again an awkward claim for the

law'. See J Welsh and M Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2 Global Responsibility to Protect 213, 230.

[13] See, recently, D Bethlehem, 'Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention' (EJIL *Talk!*, 12 September 2013) <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>.

[14] See JA Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009) 63–110.

[15] The Legal Opinion came to the conclusion that 'all these conditions would clearly be met in this case'. See UK Legal Opinion (n 1) para 5. The UK has proffered more detailed conditions previously, albeit in the abstract. See, for example, P Reynolds, 'Blair's "international community" doctrine' (BBC News, 6 March 2004) <http://news.bbc.co.uk/1/hi/uk_politics/3539125.stm>.

[16] UK Legal Opinion, ibid, para 4(i).

[17] See United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syria Arab Republic, *Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013* (13 September 2013) <http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf>.

[18] UK Legal Opinion (n 1) para 4(1)(i).

[19] ibid, para 4(ii).

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UK to make.[20] It was, nonetheless, asserted that previous attempts by the UK and its international partners to secure a resolution of this conflict through the UNSC had been blocked and that '[i]f action in the Security Council [was to be] blocked again, no practicable alternative would remain to the use of force to deter and degrade the capacity for the further use of chemical weapons by the Syrian regime'.[21]

The last of the conditions set out in the opinion was that '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)'.[22] In this sense the UK was clear that 'military intervention to strike specific targets with the aim of deterring and disrupting further such attacks would be necessary and proportionate and therefore legally justifiable'.[23] Given that the necessity requirement had been seemingly addressed in the second of the conditions above, this last condition appeared to be more concerned with building a case as to the proportionality of any prospective action as it was claimed that '[s]uch an intervention would be directed exclusively to averting a humanitarian catastrophe, and the minimum judged necessary for that purpose'.[24]

What is interesting is that the UK did not seem to claim to be responding in order to put an end to a humanitarian catastrophe so much as to avert one by the Assad regime, or more accurately to 'deter' and 'disrupt' its plans for one and 'degrade' its capabilities for creating one through the use of chemical weapons.[25] Indeed, '[g]iven the Syrian regime's pattern of use of chemical weapons over several months', forcible measures were deemed necessary as 'it is likely that the regime will seek to use such weapons again'.[26] Ultimately, while it was made clear that the humanitarian situation as things stood was of concern, there was, in a sense, an anticipatory thrust to the possible use of force.[27] Furthermore, it was noteworthy that the UK characterized the action as 'legally justifiable',[28] as opposed to simply lawful, and humanitarian intervention as a 'doctrine',[29] as opposed to a right, and that it felt the need to stress that the action it would take would be an '*exceptional* measure on grounds of overwhelming humanitarian necessity'.[30] This raises the question as to whether, and if so how, the legal justification of humanitarian intervention that the UK relied upon for any prospective use of force against Syria can be reconciled with the *lex lata*.

[20] See section IV for more on the reaction of other States to the possible use of force.

[21] UK Legal Opinion (n 1) para 4(1)(ii).

[22] ibid, para 4(iii).

[23] ibid, para 4(1)(iii).

[24] ibid. It has, however, been questioned by Stahn whether the 'doctrine of "humanitarian intervention" offers a proper fit for the motives of intervention'. This was because unlike interventions on other occasions, intervention here 'was guided by other purposes, namely (i) shifting the military balance between the Assad regime and opposition forces and (ii) sanctioning an unlawful means of combat, that is, use of chemical weapons.' See C Stahn, 'Between Law-breaking and Law-making: Syria, Humanitarian Intervention and "What the Law Ought to Be"' (2014) 19 JC&SL 25, 30.

[25] UK Legal Opinion, ibid, paras 2 and 4.

[26] ibid, para 4(1)(i).

[27] This can also be found in the US's justifications for the prospective use of force in this context. See section IV. On the concept of 'anticipatory humanitarian intervention' see J Charney, 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 93 AJIL 834.

[28] UK Legal Opinion (n 1) para 4(1)(iii).

[29] ibid, para 4.

[30] ibid, para 4(1)(iii) (emphasis added).

III. THE LEGAL OPINION AND THE *LEX LATA*

The doctrine of humanitarian intervention has traditionally drawn a range of views from scholars utilizing various theoretical underpinnings to support their arguments.[31] Opinions or perceptions as to the contours of the *lex lata* in the area of the use of force, perhaps more than any other area of the law, appear to rest to a great extent upon the 'observational standpoint' of the assessor.[32] These observational standpoints reflect underlying differences in methodological approaches to the formation, and even the purpose, of international law. In setting out the main divides between these methodological approaches Olivier Corten has separated the approaches into the 'extensive' approach, with its focus on the customary source of an obligation or right, the physical elements of State practice, and the 'policy-oriented' approach to interpreting the normative significance of this practice, and the 'restrictive' approach, which sees greater equality between the sources of legal obligation, perceives the justificatory discourse engaged in by States as of greater significance than the physical actions that it is used to justify, as well as focusing upon the gathering of views of States in general before discerning any change in the law.[33]

In this respect, the significance of the UK's legal opinion in 2013 in support of a specific legal right of humanitarian intervention is heightened by the fact that towards the end of the Cold War, in 1986, the UK Foreign Office produced a policy document in which it took the view that:

> the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main 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 for abusing such a right argues strongly against its creation. . . . In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law. . . the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal.[34]

While a critical analysis of the above methodological approaches to the law is beyond the scope of this contribution, if we are to accept Corten's two broad classifications it appears that the UK in 1986 adopted a restrictivist position in assessing the *lex lata* on the law of humanitarian intervention in the absence of an authorization from the UNSC while, in 2013, it distinctly took a more extensivist approach. The purpose of this section is to briefly examine the UK's position as to the *lex lata* in 1986 and what, if anything, occurred in the intervening years to 2013 that may have impacted upon its position so dramatically.

[31] For a good account of these various views see C Burke, *An Equitable Framework for Humanitarian Intervention* (Hart Publishing 2013) 6–89.
[32] Stahn (n 24) 32.
[33] O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010) 4–27.
[34] UK Foreign Office Policy Document No 148. See (1986) 57 BYBIL 614, 619.

A. Reading 'the UN Charter and the Corpus of Modern International Law'

The prohibition of the threat or use of force, which is the primary norm under focus here, is both contained within the UN Charter and in customary international law.[35] While not necessarily strict formalists, those within the restrictivist camp do at least see equality between the treaty and customary sources of a rule.[36] Although the two sources of the obligation are not necessarily identical,[37] there is nothing to indicate they are, or have been at any point since 1945, different to any significant degree. It is also difficult to see how they could be any different given that, in the absence of an express intentional limitation by States, any relevant State practice would be of significance both for (re)interpreting the Charter and modifying the customary prohibition.

As explained below, the emergence of a forcible right of humanitarian intervention would mean that States would *prima facie* be acting in direct contravention of their UN Charter obligation to refrain from the threat or use of force. States may, of course, take the unlikely step of expressly rescinding or modifying their obligations under the UN Charter so as to permit humanitarian intervention.[38] Yet, in the absence of such an event one cannot simply ignore or exclude the significance of this source of the prohibition — and States' Charter obligations in general—in terms of the brake it places upon the possibility for normative evolution.[39] One may not in this sense simply choose instead to focus upon the arguably more malleable customary source of the norm to provide the answer sought. In the absence of a clear agreement amongst States to limit or exclude the significance of Article 2(4) no change in the law can emerge without particular consideration being given to this fundamental provision and how it might be (re) interpreted.

It bears recalling that Article 2(4) provides that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

While self-defence and UNSC authorization exist within the Charter as the two established exceptions to the prohibition,[40] it is also notable that Article 2(4) itself does not expressly allude to any exceptions, which at least raises the possibility that

[35] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1984] ICJ Rep 14, para 34.

[36] Corten (n 33) 16.

[37] *Nicaragua case* (n 35) para 176.

[38] See Chapter XVIII of the UN Charter (1945). Given that virtually every State is subject to the prohibition in Article 2(4), any agreement to amend its scope would arguably also have a knock-on effect for the customary contours or existence of the norm, in the absence, that is, of any statement limiting the applicability of the modifying agreement.

[39] The International Law Commission expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*'. See (1996-II) UNYBILC 247. It is also significant that the International Court of Justice also noted in the *Nicaragua* case that the prohibition 'is frequently referred to in statements by *state representatives* as being … a fundamental or cardinal principle'. See *Nicaragua* case (n 35) para 190 (emphasis added). Although, see, in general, JA Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 MichJIntlL 215.

[40] See Chapter VII of the UN Charter. There is no express exception to Article 2(4) of humanitarian intervention contained within the Charter, which might seem surprising given that the UN Charter was drafted during the horrors of the Holocaust.

humanitarian intervention is, or could be, an implied exception. The issue can be distilled into two separate components: whether the text of the prohibition of the use of force and the UN Charter in general might be interpreted to permit States to engage in humanitarian intervention or whether such an implicit exception was adopted at the time, or has subsequently emerged. Indeed, the meaning of even fundamental provisions such as Article 2(4) do not necessarily remain static and may be subject to a process of (re)interpretation and change if the vital required element (that is correctly asserted by the restrictivists) of general *agreement* amongst the State parties to the Charter is present.[41] Authority for the proposition that agreement between the parties is necessary for an authoritative interpretation of a treaty and its provisions can be found in the Vienna Convention on the Law of Treaties (1969) (VCLT).[42] In this respect, although it has been said that '[t]he stance on intervention is … to some extent a question of choice, to which there is no clear-cut answer',[43] if the substantive law fails to provide an indisputably clear answer, as the UK's 1986 statement appears to allude to in the context of the UN Charter and humanitarian intervention,[44] then a resort to any relevant procedural law, in this case the VCLT, becomes justifiable. Therefore, regardless of what the ordinary meaning of the text of a treaty provides, a special meaning may be given to it if there is discernible general agreement for such an interpretation.[45]

It would have been straightforward for Article 2(4) of the Charter, inclusive as it is of no express exceptions, to simply state that '[a]ll Members shall refrain in their international relations from the threat or use of force'. Instead, however, it included what may be seen as unnecessary, not to mention clumsy, additional wordage. The *travaux préparatoires* of the Charter indicates that the intention of the drafters of the Charter regarding the inclusion of the phrase 'against the territorial integrity or political independence of any State' was to give emphasis to the protection of these two attributes of Statehood as opposed to providing any form of qualification or limitation to the prohibition of the threat or use of force.[46] The argument that force which does not

[41] While the norm prohibiting the threat or use of force is widely held as being *jus cogens*, an agreement may emerge amongst the State parties to the Charter regarding its (re)interpretation thus subjecting the norm to of a process of modification. Art 53 of the Vienna Convention on the Law of Treaties declares that 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. There does not, however, seem to be anything preventing the 'international community of States as a whole' from simply agreeing to cease the applicability of the prohibition of the use of force without necessarily replacing it with a subsequent norm of a *jus cogens* nature.

[42] See arts 31(2)(a) and (b) and 31(3)(a) and (b) of the VCLT. The VCLT is a treaty that has been ratified by 114 States with others recognizing it, or elements of it, as a restatement of customary international law.

[43] Stahn (n 24) 34.

[44] The UK was somewhat equivocal in its 1986 policy document in stating that the UN Charter and the corpus of modern international law does '*not seem* specifically to incorporate such a right' (emphasis added).

[45] Art 31(4) of the VCLT.

[46] See A Randelzhofer, 'Article 2(4)' in B Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press 2002) 112 at paras 37–39. Michael Akehurst stated that 'the *travaux préparatoires* indicated that the reference to territorial integrity, political independence, and the purposes of the United Nations was added to Article 2(4), not in order to limit the prohibition on the use of force, but in a clumsy attempt to strengthen it'. See M Akehurst, 'Humanitarian Intervention' in H Bull (ed), *Intervention in World Politics* (Clarendon Press 1986) 95. See also I Brownlie, *The Rule of Law in International Affairs* (Martinus Nijhoff 1998) 198.

deprive another State of all or a part of its territory, or that does not remove a government or deprive it of any meaningful independence, is excluded from the purview of Article 2(4) is one that has been found mainly within the scholarly literature.[47] While it was made on a few occasions by States prior to the publication of the UK's policy document in 1986[48] there is nothing to indicate that it had become an agreed interpretation regarding the breadth and scope of Article 2(4), arguably leading the UK to adopt the position it did at that time. Although this particular interpretational argument has crept into the discourse of States since,[49] this has again been exceptional leading one to conclude that the interpretive presumption found in the *travaux* had not been overturned by the time the UK published its legal opinion in 2013.

Along similar lines, it might be argued that as opposed to being 'inconsistent with the Purposes of the United Nations' some uses of force, such as those for humanitarian purposes, would, if anything, in fact further those purposes.[50] However, an examination of the Charter fails to support this argument. It is true that the preamble to the Charter prominently states that one of the founding principles of the UN is to 'reaffirm faith in fundamental human rights', with the Charter later going on to state the UN shall 'promote … universal respect for, and observance of, human rights'[51] and that '[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization' for the achievement of this purpose.[52] Yet, this somewhat promotional and aspirational language stands in contrast to the obligatory language found in Article 2(4), which states clearly that members of the UN 'shall' refrain from the threat or use of force.[53] It has been argued that the strict adherence to such an interpretation of this norm is only feasible if the collective security system contained in Chapter VII of the Charter functions as envisaged.[54] If not, then Article 2(4) must be interpreted to permit forcible measures that further the purposes of the UN, in particular the protection of human rights. In such circumstances the argument that forcible measures might be justified in

[47] See, for example, D Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 152.

[48] There was also an implicit rejection of the argument by the International Court of Justice after it had been put forward by the UK to defend its incursion into Albanian waters in the *Corfu Channel* case. See *Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 4, at 35. It was not accepted by many States following Israel's reliance upon it to justify its incursion into Ugandan territory in 1979 to rescue Israeli nationals that had been taken hostage on an aircraft by a group of Palestinians. See M Shaw, *International Law* (6th edn, Cambridge University Press 2008) 1144.

[49] In the *Legality of Use of Force* case of 1999 Belgium made a similar argument in the ICJ. It argued for the legality of NATO's intervention in Kosovo on the basis that it 'never questioned the political independence and the territorial integrity of the Federal Republic of Yugoslavia' and was as such an 'armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State'. However, Belgium was relatively isolated in making this argument which was not one that the Court had the opportunity to express its opinion on as it did not ultimately hear the case for jurisdictional reasons, most notably Serbia and Montenegro's lack of *locus standi* before the Court. See *Legality of Use of Force (Serbia and Montenegro v Belgium)*, Oral Proceedings, Public sitting, 10 May 1999, 12.

[50] See, for example, FR Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd edn, Transnational Publishers 1997) 151.

[51] Art 55(c), UN Charter (1945).

[52] Art 56, ibid.

[53] C Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the* Jus ad Bellum *in the Post-Cold War Era* (Ashgate 2010) 119.

[54] See, generally, M Reisman, 'Coercion and Self-Determination' (1984) 78 AJIL 642.

the cause of 'human dignity' was advanced strongly during the Cold War when elements of the collective security system were largely dysfunctional.[55] However, this argument was not one openly advanced by States and did not appear to find favour in the UK's statement in 1986.

The UK's reference in its 1986 statement to the corpus of 'modern international law' is perhaps a reflection of the fact that such a restrictive interpretation of Article 2(4) as adopted there also finds support in the *Declaration on Friendly Relations* of 1970, which in many respects was an elaboration upon this relatively brief provision of the UN Charter at a time when it was clear that the UNSC did not function as envisaged.[56] In connection with the prohibition it states in unqualified terms that '[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State', thus apparently offering confirmation that Article 2(4) does not provide for a right of unilateral humanitarian intervention regardless of the operational realities of the collective security apparatus.[57] More recently, the 2005 World Summit Outcome Document did not divert from this position or alter the Charter arrangements for the use of force, in particular in light of the emergence of the R2P concept.[58] In fact, '[i]n that regard, the responsibility to protect does not alter, indeed it *reinforces*, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter'.[59] On a regional level, while the African Union has provided itself with the right to 'intervene in a member State … in respect of grave circumstances …',[60] it arguably 'provides a basis for humanitarian intervention among its member states by way of consent',[61] and thus does not represent a violation of, or attempted modification to, the prohibition of the threat or use of force. In short, no agreement has been made to either alter or subsequently interpret the Charter to provide for a right of humanitarian intervention. On the contrary, activity within the UN General Assembly would suggest quite the opposite, in that, while the exact parameters of the prohibition or the exceptions to it have not been discussed or set out in any detail, the general prohibition has been expressly reaffirmed, without any indication of a restriction to it or the addition of further exceptions.[62]

In the post-Cold War period arguments of an extensivist nature in light of UNSC paralysis could not, on the one hand, be so easily made, with the UNSC demonstrating its ability to act on many occasions in the face of humanitarian crises.[63] Yet, on the other

[55] ibid.

[56] *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, 24 October 1970, GA Res 2625 (XXV) (1970).

[57] In similar terms, the *Definition of Aggression* provides that '[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression'. *Definition of Aggression*, 14 December 1974, GA Res 3314 (XXIX) (1974).

[58] 2005 World Summit Outcome document, UNGA Res A/60/L.1 (15 September 2005), paras 138–139.

[59] Report of the UN Secretary-General, *Implementing the Responsibility to Protect*, UN Doc A/63/677, 12 January 2009, para 3 (emphasis added).

[60] Art 4(h), Constitutive Act of the African Union (2000).

[61] Stahn (n 24) 38.

[62] See, for example, *Declaration on Friendly Relations* (n 56); *Definition of Aggression* (n 57); 2005 World Summit Outcome document (n 58).

[63] See C Henderson, 'The centrality of the United Nations Security Council in the legal regime governing the use of force' in ND White and C Henderson (eds), *Research Handbook on International Conflict and Security Law:* Jus ad Bellum, Jus in Bello, *and* Jus post Bellum (Edward Elgar 2013) 120, 137.

hand, the rise in willingness and ability of the UNSC to act has only served to highlight further the cases in which the Council has *not* acted. As such, arguments regarding intervention in light of UNSC abstinence have not entirely dissipated.[64] However, and as will be discussed in the next section, when States have made arguments favouring intervention they have not been so much based upon a particular interpretation of the UN Charter, but more generally upon a 'humanitarian necessity'. As such, it becomes important to address in more detail the next element in the UK's statement of 1986, that is, State practice.

B. Interpreting 'State Practice'

While agreement between the parties to any implied exception to the Charter—either at the time of its adoption or subsequently—is necessary, this agreement can be discerned through 'subsequent *practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[65] Some restrictivists would argue that regardless of the humanitarian outcomes of an intervention there is only the possibility for normative impact if it is accompanied by the invocation of a 'new right' or 'claim that a modification of the rule occurred'.[66] Indeed, the lack of such an invocation or claim arguably led the UK to adopt the view in 1986 that there were no Cold War precedents for a right of humanitarian intervention, despite acknowledging the fact that incidents had occurred that might be construed as such. However, this would seem to take an overly formalist position. If a series of interventions for humanitarian purposes that took place over an extensive period of time, by different States, and in different contexts went unchallenged, it would be difficult to claim that this practice was entirely irrelevant to the interpretation of Article 2(4) despite the lack of reliance upon a novel right of humanitarian intervention and whether or not this provision was directly referred to at any stage. To claim otherwise would simply be legal fiction. Yet at no point during the UN Charter era has such an unchallenged practice occurred.

The three relevant incidents that both the extensivists and restrctivists refer to during the Cold War era are India's intervention in East Pakistan (1971), Vietnam's intervention in Cambodia (1978–79), and Tanzania's intervention in Uganda (1979).[67] However, while the extensivists highlight the humanitarian outcomes of these interventions, it remains that no discernible agreement by States emerged from any of these incidences that forcible humanitarian intervention had become legally permissible. The acting States themselves did not make such a claim, placing emphasis instead upon claims of self-defence,[68] and the incidents were followed with at least some condemnation from States party to the UN Charter and in some cases from the UN organs themselves.[69] As such, while the UK in its statement of 1986 gave a

[64] See Bethlehem (n 13).
[65] Art 31(3)(b) of the VCLT (emphasis added).
[66] See, for example, Corten (n 33) 29.
[67] See (1971) *UNYB* 146; *Keesing's Record of World Events* (1979) 29613; *Keesing's Record of World Events* (1979) 29669–73.
[68] ibid.
[69] See, for example, UNGA Resolution 34/22 (1979). See also NJ Wheeler, *Saving Strangers. Humanitarian Intervention in International Society* (Oxford University Press 2000) 55–136.

tentative nod to the extensivists by acknowledging that this period 'at best provide[d] . . . a handful of genuine cases of humanitarian' it ultimately showed its restrictivist hand by concluding that 'on most assessments' it provided 'none at all'.

Furthermore, it is difficult to interpret the practice that occurred between the UK's policy document of 1986 and its legal opinion in the context of Syria in 2013 as exhibiting the required agreement for a (re)interpretation of Article 2(4). Ironically, given its rejection of both the existence and prudence of a right of humanitarian intervention in 1986, the UK has been the leading proponent if not of an express legal right of humanitarian intervention then of the fact that interventions for humanitarian purposes can on occasion be legally justified. It may have been the UK's concern for the 'costs in terms of respect for international law' that prevented it from expressly fully endorsing a shift in the law to incorporate a full-fledged right of humanitarian intervention, but such concerns of a prudential nature did not get in the way of it being involved in forcible interventions in both Iraq (1991–2003) and Kosovo (1999) that were undertaken ostensibly for humanitarian purposes but without authorization from the UNSC.[70]

While these interventions of a humanitarian nature occurred they received resistance and opposition, sometimes very strongly, from many parties to the UN Charter. Although the international community appeared to implicitly condone the earlier phases of the military campaign in Iraq,[71] widespread condemnation began to be audible after 1996.[72] When France and Russia—who represented two of the four States that had established the safe havens and no-fly zones—ended their participation claiming that action was being taken that went beyond the original aims of the establishment of the safe havens and no-fly zones, this cannot but be seen as a strong indicator that the UK and US were no longer acting within what the international community deemed acceptable, and thus within the bounds of legality.[73] On the other hand, NATO's intervention in Kosovo proved controversial from the outset with several UN members claiming it was a violation of the UN Charter.[74] Furthermore, shortly afterwards the G77, which is representative of the majority of the world's States, rejected 'the so-called "right" of humanitarian intervention, which has *no basis in the United Nations Charter* or in the general principles of international law'.[75] As such, while action has taken place with a humanitarian grounding there simply is insufficient evidence to plausibly claim that agreement between the parties to the UN Charter has been established through practice that humanitarian intervention now exists as a further implied exception to the prohibition of the use of force found in Article 2(4).

There has been, perhaps consequently, a discernible resort to arguments of a customary international law nature in claiming that a right of humanitarian intervention existed or was emerging. It is perhaps of significance in this respect that in its Legal Opinion of August 2013 the UK refrained from making any reference to the UN Charter, like it did in its 1986 policy document. While the UK took a restrictivist

[70] See UK Materials on International Law, (1992) 63 BYIL 824; UNSC Verbatim Record (24 March 1999) UN Doc S/PV. 3988.
[71] Henderson (n 53) 100–5.
[72] ibid, 103–4.
[73] ibid.
[74] See, for example, UNSC Verbatim Record (24 March 1999) UN Doc S/PV. 3988, Russia (at 2) and China (at 12).
[75] Group of 77 South Summit, 'Declaration of the South Summit' (Havana, Cuba, 10–14 April 2000), para 54 (emphasis added).

approach in its 1986 statement and put much store by the fact that a right of humanitarian intervention could not be found within the UN Charter, it was just a few years later when a discernible shift towards an extensivist outlook, and the general focus on the customary source of a right, was witnessed. For example, during a House of Commons Foreign Affairs Select Committee debate in 1992, the then Deputy Legal Adviser at the Foreign and Commonwealth Office, Anthony Aust, stated that the UK's action in Iraq after the end of the Gulf War was 'in exercise of the customary international law principle of humanitarian intervention', with no longer any mention of the UN Charter or how the existence of such a customary principle might affect the UK's obligations under it.[76] No events had seemingly occurred between 1986 and 1992 to bring about such a change. However, such references to a specific legal right of humanitarian intervention, and in particular the source of such a right, were generally, and notably, absent in connection with both the intervention in Iraq and NATO's intervention in Kosovo. Indeed, most of the intervening States, including the UK, based their action upon the justification of 'humanitarian necessity'.[77]

In this respect, while many scholars saw the NATO intervention as a straightforward violation of the law,[78] others, while maintaining the illegality of the actions, were prepared to look at the surrounding factors, including the perceived humanitarian necessity, in viewing the intervention as unlawful yet excusable or legitimate in some way. Bruno Simma, for example, was of the opinion that in this case only a 'thin red line' separated the intervention from being lawful, but that no independent right of humanitarian intervention had emerged or should emerge.[79] Thomas Franck, in similar tones, saw several elements to the intervention that acted as mitigating factors.[80] However, Antonio Cassese, while recognizing the illegality of the intervention, also

[76] See A Aust, Statement before the House of Commons Foreign Affairs Select Committee, 2 December 1992, in (1992) 63 BYBIL 827–8.

[77] For example the UK claimed in connection with the intervention in Kosovo that 'on the grounds of overwhelming humanitarian necessity, military intervention is legally justifiable'. UNSC Verbatim Record (24 March 1999) UN Doc S/PV. 3988, UK (at 12). See also US (at 4), Slovenia (at 6), Gambia (at 7), Netherlands (at 8), France (at 9), Malaysia (at 10), Argentina (at 11) and Slovenia (at 19). A possible way by which unilateral humanitarian interventions might be justified is by the invocation of necessity as a circumstance precluding wrongfulness. Art 25 of the International Law Commission's Draft Articles on State Responsibility (2001) provides that a state may be exempted from international responsibility following a violation of international law if the violation '[i]s the only way for the state to safeguard an essential interest against a grave and imminent peril'. The problem with invoking necessity in this context, however, is that it cannot be so invoked if the action would 'seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole'. It is difficult to see how the territorial integrity or sovereignty of the State concerned would not be deemed such an essential interest. Furthermore, Article 26 is clear that necessity cannot preclude 'the wrongfulness of any act of a state which is not in conformity with an obligation arising under a peremptory norm of general international law'. While the debate is somewhat open as to whether it is force or that of a particularly aggressive nature which is prohibited as a *jus cogens* norm, the pronouncements of the International Court of Justice in the *Nicaragua* case and comments by the International Law Commission would seem to suggest it may be the former. See above n 39.

[78] See, for example, I Brownlie and CJ Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49 ICLQ 878.

[79] B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1, 1.

[80] TM Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 180.

could not escape the necessity felt by many of the acting States.[81] As such, it was argued that while there was no *opinio juris* for the legality of forcible humanitarian interventions of this nature, with many States stressing that it was an exceptional measure, there was nonetheless a discernible '*opinio necessitatis*' with the potential to have a normative impact if witnessed again in the future. This would mean that even if States did not specifically invoke a 'legal right of humanitarian intervention' one could not rule out that subsequent actions taken upon the basis of humanitarian necessity with the acting States seemingly convinced of their legality would have an impact upon the law governing the use of force. Yet, while it might be argued that such *opinio necessitatis* for forcible action has been discernible in the context of Syria,[82] this has only been by a handful of States thereby placing question marks at the very least over its normative impact.

In the context of the Syrian crisis, Daniel Bethlehem, although refraining from arguing conclusively that a *lex lata* right of humanitarian intervention existed, instead set out a 'tapestry' of elements and, in drawing the various threads together, argued that 'there is a case to be made in favour of the emergence of a tightly constrained principle of humanitarian intervention that is consistent with traditional conceptions of customary international law'.[83] Upon this basis the argument is made that humanitarian intervention 'is acceptable in the light of the progress of the humanistic values at the heart of the international community. It is objectively necessary to allow certain unilateral actions in cases in which the collective security mechanisms have not functioned.'[84] It is again interesting though that this 'case' for a right of humanitarian intervention was located within the confines of 'traditional conceptions of customary international law', with little satisfactory consideration given to Article 2(4) of the UN Charter.

A key thread in Bethlehem's tapestry is the emergence of the R2P concept, a concept which might be thought to provide fresh impetus for an express attempt at establishing a right of humanitarian intervention. But aside from the initial report of the International Commission on Intervention and State Sovereignty (ICISS) where all options for invoking the responsibility to react element of the concept were addressed,[85] various reports of the UN and the World Summit Outcome document of 2005 have fixed this responsibility squarely upon the UNSC itself.[86] In this respect, while there was some uncertainty as to whether the military action ultimately authorized by the UNSC in Libya in 2011 was done so upon the basis of R2P,[87] there was no real suggestion that

[81] See A Cassese, 'A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*' (1999) 10 EJIL 791, 797–8.

[82] See section IV.

[83] Bethlehem (n 13).

[84] ibid.

[85] See Report of the ICISS (n 11) sections 4 and 6.

[86] See High-Level Panel report (n 12) para 181; Report of the United Nations Secretary-General, 'In Larger Freedom: Towards Security, Development and Human Rights for All' (21 March 2005) UN Doc A/59/205, paras 125 and 135; 2005 World Summit Outcome document (n 58) para 139. This follows from the embedded practice of the Council in determining internal crises to be 'threats to the peace' and thus opening up its Chapter VII powers.

[87] UNSC Resolution 1973 (2011) in its preamble only reiterated 'the responsibility of the Libyan authorities to protect the Libyan population' with no reference to the responsibility of the international community or the UNSC to do so if the Libyan authorities were not able or willing to. See also C Henderson, 'International Measures for the Protection of Civilians in Libya and Côte d'Ivoire' (2011) 60 ICLQ 767, 778.

action could have been taken without such authorization.[88] Despite discussion by the ICISS itself,[89] no residual responsibility has been placed upon States or regional actors should the UNSC for any reason refrain from taking forcible action in the face of what appears to be a humanitarian situation.[90] Given that as things stood at the time of the publication of the UK's opinion in August 2013 the UNSC had no chance of authorizing action in Syria, there was an air of tokenism about the UK's statement in its opinion that it was:

> seeking a resolution of the United Nations Security Council under Chapter VII of the Charter of the United Nations which would … authorise member States, among other things, to take all necessary measures to protect civilians in Syria from the use of chemical weapons and prevent any future use of Syria's stockpile of chemical weapons.[91]

In the context of this background, it is, however, of no real surprise that the UK did not even mention, let alone rely, upon R2P in its legal opinion. Such reliance would not, in any case, have bolstered a justification which had, as highlighted above, no basis within the *lex lata*.

IV. PROVISIONAL CONCLUSIONS REGARDING THE IMPACT OF THE OPINION UPON THE *LEX LATA*

The significance of the UK's legal position is that it was the first formally expressed and unequivocal invocation by any State of the legal doctrine of humanitarian intervention. In this respect it had the real possibility of making an impact upon the *lex lata.* Yet, as noted above, for any impact to be discernible there would need to be widespread agreement amongst State parties to the UN Charter. By contrast, there was very little apparent reaction, and no audible support for it. The UK was not alone in favouring a possible forcible response, with other States such as Denmark, France and the US offering up justifications for a prospective use of force. While the French government avoided any mention of international law in its justifications,[92] a day after the British government released its legal opinion the Danish government published its own opinion on prospective forcible action against Syria without UNSC authorization, using Kosovo

[88] While NATO's Secretary-General, Anders Fogh Rasmussen, was adamant that authorization from the UNSC was required, the UK equivocally stated the need for 'lawful authority' to use force in Libya. See ibid. It should be noted that in the debates in Parliament in August 2013 regarding the UK's possible involvement in a direct forcible intervention in Syria a number of MPs who spoke out in favour of intervention did so upon the basis of the emergence of R2P. See, for example, House of Commons Daily Debates (29 August 2013) cols 1430, 1443 and 1514.

[89] Report of the ICISS (n 11) para 6.13.

[90] The only possibility outside of express *a priori* authorization by the UNSC which has been floated to any great extent in the face of a block in the UNSC is action by regional organizations which is then subsequently approved by the UNSC *ex post facto*. The High-Level Panel, for example, has seemingly given some credence to this option. See High-Level Report (n 12) para 272 (a). This is arguably a result of the ECOWAS interventions in Liberia in 1990 and Sierra Leone in 1998, both of which were followed by endorsement of the UNSC. See, respectively, UNSC Resolution 788 (1992), para 1, and UN Doc S/PRST/1998/5 (26 February 1998) para 5.

[91] UK Legal Opinion (n 1) para 3.

[92] See, for example, V Giret *et al*, 'Réforme pénale, Syrie, pression fiscale … Hollande s'explique dans "Le Monde"' (*Le Monde*, 30 September 2013) <http://www.lemonde.fr/politique/article/2013/08/30/hollande-au-monde-le-massacre-de-damas-ne-peut-ni-ne-doit-rester-impuni_3468851_823448.html>.

as a precedent and similarly providing three conditions for the legality of any humanitarian intervention.[93]

Even the US did not offer any support for the UK's legal opinion, despite showing a willingness to use force in response to the chemical weapons attacks in Syria.[94] Instead, in taking an exceptional approach to the use of force, President Obama, in an address to the nation on 10 September 2013, focused on deterrence and the prospect of further attacks, the protection of allies in the region, and enforcing the norm against the use of chemical weapons.[95] It was thus somewhat telling that just a few days earlier on 8 September 2013 in a brief Statement, White House Counsel, Kathryn Ruemmler, stated that while any forcible action against Syria without authorization by the UNSC would not fit 'a traditionally recognized legal basis under international law', it would nonetheless be 'justified and legitimate under international law'.[96]

However, not only were the acting States on the whole not willing to rely expressly on a legal right of humanitarian intervention, but there was also a notable amount of condemnation or, at best, caution, in regard to the use of force in Syria. Soon after the publication of the UK's legal opinion, the Russian President, Vladimir Putin, published an op-ed in the *New York Times* in which it was proclaimed that;

> [t]he law is still the law, and we must follow it whether we like it or not. Under current international law, force is permitted only in self-defense or by the decision of the Security Council. Anything else is unacceptable under the United Nations Charter and would constitute an act of aggression.[97]

What is significant is that this sentiment was also shared by many other States. China, Brazil, India, Indonesia and South Africa all held the opinion that action in these circumstances without the authorization of the UNSC would represent a violation of international law and one that they could not support.[98] Regardless of one's perception of the political leaning of these States, and the perhaps predictable reaction generated by

[93] Danish Ministry of Foreign Affairs, 'General principled considerations on the legal basis for a possible military operation in Syria' UPN Alm.del Bilag 298 (30 August 2013) <http://www.ft.dk/samling/20121/almdel/upn/bilag/298/1276299/index.htm>. See also A Henriksen and M Schack, 'The Crisis in Syria and Humanitarian Intervention' (2014) 1 Journal on the Use of Force and International Law 122, 127.

[94] President Obama had just a year earlier drawn a 'red line' in regard to the use of chemical weapons, the crossing of which was said to affect his calculus in terms of the degree of intervention that he would be willing to engage in. See M Landler, 'Obama Threatens Force against Syria' (*New York Times*, 20 August 2012) <http://www.nytimes.com/2012/08/21/world/middleeast/obama-threatens-force-against-syria.html?_r=0>.

[95] The White House, Remarks by the President in Address to the Nation on Syria (10 September 2013) <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>.

[96] C Savage, 'Obama Tests Limits of Power in Syria Conflict' (*New York Times*, 8 September 2013) <http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html?pagewanted=all&action=click&module=Search&region=searchResults&mabReward=relbias%3As&url=http://%3A%2F%2Fquery.nytimes.com%2Fsearch% 2Fsitesearch%2F%23%2Fobama%2Btests%2F>.

[97] V Putin, Op-ed: 'A Plea for Caution from Russia' (*New York Times*, 11 September 2013) <http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html>.

[98] See S Lam, 'China tells Washington to return to U.N. on Syria, urges caution' (*Reuters*, 9 September 2013) <http://www.reuters.com/article/2013/09/09/us-syria-crisis-china-idUSBRE98804820130909>; 'Brazil opposes military intervention in Syria without UN backing' (*China Daily*, 28 August 2013) <http://www.chinadaily.com.cn/xinhua/2013-08-29/

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this, it is nonetheless simply not possible to discern any significant impact upon the position of humanitarian intervention under international law in the absence of their support or, at the very least, acquiescence.

However, while the ultimate normative consequences of the UK's legal opinion may not yet be fully known, reliance upon a justification for the use of force was not necessary in 2013 for two reasons. First, the enthusiasm for humanitarian intervention demonstrated by the UK government was in many ways dampened by the vote of the House of Commons against any possible participation in military action by the UK.[99] Secondly, less than a month later the UNSC adopted Resolution 2118 (2013) which, as an alternative to military action, required Syria to dispose of its chemical weapons stockpiles and cooperate with the Organisation for the Prohibition of Chemical Weapons.[100]

V. CONCLUSION

It has perhaps gone somewhat unnoticed that in publishing this legal opinion the UK was arguably issuing an unlawful threat to use force. The International Court of Justice was clear in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that 'if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal'.[101] As established above, at the point when the opinion was issued, there was no basis upon which to plausibly claim that a right of humanitarian intervention existed under international law. This is not to say that one should not, or could not, exist in the future, but that that such a right did not exist at the time the threat was made.

Yet, despite the fact that we have witnessed a violation of international law, it is also difficult to conclude that it was not in some ways a constructive development with at least some positive outcomes. With the publication of this opinion the UK has now unequivocally established itself as *the* norm entrepreneur in the context of humanitarian intervention. While for a long time restricted to the discourse of scholars and commentators, the legal doctrine of humanitarian intervention has now formally moved into the discourse of States with a justificatory precedent for the UK or other States to draw upon in the future.

For international law to evolve with the times and for a treaty interpretation or customary international law modification to take place, this initial violation is a key stage in generating the necessary reaction to gauge where States stand, thus providing weight to arguments that the law has either shifted or that the *status quo* has been maintained. Its publication can in this sense be seen as a victory for the 'restrictivists' as

content_9986054.html>; CS Kasturi, 'India opposes Syria action' (*The Telegraph (India)*, 31 August 2013) <http://www.telegraphindia.com/1130901/jsp/nation/story_17298146.jsp#.U2jxp1dRp8E>; Ministry of Foreign Affairs, Republic of Indonesia, 'Indonesian President: Military Intervention in Syria Not the Right Solution' (8 September 2013) <http://kemlu.go.id/Pages/News.aspx?IDP=6432&l=en>; 'Factbox: Where G20 members stand on military action against Syria' (*Reuters*, 6 September 2013) <http://www.reuters.com/article/2013/09/07/us-syria-crisis-g20-factbox-idUSBRE98602P20130907>.

[99] BBC News, 'Syria crisis: Cameron loses Commons vote on Syria action' (30 August 2013) <http://www.bbc.co.uk/news/uk-politics-23892783>.

[100] UNSC Resolution 2118 (2013) paras 4, 6 and 7.

[101] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 47.

it failed to spark much debate, or at least that which might be expected from such a forthright publication. Indeed, it is very difficult to perceive the UK's legal opinion, or even the Syria crisis more broadly, as a 'law-making moment' in the context of the doctrine of unilateral humanitarian intervention.[102] Not only did it create relatively little reaction and dialogue, but the underlying basis of its key proposal was rejected by other States. In addition, the right was not similarly adopted by many States which supported military action on this occasion, and it was followed very quickly by a non-forcible UNSC mandated alternative solution to the particular crisis. As such, those in favour of forcible intervention without UNSC authorization will have, if anything, a tougher hurdle to surmount in justifying any such prospective action upon the emergence of the next humanitarian crisis to make it on to the agenda of the international community.

APPENDIX

Chemical Weapon Use by Syrian Regime: UK Government Legal Position

1. This note sets out the UK Government's position regarding the legality of military action in Syria following the chemical weapons attack in Eastern Damascus on 21 August 2013.
2. The use of chemical weapons by the Syrian regime is a serious crime of international concern, as a breach of the customary international law prohibition on use of chemical weapons, and amounts to a war crime and a crime against humanity. However, the legal basis for military action would be humanitarian intervention; the aim is to relieve humanitarian suffering by deterring or disrupting the further use of chemical weapons.
3. The UK is seeking a resolution of the United Nations Security Council under Chapter VII of the Charter of the United Nations which would condemn the use of chemical weapons by the Syrian authorities; demand that the Syrian authorities strictly observe their obligations under international law and previous Security Council resolutions, including ceasing all use of chemical weapons; and authorise member States, among other things, to take all necessary measures to protect civilians in Syria from the use of chemical weapons and prevent any future use of Syria's stockpile of chemical weapons; and refer the situation in Syria to the International Criminal Court.
4. If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

   (i) 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;

[102] H Koh, 'Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)' (EJIL *Talk!*, 4 October 2013) <http://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward/>.

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(ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and

(iii) 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 (i.e. the minimum necessary to achieve that end and for no other purpose).

5. All three conditions would clearly be met in this case:

(i) The Syrian regime has been killing its people for two years, with reported deaths now over 100,000 and refugees at nearly 2 million. The large-scale use of chemical weapons by the regime in a heavily populated area on 21 August 2013 is a war crime and perhaps the most egregious single incident of the conflict. Given the Syrian regime's pattern of use of chemical weapons over several months, it is likely that the regime will seek to use such weapons again. It is also likely to continue frustrating the efforts of the United Nations to establish exactly what has happened. Renewed attacks using chemical weapons by the Syrian regime would cause further suffering and loss of civilian lives, and would lead to displacement of the civilian population on a large scale and in hostile conditions.

(ii) Previous attempts by the UK and its international partners to secure a resolution of this conflict, end its associated humanitarian suffering and prevent the use of chemical weapons through meaningful action by the Security Council have been blocked over the last two years. If action in the Security Council is blocked again, no practicable alternative would remain to the use of force to deter and degrade the capacity for the further use of chemical weapons by the Syrian regime.

(iii) In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention to strike specific targets with the aim of deterring and disrupting further such attacks would be necessary and proportionate and therefore legally justifiable. Such an intervention would be directed exclusively to averting a humanitarian catastrophe, and the minimum judged necessary for that purpose.

29 August 2013