insights

American Society of International Law

August 30, 2013 Volume 17, Issue 21

Legality of Intervention in Syria in Response to Chemical Weapon Attacks

By Kenneth Anderson

ASIL *Insights*, international law behind the headlines, informing the press, policy makers, and the public.

Introduction

The increasing conviction that the government of Bashar al-Assad in Syria has used chemical weapons in an attack with many civilian casualties raises the question: what military response may the outside world legally take without the authority of the UN Security Council?

International law questions are not the only ones that matter to the decision to intervene militarily, of course. Whether a proposed course of action is legal has to stand alongside other essential questions. Is the proposed mission practical and prudent? And whether a proposed course of action in a crisis is, strictly speaking, legal or not under existing international law might not settle matters for some important international actors. For these governments, legal scholars, international NGOs and human rights advocates, even something that is formally not legal might, under circumstances of humanitarian crisis, emergency, and necessity, still be seen as justified and right, irrespective of what international law has to say about it. However, international law is always vital to the discussion, especially in a moment of grave crisis marked by significant political disagreement among states and deadlocked diplomacy in the UN Security Council.

To the surprise of many, international law does not provide clear-cut answers. The basic propositions that would justify armed intervention under international law are sharply contested by states through their governments and foreign ministries, international organizations and their diplomats and lawyers, and independent experts such as professors of international law.

The purpose of this *Insight* is to describe the legal positions, their arguments and counterarguments. I assume, for this analysis, that the Government of Syria has used chemical weapons that injured or killed a large number of civilians; and that Russian

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opposition will continue to block the UN Security Council from authorizing intervention. The practical question is whether the United States and its allies ought to take armed military action in Syria against the Assad regime. The legal question is whether it can do so under international law without the authorization of the UN Security Council. What are the arguments that the United States can make in favor of the international legality of such action, and what are the arguments against? Formalist and pragmatic approaches to international law provide very different answers.

The UN Charter

The United States would be in the surest legal position if it could find support in the formal language of the UN Charter. The Charter says, in Article 2(4), that states shall refrain from the "threat or use of force against the territorial integrity" of any other member state.[1] It goes on to say, in Article 51, that the Charter does not impair a state's "inherent right of individual or collective self-defense" - but only in case of an "armed attack."[2] Otherwise, authority to use force is given over to the Security Council.

Neither the United States nor its allies have themselves been attacked. There is thus no basis for invoking individual self-defense. Even formalists accept that the law is more than treaties, however, and some might even accept that customary law of "inherent" self-defense might in principle include *casus belli* – grounds for resorting to hostilities – broader than a literal "armed attack." The United States in this case (persuasively to formalists or not) has asserted its *own* "vital national security interests" in not facing future foes willing to use chemical weapons, as part of its self-defense and not only as a generalized humanitarian interest.

Could the United States claim that it is acting in "collective" self-defense? The United States has cited the possible self-defense of neighboring states, including Jordan, Turkey, and Israel, but those countries have not clearly signaled a request for assistance in their own self-defense. The United States said, much earlier as the Syrian civil war escalated, that the Assad government had lost legitimacy, but this was a political, not legal, claim. It might go a step further and say that the Assad government is no longer the legitimate, lawful government of Syria, and argue that it uses force not against UN member state "Syria," but rather against the illegitimate Assad regime and in collective self-defense of the Syrian people. The difficulties of this approach include, however, that declarations of illegitimacy by the United States and some of its allies aside, the Assad government meets essentially all the formal requirements of international law to be the legal government.[3] It remains in "effective control of the state," observers would likely conclude, and continues to be recognized as the legal government by states generally (and not just by Russia).

The United States seeks recourse that is indeed contemplated by the UN Charter. However, it is the prerogative of the Security Council to determine whether some act by a state is a threat, in the language of Article 39, to "international peace or security." The Security Council has in the past found threats to international peace and security on the basis of acts taking place wholly within a state, by a government against its people.[4] But it has not done so in this case, because – pursuant to the fundamental structure of the UN Charter – some permanent, veto-bearing members of the Security Council have not so far agreed.

Responsibility to Protect

Given general agreement that purely formal legal arguments based on the UN Charter leave authorization with the Security Council, many proponents have urged armed intervention on a pragmatic, less formal, legal argument. The international community has accepted a legally binding norm prohibiting mass atrocities against civilian populations,

including those that take place within a single state. This indisputably binding legal norm has no meaning if it does not imply the legal authority to enforce it, including by the use of force; if you will the end, you must will the means.

This, in effect, yields a legal argument for so-called "responsibility to protect" or "R2P" that was raised far earlier in the Syrian civil war. The international community has both a right and obligation, in the strongest form of the argument, to intervene in the internal affairs of a state in order to protect civilian populations against mass atrocities, which are plainly prohibited by international law.[5] As a basis for the United States and its allies to act unilaterally, however, the humanitarian intervention argument suffers from two grave legal problems.

The first is that it is far from settled that, as a matter of formal international law, R2P has been accepted as binding law. The prohibition on mass atrocities has, certainly; but acceptance of a remedy in the form of permission to intervene in the territory of a state, as R2P asserts, much less so if at all. (Indeed, it is doubtful that even the United States believes this is so as a matter of current international law.) The second is that to the extent that one can point to any formal legal acceptance of R2P as a lawful remedy, it appears to be only by authorization of the Security Council, not unilateral action by concerned states, even accepting that they act benevolently and in good faith.

This legal state of affairs did not come about by accident. On the contrary, cabining of a gradual, cautious evolution toward R2P strictly within the Security Council was a deliberate move by states who, far from celebrating the new humanitarianism that the United States and NATO believed they found in the 1999 Kosovo intervention, were gravely worried by it. Their concerns are reflected in the closest thing to a "formal" acceptance of R2P in international law – the UN reform document adopted by the General Assembly as a resolution in 2005.[6] While this "Final Outcome Document" mentions the concept of responsibility to protect, it puts it strictly into the hands of the Security Council. The formal legal argument on this basis cuts against unilateral action by states.

Illegal but Legitimate Response to Mass Atrocities

The formal legal limitations of R2P and the apparent requirement of Security Council authorization have led some international lawyers to embrace two seemingly inconsistent positions: The first is the formal legal conclusion that unilateral intervention indeed would be illegal. And the second is - do it anyway, because though illegal, it would still be politically and morally legitimate.[7]

This revives a position offered by a number of international lawyers at the time of the Kosovo war – "illegal but legitimate." To the extent that it had resonance at that time, it was likely because international politics were in a different place from today. Despite the horrors of Rwanda and the Yugoslavia wars, there was a residual, hopeful belief left over from 1990 that the great powers (which effectively meant the United States along with NATO) were in essential agreement on such things as mass atrocities. In retrospect, it would probably be more accurate to say that Russia correctly perceived that it lacked the real power to contest Kosovo and simply let it go – without, however, much forgiving or forgetting. In today's world of rising great powers, BRICS, resurgent China and Russia, the extra-legal political legitimacy that once made this argument plausible as an alternative to a formal legal one is not really evident. Should the United States or its allies act alone, they cannot depend on the same general sense of political legitimacy that NATO could in Kosovo as late as 1999.

Moreover, the view of many other countries in the world—that NATO took a distinctly limited license by the Security Council for humanitarian intervention in Libya and turned it into unlimited license for regime change—has almost certainly altered the willingness of Russia

and China to grant any formal authority through Security Council authorization.[8] They simply do not appear to trust the Western powers to respect what they believed were the limited terms on which it was granted in the past. Libya, it might be said, has poisoned the well of political legitimacy for humanitarian intervention, through overreach beyond the terms of formal law. Thus, the assertion of a moral obligation standing beyond and above formal international law might well be the right thing to do – but its political legitimacy, if that is what finally matters in the absence of legality, depends as well on how others regard it. It is unlikely that an armed action for the sake of humanitarian intervention, in the reasonable certainty that the Security Council would not authorize it if asked, would have the political legitimacy claimed for it or that it would gradually acquire it over time, sufficient to overcome its acknowledged illegality.

Bans on the Use of Chemical Weapons

The specific issue that has moved the Obama administration to act has not been the humanitarian disaster or even mass atrocities over the course of the Syrian civil war. It is the apparent use of chemical weapons. The fact of a major chemical weapons attack provides a different formal legal argument.

An accumulation of treaties, starting with the 1925 Poison Gas Protocol following World War I and running through the 1993 Chemical Weapons Convention, as well as developing state practice and custom, all lead to the conclusion that the use of chemical weapons is a violation of international law. There might still be some fringe disputes over whether a reprisal use, in response to an illegal first use, is legal, but it appears unlikely today. In that case, a chemical attack by the Assad government is a plain and serious violation of international law, but then the question is what remedy exists and who is able to exercise it?

One approach is to say that the use of chemical weapons worsens the humanitarian crisis in Syria, and therefore humanitarian intervention under R2P is justified. Yet this argument suffers derivatively from all the problems of the unilateral invocation of R2P discussed above. The more important question is whether anything about the use of chemical weapons provides a distinct legal ground for action.

The strongest case would be a formal legal argument that international law has come to treat the prohibition on any use of chemical weapons in war against civilians or soldiers as a "*jus cogens* norm."[9] *Jus cogens* norms are a special category of international laws so fundamental that no derogation or departure from them can be accepted; even contrary treaty provisions are superseded. Genocide and crimes against humanity are examples.[10] While the use of chemical weapons may be universally considered a violation of international law, the claim that it is a violation of a *jus cogens* norm would be sharply disputed. Moreover, the Charter's prohibition on the use of force save in limited circumstances of self-defense may be argued to be itself a *jus cogens* norm, and one more widely accepted than an absolute ban on the use of chemical weapons. The question of who can authorize a remedy even for a violation of a *jus cogens* norm remains on the table – only the Security Council?

The international community finds itself in a very troubling situation. From the horrors of World War I until now, chemical weapons have gradually come to be seen as an unacceptable weapon. This has been a gradual and partly informal change of norms – from the Cold War period in which both sides contemplated the use of chemical weapons to now. The relatively few modern uses by governments, such as Saddam Hussein's, have not altered their pariah status.[11] But now, after the gradual evolution of a norm both legal and political over nearly a century, it seems the world might accept a profound alteration of that status quo. Who would have thought, a mere year or two ago, that the status quo norm against the use of such weapons would be so fragile, and if breached might draw down

upon the user merely token or perhaps even no consequences? The use of chemical weapons in an internal armed conflict against civilians thus not only might incur few or no real world consequences – but might incur few or no consequences in large part because of *legal* arguments that those who might respond to preserve an important humanitarian norm could not lawfully do so under the formal law of the UN Charter.

Pragmatic International Law in Defense of the Chemical Weapons Prohibition

Great powers capable of a practical defense of the chemical weapons prohibition argue their obligation to do so. U.S. Secretary of State John Kerry, in saying that the violation of this international law norm must have consequences is arguing for the defense of a norm against chemical weapons use as such, not merely on the grounds that their use worsens the humanitarian disaster in Syria.[12]

To regard this as a legal argument, rather than merely a policy or political one, requires a different understanding of the nature of international law than the one that has driven the discussion of alternative arguments so far. International law can be regarded as essentially defined by formal characteristics – the text of the Charter, for example. Formalists make the arguments presented so far. But another way to view international law as law reflects the traditional, long-held approach of the United States and its Department of State. This is sometimes known as a "pragmatic" approach to international law. Law among nations, it asserts, is necessarily and inevitably intertwined with politics, policy, diplomacy, and real world consequences of actions – that is, the facts of power.[13]

This approach to international law differs from the "illegal but legitimate" way of seeing international law, in that the pragmatic approach views these other factors as *part of* international law itself, and indeed a vital way of ensuring that international law remains relevant *as law* to the harsh realities of international politics. It rejects formalism because it wraps these consequences-based, real world concerns into the law itself – and hence offers a view of the law that is still about law, but goes well beyond strict formalism. Both approaches are contested but plausible understandings of international law, each with long pedigrees and no easy way of reconciling their fundamentally different approaches.

The United States by and large adopts a pragmatic view of international law, and this provides perhaps the best, or at least most plausible, argument in favor of intervention to address violations of the norm against chemical weapons use by the Assad regime. The argument is that the United States acts to defend a norm that, while lacking formal expression in a strictly legalistic sense, has long endured as a profound humanitarian constraint.[14] It can scarcely be overstated how much harm would come about were this enduring norm to be undermined by inaction by the United States and its allies, as states around the world took notice that chemical weapons were used on a major scale without consequences, because of handwringing over legalisms. The pragmatic approach to international law sees international law not as a formal enterprise unto itself, but instead as part of a system of general international order, where the law itself embraces the legality of enforcing a certain amount of rough order in the world.

This legal argument suggests that the meaning of international law has never been as purely rule-bound or entirely separated from the requirements of international order as a formalist UN Charter view suggests. In that view, it is inconceivable that the United States should not act, even without Security Council authorization. The United States would act both in its own "vital national security interests" as self-defense, and in reprisal against the Assad government – to impose a substantial cost on its violation of the norm, to disincentivize future violations, and to send a signal to the rest of the world that the norm remains in place.

The tradition of pragmatic international law is cautious about declaring final, formal answers in law, precisely because it is not formalist and looks to facts and circumstances of the real world, consequences, and power. Instead, consistent with a pragmatic approach (at least as seen from an outside observer's view), it seems to look for legal answers that are reasonable, reasonably practicable in the real world and not just in formal law, and can be offered in good faith. But this "reasonable" approach to international law thereby has to accept that others might, equally in good faith, reach different but reasonable legal conclusions. And Security Council members seeking to block military action can make arguments that they would claim are not only reasonable and defensible, but based on far stronger formal grounds.

Thus, the United States may claim that it is entitled to pursue a position that it considers pragmatically necessary and reasonably justified under international law. The obligation for the United States to act arises where basic principles of international order are at stake, such as erosion of the norm against chemical weapons use. Yet the very flexibility and openness that characterizes this pragmatic approach – the reciprocity that characterizes relations between sovereign states - must mean that other states with plausible positions are entitled to do the same.[15] Over the long run, surely this is *not* a recipe for the peaceful settlement of disputes: it displaces the role of the Security Council, and it invites other great powers to respond in kind. It might preserve the global norm against the use of chemical weapons. But it risks undermining the authority of the Security Council in the eyes of the great powers—including those who sit on it— as well as the rest of the world, and over time could pave the way to great power war.

Conclusion

The world is thus at a fraught place, not just about particular actions, but about the conception of international law that undergirds international order. A legal norm hangs in the balance—one with both formal and informal dimensions, a norm of warfare of enormous humanitarian consequence if systematically breached and also of unexpected endurance. And yet, at the same time, the authority and role of the Security Council are equally at issue here. It is not clear that any of the legal arguments – on any side – are adequate to address the real world stakes.

About the Author:

Kenneth Anderson is a professor at Washington College of Law, American University; a visiting fellow of the Hoover Institution and member of its Task Force on National Security and Law; and a non-resident senior fellow at the Brookings Institution. His most recent book is Living With the UN: American Responsibilities and International Order (Hoover Institution Press 2012).

Endnotes:

[1] U.N. Charter art. 2, para. 4.

[2] U.N. Charter art. 51.

[3] *See* Restatement (Third) of Foreign Relations § 203 (1987) (for a statement of criteria); *see also* Michael N. Schmitt, *Legitimacy versus Legality Redux: Arming the Syrian Rebels*, 7 J. Nat'l Sec. L. & Pol'y (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308844 (for the discussion in the context of the Syria civil war).

[4] *See, e.g.*, S.C. Res. 1973, U.N. Doc. S/Res/1973 (Mar. 17, 2011), establishing a no-fly zone and other forcible measures under Chapter VII of the Charter, on the basis, among other things, of the threat to international peace and security in a part of Libya, the Libyan Arab Jamahiriya.

[5] Mass atrocities are made illegal under a lengthy list of UN treaties as well as customary

international law, including, for example, the Genocide Convention and the Geneva Conventions of 1949; in addition, some aspects of mass atrocities violate *jus cogens* norms, that is, non-derogable, preemptory norms of international law.

[6] 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005); for accompanying and background documents, *see* United Nations, 2005 World Summit Documents, 60th Session of the General Assembly, *available at* http://www.un.org/summit2005/documents.html.

[7] *See, e.g.*, Ian Hurd, Opinion, *Bomb Syria, Even If It Is Illegal*, N.Y. Times, Aug. 28, 2013, *available at* http://www.nytimes.com/2013/08/28/opinion/bomb-syria-even-if-it-is-illegal.html?_r=0.

[8] For example, see the statement by Russian foreign ministry spokesman Alexander Lukashevich criticizing "attempts to bypass the Security Council, once again to create artificial, groundless excuses for a military intervention." *Syria Crisis: Russia and China step up warning over strike*, BBC News, Aug. 27, 2013, *available at* http://www.bbc.co.uk/news/world-us-canada-23845800.

[9] *See* Vienna Convention on the Law of Treaties, art. 53, Jan. 27, 1980, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[10] For discussion of this concept, *see, e.g.,* Cherif Bassiouni, Crimes Against Humanity: Historical Evolution and Contemporary Application (2011).

[11] The best single volume history of Saddam Hussein's use of chemical weapons in the 1980s, including the international response at the time and following is Joost R. Hiltermann, A Poisonous Affair: America, Iraq, and the Gassing of Halabja (2007), particularly pages 224-246.

[12] John Kerry, Secretary of State, Statement on Syria (Aug. 30, 2013), *available at* http://www.state.gov/secretary/remarks/2013/08/213668.htm.

[13] For an academic description and defense of this "pragmatic approach," see Michael Glennon, The Fog of Law: Pragmatism, Security, and International Law (2010).

[14] For example, the New York Times cites unnamed U.S. officials espousing these views, in Mark Landler, David E. Sanger & Thom Shanker, *Obama Set for Limited Strike on Syria as British Vote No*, N.Y. Times, Aug. 29, 2013, *available at* http://www.nytimes.com/2013/08/30/us/politics/obama-syria.html?pagewanted=1&hp.

[15] For a leading academic discussion of reciprocity in international law, *see* Mark Osiel, The End of Reciprocity: Terror, Torture, and the Law of War (2009).