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USE OF FORCE IN HUMANITARIAN CRISES: ADDRESSING THE LIMITATIONS OF U.N. SECURITY COUNCIL AUTHORIZATION

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INTRODUCTION

The original 2001 United Nations (UN) codification of the Responsibility to Protect (R2P) granted the UN Security Council exclusive control over authorizing use of force in sovereign states.[1] Unfortunately, as demonstrated over the past 20 years, the need for humanitarian intervention has not changed and the use of force in the name of humanitarian intervention has not always occurred even when the need for such intervention was dire.[2] When the UN Security Council is deadlocked and a humanitarian crisis is at hand, it is necessary to have a means of using low-intensity military force to prevent mass atrocity crimes. In this article, we discuss the need for a framework for non-UN authorized military force in the name of humanitarian intervention. Expanding on previous work,[3] we set forth a seven-point framework for countries to follow if they wish to justifiably use military force in humanitarian crises without UN authorization.

RESPONSIBILITY TO PROTECT AND HUMANITARIAN CRISES

Under R2P, a state itself is responsible for protecting its own people. [4] However, the third pillar of R2P indicates that there is a broader responsibility that falls on the international community when a state is "unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities."[5] The UN Charter generally prohibits the use of force by outside states within sovereign states and sets forth a state's right to be free from intervention, except for measures authorized by the Security Council,

1. Rep. of the Int'l Comm'n on Intervention and State Sovereignty, transmitted by Letter Dated 26 July 2002 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General, The Responsibility to Protect, at 49, U.N. Doc. A/57/303 (2001) [hereinafter R2P Report].

2. *See generally* Aiden Hehir, *Response: The Responsibility to Protect Doctrine Has Failed*, WASH. POST (Feb. 26, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/02/26/response-the-responsibility-to-protect-doctrine-has-failed/ [http://perma.cc/85F5-Z4ZS] (describing the ineffectiveness of R2P due to improper implementation by States).

3. *See* Paul R. Williams et al., *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis,* 45 CASE WESTERN RES. J. INT'L L. 473 (2012) (discussing the use of military options under R2P and its application to the Syrian Crisis).

4. R2P Report, *supra* note 1, at 13.

5. *Id.* at 17.

such as actions justified by R2P.[6] In certain cases, however, political dynamics on the Security Council may prevent UN member states from gaining the authorization to intervene in serious humanitarian crises (e.g. Kosovo).[7] Currently, R2P lacks a framework for the limited use of force when there is a humanitarian emergency and an occurrence of mass atrocity crimes but the Security Council is deadlocked.[8]

When a state is committing mass atrocity crimes against its own people, a coalition of the willing has the right, and arguably the obligation, to intervene to cease the crimes.[9] Under R2P, low-level and low-intensity use of force is reserved for actions that fit within the UN Charter Chapter VII framework.[10] This use of force can only be deployed when peaceful options, including sanctions and diplomacy, have been exhausted and the actions are subject to approval by the UNSC.[11] As R2P states:

> There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has. Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary General raise it under Article 99 of the UN Charter. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the group that might support a military intervention.[12]

However, as has been observed during the conflict in Syria, the international community cannot necessarily depend on the Security

6. *See* U.N. Charter art. 2, ¶¶ 4, 7 (prohibiting the use of force generally), *see also* U.N. Charter art. 39, ¶ 1 (giving the Security Council authority to determine the existence of threat and the right measure to take).

7. *See* Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y.B. INT'L L. 141 (1999) (discussing the failure of NATO in Kosovo and questioning the nature of modern international law in times of humanitarian crisis).

8. Williams et al., *supra* note 3, at 476.

9. R2P Report, *supra* note 1, at 52.

10. *Id.* at 33-4.

11. *Id.* at XII.

12. *Id.*

Council to approve appropriate use of force under R2P. Time and time again, Russia has vetoed Security Council Resolutions on Syria that do not align with its own political interests in the conflict; as of April 11, 2018, Russia used 12 vetoes on Security Council Resolutions for Syria.[13]

Consequently, the U.S. government has been faced with challenges throughout the Syrian conflict about whether and how to intervene in the face of humanitarian crisis and mass atrocity crimes. Both the Obama and Trump administrations have taken low-intensity military action in Syria to prevent further mass atrocity crimes.[14] In connection with that, we will turn now to a discussion of the April 2018 chemical weapon attacks by the Assad regime against the Syrian people and the U.S. government's subsequent actions.

THE U.S. GOVERNMENT'S RESPONSE TO SYRIA'S CHEMICAL WEAPON ATTACKS

On April 7, 2018, the Syrian government attacked civilians with chemical weapons in the Damascus suburb of Douma.[15] After the April 7, 2018 chemical weapon attacks in Syria, Russia blocked a Security Council resolution "that would have established a mechanism to investigate use of such weapons in Syria, as well as another concerning a fact-finding mission in the war-torn country."[16] On April 13, 2018, after multiple failed attempts to pass UN Security Council Resolutions that would investigate these attacks, the U.S. authorized its military to conduct airstrikes against three facilities associated

13. *Russia's 12 Vetoes on Syria*, RAIDIÓ TEILIFÍS ÉIREANN (Apr. 11, 2018, 7:47 PM), https://www.rte.ie/news/world/2018/0411/953637-russia-syria-un-veto/ [https://perma.cc/6N7M-S5CS].

14. *See* Barbara P. Usher, *Obama's Syria legacy: Measured diplomacy, strategic explosion*, BBC (Jan. 13, 2017) (arguing that both Barack Obama and President Trump showed reluctance to military intervention in Syria), https://www.bbc.com/news/world-us-canada-38297343 [https://perma.cc/SQY2-F2JP]; *see also* Eric Schmitt & Maggie Haberman, *Trump to Allow Months for Troop Withdrawal in Syria, Officials Say*, N.Y. TIMES (Dec. 31, 2018), https://www.nytimes.com/2018/12/31/us/politics/trump-troop-withdrawal-syria-months.html [https://perma.cc/7ZBB-JY9T] (informing that President Trump has ordered a withdrawal of all troops from Syria).

15. *Syria War: What We Know About Douma 'Chemical Attack,'*, BBC (July 10, 2018), https://www.bbc.com/news/world-middle-east-43697084 [https://perma.cc/G2U5-Q93V].

16. *Security Council Fails to Adopt Three Resolutions on Chemical Weapons Use in Syria,* U.N. NEWS (Apr. 10, 2018), https://news.un.org/en/story/2018/04/1006991 [https://perma.cc/XV9H-2TEH].

with the Syrian chemical weapons attacks in collaboration with the U.K. and France.[17] The goal of these actions was to destroy the facilities to prevent future mass atrocity crimes.[18]

On April 14, 2018, Russia proposed a Security Council proposal to condemn these actions by the U.S. and called for the U.S.-led coalition to "immediately cease such actions and refrain from any further use of force in violation of international law."[19] While Russia argued that the coalition's actions were illegal under international law, the U.S. did not agree. According to a Department of Justice Office of Legal Counsel (OLC) memo released in May 2018, the U.S.-led use of force in Syria adhered to historical precedent and was justified on the basis of U.S. national interest in regional stability, prevention of a worsening humanitarian crisis, and chemical weapon nonproliferation.[20] The U.S.-led coalition's actions are consistent with other actions that have been taken by NATO in Kosovo, Libya, and other countries, and supports a precedent for the U.S. using military force for humanitarian reasons without UN authorization despite the fact that the U.S. has not publicly stated its position on doing so.[21]

THE NEED FOR A FRAMEWORK

The Security Council's veto system can breed these deadlock situations, as demonstrated by Russia's failure to approve use of force against the Assad regime. Until a framework for use of force without UN authorization is codified, the international community may continue to be unable to intervene in humanitarian crises when UN authorization is impossible.

There is precedent for intervention in the name of humanitarian crisis—the U.S. used military force to end mass atrocities in Kosovo when NATO bombed Serbia and Yugoslavia to address the ethnic cleansing of Albanians.[22] The U.S. also used military force in Libya

17. Office of Legal Couns., Slip Opinion on the April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities (May 31, 2018), at 2.

18. *Id.* at 11.

19. Press Release, Security Council, Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression, U.N. Press Release SC/13296 (Apr. 14, 2018), https://www.un.org/press/en/2018/sc13296.doc.htm [https://perma.cc/KR2Z-B8VX].

20. Office of Legal Couns., *supra* note 17, at 11-12.

21. *Id.* at 6, 19.

22. *1999-Operation Allied Force*, AIR FORCE HIST. SUPPORT DIVISION (Aug. 23, 2012), https://www.afhistory.af.mil /FAQs/Fact-Sheets/Article/458957/operation-allied-force/ [https://perma.cc/VP2Q-Q5HB].

when the U.S., France, and Britain attacked government facilities near Benghazi and successfully protected civilians from attacks by their government.[23] The Trump administration followed along this vein with its action in Syria in April 2018, and by building on this momentum, has presented the opportunity to cement a new norm.

The OLC memo on airstrikes in Syria pushed the international community closer to a framework for this issue and is, as Harold Koh writes, a "lawmaking moment"—a chance to solidify customary international law as it relates to use of force for humanitarian intervention without UN authorization.[24] The Trump administration's response to the 2018 chemical weapon attacks is a prime opportunity to establish pertinent appropriate guidelines for R2P from this point onward and to establish a framework for future action. Without a framework, there is the potential to abuse the justification of humanitarian intervention. Russia's actions in Ukraine, which Russia falsely justified along humanitarian lines,[25] is an example of why it is important to establish a framework for the use of force for humanitarian reasons. Moreover, a framework will crystalize the existence of this practice into customary international law.

A Framework for Non-UN Authorized Use of Force for Humanitarian Intervention

Building on previously proposed work on this topic, we set forth the following framework for R2P justification of regional organizations or coalitions using force to prevent mass atrocity crimes and intervene in humanitarian crises without UN Security Council authorization.[26] While the use of force without explicit UN authorization may be perceived as pushing the limits of international law, a framework helps to ensure that use of force will fit under R2P. The criteria are as

23. Mary Dejevsky, *Putin attacks Britain and US for 'violating Libya resolution'*, INDEPENDENT (Nov. 12, 2011), https://www.independent.co.uk/news/world/europe/putin-attacks-britain-and-us-for-violating-libya-resolution-6261163.html [https://perma.cc/HJY8-YF8J]. While the use of force in Libya was authorized by the UN Security Council, Russia has subsequently argued that the intervention far exceeded what was contemplated or authorized by the resolution.

24. Harold Hongju Koh, *Humanitarian Intervention: Time for Better Law,* 111 AJIL UNBOUND 287, 288.

25. *Ukraine's Foreign Ministry Condemns Another Russian "humanitarian convoy" Arrived in Donbas,* UKR. INDEP. INFO. AGENCY NEWS (Nov. 24, 2018, 1:15 PM), https://www.unian.info/war/10350636-ukraine-s-foreign-ministry-condemns-another-russian-humanitarian-convoy-arrived-in-donbas.html [https://perma.cc/BGE8-WLPT].

26. Williams et al., *supra* note 3, at 476.

follows: (1) a prima facie case must be established that atrocity crimes are occurring or are about to occur; (2) peaceful options have been exhausted; (3) the Security Council is unable to act in a timely and appropriate manner; (4) any military force used must be limited to low-intensity options designed to protect populations and must be carried out in such a way as to limit collateral damage; (5) the use of low-intensity military force must be authorized by a legitimate authority, which could include the UN General Assembly, regional organizations, or international coalitions; (6) the intervention must come at the request of credible opposition groups that represent victims of atrocity crimes and shall be done collectively by members of the international community; and (7) the use of force should be followed up with or integrated into a larger strategy and policy for addressing the humanitarian crisis. Below, we will apply these criteria to the April 2018 chemical weapon attacks by the Assad regime and the subsequent actions taken by the U.S.-led coalition to demonstrate how it fits into this framework.

The first tenant of the framework calls for the establishment of a prima facie case. For a prima facie case to be established, an international body or multiple independent sources must demonstrate through evidence that mass atrocity crimes are occurring or will occur unless immediate action is taken to protect a population.[27] In the days after the April 2018 chemical weapon attacks in Syria, various credible sources, including the World Health Organization (WHO), documented the symptoms of victims and witness testimonies.[28] According to the WHO,

27. *Id.* at 492.

28. *See* Tarik Jasarevic, *WHO Concerned About Suspected Chemical Attacks in Syria*, STATEMENT BY THE WORLD HEALTH ORGANIZATION [WHO] (2018), http://www.who.int/mediacentre/news/statements/2018/chemical-attacks-syria/en/ [https://perma.cc/F5NY-U9SM] (documenting signs and symptoms consistent with exposure to toxic chemicals); Donia Chiacu et al., *Douma Symptoms Consistent with Nerve Agent: U.S. State Department*, REUTERS (Apr. 9, 2018, 12:19 PM), https://www.reuters.com/article/us-mideast-crisis-syria-statedept/douma-symptoms-consistent-with-nerve-agent-u-s-state-department-idUSKBN1HG2IB [https://perma.cc/RD2E-SCNL]; Yonette Joseph & Christina Caron, *Burning Eyes, Foaming Mouths: Years of Suspected Chemical Attacks in Syria*, N.Y. TIMES (Apr. 8, 2018), https://www.nytimes.com/2018/04/08/world/middleeast/syria-chemical-attacks-assad.html [https://perma.cc/K8CZ-KTF9] (providing a timeline of the major episodes of the suspected chemical attacks); *Syria Civil Defense Condemn Chemical Attack on Douma*, Syrian American Medical Society [SAMS] (Apr. 8, 2018), https://www.sams-usa.net/press_release/sams-syria-civil-defense-condemn-chemical-attack-douma/ [https://perma.cc/5AX5-NVEG] (documenting the various symptoms caused by the chemical weapon attacks).

> [A]n estimated 500 patients presented to health facilities exhibiting signs and symptoms consistent with exposure to toxic chemicals. In particular, there were signs of severe irritation of mucous membranes, respiratory failure and disruption to central nervous systems of those exposed."[29]

Given the Assad regime's failure to fulfill its 2013 commitment to destroying its chemical weapon stockpile,[30] the continued presence and threat of mass atrocity crimes, and the credible documented proof of the attacks, a prima facie case is established.

The second framework criterion is that peaceful options must be exhausted prior to non-UN authorized use of force; these peaceful options include, but are not limited to: peace plans, ceasefires, political sanctions, and targeted economic sanctions.[31] As was the case in 2012, and as is the case even more so in 2018, peaceful attempts at protecting Syria's population and ending the humanitarian crisis have failed.

The Syria crises illustrates the extent to which the international community must exhaust peaceful options before low-intensity military options could be considered. In Syria, the international community has consistently tried to broker peace plans, both through regional organizations and through the UN, with little success. In failing to create a peace plan, the United States, European Union, and Arab League have imposed extensive sanctions that restrict the travel and freeze the assets of Syrian officials,[32] block the purchase of Syrian oil,[33] and target Syrian information technology.[34] The EU has also imposed seventeen rounds of sanctions.[35] Neither the sanctions nor the

29. Jasarevic, *supra* note 28.

30. Daryl Kimbal & Kelsey Davenport, *Timeline of Syrian Chemical Weapons Activity, 2012-2018*, ARMS CONTROL ASSOCIATION (2018), https://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity [https://perma.cc/QQ3T-5DYA].

31. Williams et al., *supra* note 3, at 495.

32. Katherine Marsh, *Syria Sanctions Declared as Violent Crackdown Continues,* THE GUARDIAN, (May 6, 2011, 1:23 PM), https://www.theguardian.com/world/2011/may/06/syria-sanctions-crackdown-eu [https://perma.cc/X22S-4TFN].

33. Indep. Int'l Comm'n of Inquiry, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic ¶ 34, U.N. Doc. A/HCR/21/50 (2012).

34. Press Center, *Fact Sheet: New Executive Order Targeting Human Rights Abuses Via Technology*, U.S. TREASURY DEP'T, OFF. OF PUBLIC AFF. (Apr. 23, 2012), https://www.treasury.gov/press-center/press-releases/Pages/tg1547.aspx [https://perma.cc/4G2L-WLBP].

35. Stephen Castle, *European Union Tightens Sanctions*, N.Y. TIMES (July 24, 2012), https://www.nytimes.com

suggested peace plans have stopped the Assad regime from committing atrocities against its civilian population. It is clear that peaceful attempts to address the Assad regime's behavior have been ineffective and exhausted. Therefore, a non-lethal response to the April 2018 chemical weapon attacks would fail to prompt a change in the regime's behavior.

The third framework criterion requires that the UN Security Council be unable to act in a timely or appropriate manner in response to a humanitarian crisis. As mentioned above, after the April 2018 chemical weapon attacks in Syria, the UN Security Council failed to adopt resolutions that would have provided opportunities for fact-finding missions and future accountability due to Russian vetoes.[36] For example, the U.S. submitted a draft resolution that would have (1) created a UN independent mechanism for one year that would help to identify those responsible for the use of chemical weapons in Syria, (2) condemned the use of chemical weapons by expressing support for the Organization for the Prohibition of Chemical Weapons fact-finding mission, and (3) called on all parties in Syria to cooperate with investigators and humanitarian efforts.[37] Russia's veto of this resolution, as well as its vetoes of past resolutions, indicate that the Security Council is deadlocked. Due to the politics of the Syrian conflict and Russia's loyalty to the Assad regime as demonstrated by these failed resolutions, the Security Council is unable to act in a timely and appropriate manner to address the Assad regime's crimes against its own people.

The fourth tenant of this framework states that any military force used must be limited to low-intensity options designed to protect populations. In the context of the U.S.-led airstrikes responding to Syria's April 2018 chemical weapon attacks, these actions "satisfy both the 'right intentions' and 'proportionality' standards proposed by the International Commission on Intervention and State Sovereignty (ICISS) report and the UN High-level Panel for the legitimate use of force for humanitarian purposes."[38] The missiles used by the U.S.-led coalition were low-intensity in comparison to chemical weapon strikes and were carried out in such a way as to limit

/2012/07/24/world/europe/european-union-tightens-sanctions-on-syria.html [https://perma.cc/6T52-Z3ZM].

36. U.N. NEWS, *supra* note 16.

37. Press Release, Security Council, Following Three Draft Texts on Chemical Weapons Attack in Syria, Security Council Fails to Agree upon Independent Investigative Mechanism, U.N. Press Release SC/13288 (Apr. 10, 2018).

38. Williams et al., *supra* note 3, at 498; R2P Report, *supra* note 4, at XII.

collateral damage.[39] For example, the missiles were launched early on a Saturday morning and were specifically aimed at chemical weapon facilities.[40]

The fifth framework criterion calls for authorization by a legitimate authority, as is required for use of force by the ICISS report.[41] Legitimacy can stem from authorities including regional organizations, coalitions of the willing,[42] or multilateral operations, such as NATO's military intervention in Kosovo.[43] Authority may be established by regional organizations and international coalitions.[44] The U.S.-led action in Syria following the April 2018 chemical weapon attacks were authorized by a legitimate authority—a coalition of the United States, United Kingdom, and France—all of whom felt it was appropriate to respond to the attacks in this way.[45] Notably, the Russian resolution seeking to condemn the U.S., France and the U.K. was defeated in the Security Council, with only three supporting votes: Russia, China, and Bolivia.[46]

The sixth framework criterion is that the intervention must come at the request of credible groups that represent victims of atrocity crimes. In the context of Syria, a request for intervention could result from a consensus among several opposition groups and leaders or from credible members of a group that are being directly impacted by atrocity crimes.[47] This criterion aims to ensure that the victims or potential victims are requesting the military intervention, ensuring the interveners have the right intentions behind their actions. Moreover, this use of military force shall be done collectively by

39. *See* Zachary Cohen & Kevin Liptak, *US, UK and France Launch Syria Strikes Targeting Assad's Chemical Weapons,* CNN POLITICS (Apr. 14, 2018, 11:33 AM), https://www.cnn.com/2018/04/13/politics/trump-us-syria/index.html [https://perma.cc/8YDY-PWXS] (reporting that the launches were "precision strikes" that were "coordinated" and "targeted").

40. *Id.*

41. R2P Report, *supra* note 1, at 32.

42. *Id.* at 54, 59.

43. Saban Kardas, *Humanitarian Intervention: A Conceptual Analysis*, 2 ALTERNATIVES: TURKISH J. OF INT'L REL. 21, 41 (2003); Williams et al., *supra* note 3, at 500.

44. R2P Report, *supra* note 1, at 53-4.

45. Cohen & Liptak, *supra* note 39.

46. Dan Boylan, *U.N. Security Council rejects Russian bid to condemn U.S.-led strikes on Syria*, WASH. TIMES (Apr. 14, 2018), https://www.washingtontimes.com/news/2018/apr/14/un-security-council-rejects-russian-bid-condemn-us/ [https://perma.cc/UU7U-BM2Y].

47. Williams et al., *supra* note 3, at 502.

members of the international community, whether through multilateral operations, regional organizations, or coalitions of the willing to prevent abuse or misguided intentions.

Finally, the seventh tenant of the framework requires that use of force should be followed up with or integrated into a larger strategy and policy for addressing the humanitarian crisis. In doing so, countries and/or regional organizations can ensure that they continue supporting the population in crisis beyond an immediate use of force to protect them. This may include providing guidance and funding in humanitarian aid, stabilization support, and post-war recovery. In the context of Syria, this can include international support of efforts towards accountability, governance, and stabilization. Unfortunately, as announced in August 2018, the Trump administration pulled $230 million in funding to Syria, which was previously allocated for stabilization efforts.[48]

CONCLUSION

R2P offers the opportunity for use of military force in the name of humanitarian intervention without UN authorization, but needs a guiding framework for doing so. Following a framework, such as the one we have proposed in this article, would allow for interventions to protect civilians in situations where the Security Council is gridlocked but a rogue state is actively harming or plans to harm its people and would codify a customary international legal norm for humanitarian intervention. Moreover, this framework would provide opportunities for justifying the use of force along the lines of international law and for the U.S. to cite international law as a legal justification for its actions.

48. Courtney McBride, *U.S. Terminates Funding for Stabilization Efforts in Syria,* WALL ST. J. (Aug. 17, 2018), https://www.wsj.com/articles/u-s-terminates-funding-for-stabilization-efforts-in-syria-1534525186 [https://perma.cc/Y3JH-FR3Q].