

TO RUSSIA WITH LOVE: HOW MORAL ARGUMENTS FOR A HUMANITARIAN INTERVENTION IN SYRIA OPENED THE DOOR FOR AN INVASION OF THE UKRAINE

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The United Nations has been incapable of authorizing an international response to stop the mass atrocities taking place in the Syrian Civil War. This has led some concerned nations to argue for a unilateral military operation based upon the controversial international legal concept titled humanitarian intervention. Humanitarian intervention provides a distinct legal basis for the use of force when there is a moral obligation to protect victims of war crimes, genocide, or other crimes against humanity. This is in contrast to the more conservative approach known as the Responsibility to Protect. Despite the obvious appeal of invoking a progressive use of force doctrine in Syria, relying on moral authority to authorize military action raises a particularly troubling international law question: What keeps an aggressive state from invading another nation under the pretext of stopping a “humanitarian crisis”? The legal justifications for the recent military acts by the Russian Federation in the Ukraine’s Crimean Peninsula starkly illustrate the impossibility of objectively answering this question. The Ukrainian crisis has instead demonstrated that determining when a humanitarian intervention is necessitated is a subjective and political decision. It is this subjectivity which underscores the logic of the post-World War II jus contra bellum prohibition on acts of aggression and why using a moral argument to legally justify the use

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of military force dramatically increases the potential for a new age of nation-state warfare.

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I. INTRODUCTION

Many voices inside and outside of Syria have stated that the international community and the Syrian government have both failed in their responsibility to protect Syrians, a failure that, particularly in light of the alleged attacks, has reached what some are calling a tipping point and requires an immediate and meaningful response.¹

The atrocities associated with the ongoing Syrian Civil War shock the conscience: over 190,000 people dead, millions of refugees and displaced persons, and the annihilation of entire communities.² Yet it is the use of chemical weapons by the Assad regime on its own people that illustrates just how far the conflict has devolved into brutality and savagery. This “moral obscenity,” as Secretary of State Kerry called the

1. *The Crisis in Syria*, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT (last visited Oct. 8, 2013), <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria>.

2. *See Syrian civil war death toll rises to more than 191,300, according to UN*, THE GUARDIAN (Aug. 22, 2014), <http://www.theguardian.com/world/2014/aug/22/syria-civil-war-death-toll-191300-un>. *See also Sam Dagher, Syrian Regime Chokes Off Food to Town that Was Gassed*, WALL ST. J. (Oct. 2, 2013), <http://online.wsj.com/news/articles/SB10001424052702303492504579111662761701676> (explaining that the Syrian regime continues to commit atrocities with attempts to isolate and starve 12,000 civilians in the town of Moadhamiya).

chemical weapon use, dramatically intensified discussions within the international community on how to punish the Assad government while simultaneously stopping the violence.³

The Syrian's callous disregard for the longstanding international norm against the use of chemical weapons has resulted in this moral outrage.⁴ However, the traditional view of international law is careful about conflating moral authority with legality making the legal justification for the use of force in Syria highly questionable.⁵ The United Nations Charter, which regulates the use of force by all nations, expressly states in Article 2, paragraph 4 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."⁶ This broad prohibition on the use of military force is an absolute rule with only two exceptions:⁷ if the U.N. Security Council authorizes military action⁸ or if a state is acting under its inherent right of individual or collective self-

3. Michael R. Gordon & Mark Landler, *Kerry Cites Clear Evidence of Chemical Weapon Use in Syria*, N.Y. TIMES (Aug. 26, 2013), http://www.nytimes.com/2013/08/27/world/middleeast/syria-assad.html?pagewanted=all&_r=0.

4. See, e.g., WHITE HOUSE OFFICE OF LEGISLATIVE AFFAIRS, INTERNATIONAL NORM AGAINST THE USE OF CHEMICAL WEAPONS (2013) (discussing the longstanding and unequivocal international prohibition against the chemical weapons); see also Michael N. Schmitt, *The Syrian Intervention: Assessing the Possible International Law Justifications*, 89 INT'L L. STUD. 744, 749-51 (2013) (explaining why the Syrian violation of the Chemical Weapons Convention does not justify an international military response).

5. See Schmitt, *supra* note 4, at 746 (concluding "that there is no unassailable legal basis for" U.S. military operations in Syria); Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapons Attacks*, 17 AM. SOC'Y OF INT'L L. INSIGHTS, Aug. 30, 2013, <http://www.asil.org/insights/volume/17/issue/21/legality-intervention-syria-response-chemical-weapon-attacks>.

6. U.N. Charter art. 2, para. 4.

7. In recent comments concerning Syria, the U.N. Secretary General has reiterated that these remain the only two exceptions to the use of force. See U.N. Secretary-General, Press Encounter on Syria (Sept. 3, 2013), <http://www.un.org/sg/offthecuff/index.asp?nid=2967> ("The use of force is lawful only when in exercise of self-defense in accordance with Article 51 of the United Nations Charter and/or when the Security Council approves such action.").

8. U.N. Charter art. 39.

defense.⁹ As there is no U.N. Security Council Resolution authorizing action in Syria and no international actor can justifiably claim either form of self-defense, the use of military force is legally prohibited by existing international law.¹⁰

Frustrated by this traditional legal interpretation, and appalled at the barbarity taking place in Syria, many argue that the moral imperative to stop the humanitarian crisis trumps a technical reading of the law.¹¹ Others go further and argue that this moral obligation to act triggers an alternative legal concept titled humanitarian intervention.¹² Based upon the same theoretical underpinnings as the concept of Responsibility to Protect (“R2P”), but not limited by the same pragmatic limitations,¹³ humanitarian intervention provides a distinct legal basis for the use of force when there is a moral obligation to protect victims of war crimes, genocide, or other crimes against humanity.¹⁴ Humanitarian intervention,

9. *Id.* art. 51. When a state can justifiably exercise its right of self-defense is debatable and outside the scope of this paper. For a more detailed discussion *see generally* INT’L & OPERATIONAL LAW DEP’T, LAW OF ARMED CONFLICT DESKBOOK 35-40 (William J. Johnson & Andrew D. Gillman eds., 2012) [hereinafter DESKBOOK] (discussing the various views on the inherent right of self-defense in *ius ad bellum*).

10. *See* Anderson, *supra* note 5. Professor Anderson notes that “neither the United States nor its allies have themselves been attacked” and thus there is “no basis for invoking individual self-defense.” *Id.* Additionally, he concludes that the United States cannot act under any theory of collective self-defense as it is the prerogative of the U.N. Security Council to determine if a state poses a threat to international peace and security, which it has not done in this particular case. *Id.* *See also* Schmitt, *supra* note 4, at 747 (stating “there is no basis for immediate or anticipatory self or collective self defense against a paradigmatic armed attack.”).

11. *See, e.g.*, Ian Hurd, *Bomb Syria, Even If It Is Illegal*, N.Y. TIMES (Aug. 28, 2013), http://www.nytimes.com/2013/08/28/opinion/bomb-syria-even-if-it-is-illegal.html?_r=0 (“There are moral reasons for disregarding the law, and I believe the Obama administration should intervene in Syria. But it should not pretend that there is a legal justification in existing law.”).

12. Anderson, *supra* note 5 (discussing options outside of the traditional international law for military action in Syria).

13. *See infra* text and accompanying notes 21-57 for a discussion on the differences between R2P and humanitarian intervention.

14. Majorie Cohn, *The Myth of Humanitarian Intervention in Kosovo*, in LESSONS OF KOSOVO: DANGERS OF HUMANITARIAN INTERVENTION 121, 137-38 (Alexsander Jokic ed., 2001) (citing KENJI URATA, CRITICISM OF “HUMANITARIAN

unlike R2P, thus allows for a unilateral use of military force based solely upon the moral imperative to stop an ongoing crisis.¹⁵ Believing that such a moral obligation currently exists in Syria, these proponents argue this “third” exception to Article 2(4) of the U.N. Charter is clearly applicable.

Yet despite the obvious appeal of invoking a progressive use of force doctrine in Syria, relying on moral authority to authorize military action raises a number of international legal questions. For example, what makes Syria’s circumstances different than the slaughter in Darfur or the enslavement, torture, and starvation of the millions in North Korea? When does the moral responsibility that justified the intervention end? Who is responsible for governing if there is regime change? Of all the unanswered questions perhaps the most troubling is what keeps an aggressive state from invading another nation under the pretext of stopping a “humanitarian crisis”? Despite efforts to define when the right to a humanitarian intervention is triggered,¹⁶ the legal justifications for the recent military acts by the Russian Federation in the Ukraine’s Crimean Peninsula starkly illustrate the impossibility of objectively answering this question.¹⁷ The Ukrainian crisis has instead demonstrated

INTERVENTION”: THE PERSPECTIVE OF THE JAPANESE CONSTITUTION 58 (2001)) (“The general notion of humanitarian intervention is the use of force or threat of force by third countries, individually or collectively, to protect people from a government which continuously and arbitrarily subjects people living in its own territory to inhumane treatment.”).

15. See, e.g., *Chemical Weapon Use by Syrian Regime: UK Government Legal Position*, GOV.UK (Aug. 29, 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#contents> (noting that the UK is permitted to intervene in Syria under the doctrine of humanitarian intervention).

16. See *infra* text and accompanying note 49-53 (discussing the U.K.’s conditions which must be met before the right to intervene for humanitarian purposes is triggered).

17. See, e.g., *Transcript: Putin defends Russian Intervention in Ukraine*, WASH. POST (Mar. 4, 2014), available at http://www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-in-ukraine/2014/03/04/9cadc1a-a3a9-11e3-a5fa-55f0c77bf39c_story.html (explaining that the intervention in the Ukraine is based upon a request for aid by the deposed legitimate government as well as for various humanitarian purposes including protecting citizens from anti-Semitic violence).

that determining when a humanitarian intervention is necessitated is a subjective and political decision.¹⁸ It is this subjectivity which underscores the logic of the post-World War II *jus contra bellum* prohibition on acts of aggression¹⁹ and why using a moral argument to legally justify the use of military force dramatically increases the potential for a new age of nation-state warfare.

This article will support this proposition by first exploring the shared history of R2P and humanitarian intervention to highlight how the doctrines diverged on the question of unilateral use of military force in a mass atrocity situation. In contrast to R2P, humanitarian intervention equates the moral imperative to stop an ongoing mass atrocity with legal justification, and thus, a discussion on the associated problems with this position and the risks of creating legal authority based upon moral judgments will follow. The article will conclude that finding an independent legal basis for use of force outside the existing *jus ad bellum* construct²⁰ is ill-advised as it may harbor a return to the international Darwinism that led to the wars of annihilation in the 20th Century.

18. See Alison Smale & Steven Erlanger, *Ukraine Mobilizes Reserve Troops, Threatening War*, N.Y. TIMES (Mar. 1, 2014), available at http://www.nytimes.com/2014/03/02/world/europe/ukraine.html?_r=0 (noting that President Obama has called the invasion of the Ukraine a violation of international law while the Russians claim they are attempting to avert a “humanitarian catastrophe” as a justification for the territorial violation).

19. See Raphael Van Steenberghe, *The Law against War or Jus contra Bellum: A New Terminology for a Conservative View on the Use of Force*, 24 LEIDEN J. OF INT’L 747, 748 (2011) (referring to the basic rule, as outlined in the U.N. charter, that wars of aggression are prohibited in contemporary international relations); see also THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 117 (Bruno Simma & Hermann Mosler eds., 2d ed. 2002).

20. The *jus ad bellum* lays the framework for when a state actor may resort to war. See Shane R. Reeves & David Lai, *A Broad Overview of the Law of Armed Conflict in the Age of Terror*, in THE FUNDAMENTALS OF COUNTERTERRORISM LAW 139, 141 (Lynne Zusman ed.). This body of law is governed by the United Nations Charter which only allows for the use of force in cases of self-defense or if condoned by the collective judgment of the international community. *Id.*

II. R2P OR HUMANITARIAN INTERVENTION?

In the contemporary lexicon “R2P” and “humanitarian intervention” are often used interchangeably and generally understood as the same controversial “third” exception to the rule of non-intervention established in Article 2(4) of the U.N. Charter.²¹ Despite the increasing merger of the two terms in usage, the concepts are distinct, with R2P referencing the moral obligation to prevent mass atrocities while humanitarian intervention is an international legal concept, which arguably justifies the unilateral use of military force to avert a crisis.²² A short discussion on the common background between humanitarian intervention and R2P illustrates their distinct approaches to the use of military force.

The 1999 NATO bombing campaign of Kosovo, known as Operation Allied Force, was a military operation conducted outside the U.N. traditional use of force framework and defended as a humanitarian intervention.²³ Rightly interpreted as a novel exception to the U.N. Charter’s general prohibition on the use of force,²⁴ this extra-legal military operation was “far from celebrated” and caused grave worries

21. See, e.g., DESKBOOK, *supra* note 9, at 31 (noting that humanitarian intervention and Responsibility to Protect are synonymous); Mark Kersten, *Whose R2P Is It? The Responsibility to Protect Post-Syria*, JUST. IN CONFLICT, (Sept. 3, 2013), <http://justiceinconflict.org/2013/09/03/whose-r2p-is-it-the-responsibility-to-protect-post-syria/> (last visited Mar. 19, 2014) (discussing different views on R2P including the belief that it is the equivalent to a separate legal basis for use of force).

22. See GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 44 (2008) (noting that R2P is more than simply another name for humanitarian intervention); Schmitt, *supra* note 4, at 752-55.

23. See generally Marjorie Cohn, *United States Violation of International Law in Yugoslavia, Afghanistan and Iraq*, in CHALLENGES OF MULTI-LEVEL CONSTITUTIONALISM 233, 234 (Nergelius, Policastro & Urata eds., 2004) (stating “NATO purposely bypassed the UN, and in so doing, violated the Charter of the United Nations.”); see Eve Massingham, *Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?*, 91 INT’L REV. RED CROSS 803, 810-15 (2009) (detailing history of humanitarian interventions conducted without U.N. approval).

24. See Cohn, *supra* note 23, at 237 (noting “the general notion of humanitarian intervention is the use of force or threat of force by third countries, individually or collectively, to protect people from a government which continuously and arbitrarily subjects people living in its own territory to inhumane treatment”).

amongst the international community about the traditional principles of non-intervention and state sovereignty.²⁵ Simultaneous with these concerns, however, was a growing recognition that emphasis on state sovereignty often acted as a defense for internal mass atrocities leading then U.N. Secretary General Kofi Annan to comment “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?”²⁶ In answering this question the international community, first through the finding of the International Commission on Intervention and State Sovereignty²⁷ and later with a 2004 Report titled “A More Secure World: Our Shared Responsibility,”²⁸ began to coalesce around the idea that state sovereignty could not act as an absolute shield from military intervention when mass atrocities were taking place.²⁹

25. Anderson, *supra* note 5, at 3 (“[F]ar from celebrating the new humanitarianism that the United States and NATO believed they found in the 1999 Kosovo intervention, [the international community was] gravely worried by it.”).

26. See Rep. of the Int’l Comm’n on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, ¶ VII, (Int’l Dev. Res. Centre, Ottawa, 2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited 8 Oct. 2013).

27. See *id.* (describing the mandate of the Commission as an attempt to “build a broader understanding of the problem of reconciling intervention for human protection purposes and sovereignty.”); see generally Evans, *supra* note 22 (discussing that simultaneous with a state’s right to self-government comes a concomitant obligation to protect its population).

28. Rep. of the Secretary General’s High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (2004) [hereinafter *Our Shared Responsibility*], available at http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf (discussing, in Part III, the collective use of force to stop mass atrocities and endorsing the idea of a “responsibility to protect”).

29. *Id.* at 66 (“We endorse the emerging norm that there is a collective international responsibility to protect . . . in the event of genocide or other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.”).

In an attempt to reconcile this emerging norm with the long-established belief in the inviolability of state sovereignty³⁰ a pragmatic compromise was struck in the 2005 World Summit Outcome Document.³¹ While the document, which was later endorsed by U.N.

30. See U.N. Charter art. 2, ¶ 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . but this principle shall not prejudice the application of enforcement measures under Chapter VII.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987) (defining international law as “rules and principles of general application dealing with the conduct of States and of international organizations and with their relations inter se, as well as some of their relations with persons, whether natural or juridical.”).

31. See 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138-39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). Those paragraphs provide as follows:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as

Security Council Resolution 1674,³² recognized the existence of a responsibility to protect victims of mass atrocities, it did so without creating a novel legal justification for military intervention.³³ Titled appropriately “Responsibility to Protect,” or “R2P,” the concept, as articulated in the document, obligates a state to prevent internal acts of genocide, war crimes, ethnic cleansing, and crimes against humanity.³⁴ The international community, for its part, is to help and encourage compliance with this responsibility to protect and, in circumstances where a state is unwilling or incapable of complying, is authorized to intervene to stop the mass atrocities.³⁵ However, fearful of inadvertently providing justification for unilateral state action, the international community deliberately chose a “gradual, cautious evolution toward R2P strictly within the Security Council.”³⁶ As a result R2P, though recognizing the moral obligation to stop mass atrocities, does not provide an “independent legal basis for using force to intervene in another [s]tate.”³⁷

As the responsibility to protect only allows for the international community to use military force with Security Council approval, R2P is best understood as a government’s moral obligation to prevent internal mass atrocities against their populations and not as a unique code necessitating international military intervention.³⁸ This contemporary

necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

32. S.C. Res. 1674, ¶4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (reaffirming paragraphs 138 and 139 of the 2005 World Summit Outcome Document).

33. See 2005 World Summit Outcome, *supra* note 31.

34. *Id.* ¶ 139.

35. *Id.*

36. Anderson, *supra* note 5.

37. Schmitt, *supra* note 4, at 753; see also 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

38. See Samantha Power, U.S. Permanent Representative to the United Nations, Statement at an Informal Interactive Dialogue on the Responsibility to Protect: United States Mission to the United Nations (Sept. 11, 2013), available at <http://usun.state.gov/briefing/statements/214066.htm> (discussing the validity of the Responsibility to Protect as a doctrine to prevent mass atrocities but not necessarily as a

version of R2P, while providing moral legitimacy to the idea of preventing mass atrocities, is often criticized as ineffectual in stopping an ongoing humanitarian crisis.³⁹ Believing that “in order [to] secure consensus, the concept’s advocates [] abandoned many of its central tenets,” including creative options to circumvent a deadlocked Security Council,⁴⁰ critics view the compromised version of R2P as a reinforcement of the status quo. As the status quo, and particularly Security Council intransigence when confronted with a humanitarian crisis, was the very reason for the inception of R2P,⁴¹ continued reliance on a system that is “neither very consistent nor very effective in dealing with these cases, very often acting too late, too hesitantly or not at all” is dismissed by some as an inadequate solution to the mass atrocity problem.⁴²

The Security Council deliberations on the current Syrian crisis have seemingly validated the criticism of the “watered down” version of R2P⁴³ as both Russia and China have obstructed any international intervention to stop the violence.⁴⁴ Samantha Powers, the U.S. ambassador to the U.N., has condemned Russia for “continu[ing] to hold the council hostage and shirk[ing] its international responsibilities” by

justification for a military intervention); Schmitt, *supra* note 4, at 753 (“It must be emphasized that R2P is a political mechanism and moral imperative, not a legal obligation or right.”).

39. See generally Kersten, *supra* note 21.

40. Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 ETHICS & INT’L AFFAIRS 143, 146, 168 (2006).

41. See Massingham, *supra* note 23, at 810 (discussing the reasons behind the genesis of the Responsibility to Protect concept).

42. *Our Shared Responsibility*, *supra* note 28, at ¶ 202.

43. See Bellamy, *supra* note 40, at 144-45 (noting that many scholars have argued that the responsibility to protect is “watered down” and incapable of addressing humanitarian disasters); Paul R. Williams, J. Trevor Ulbrick & Jonathan Worboys, *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT’L L. 473, 479-80 (2012) (discussing why the Responsibility to Protect concept developed).

44. See, e.g., Louis Charbonneau, *U.S. Gives up on U.N. Security Council in Syria Crisis, Blames Russia*, REUTERS (Sept. 5, 2013), available at <http://www.reuters.com/article/2013/09/05/us-syria-crisis-un-usa-idUSBRE9840W420130905>.

their threat to veto any measure allowing for intervention into Syria.⁴⁵ Yet the simple, and often frustrating, truth is that the Security Council veto system purposefully allows for a permanent member to unilaterally block international action even if it may mean a state commits mass atrocity crimes against their own citizens.⁴⁶ Under existing international law, any intervention, including an exercise of R2P, without a UN mandate may perhaps be “right, necessary, and humane” yet remain illegal.⁴⁷ The gap between moral and legal justification for military intervention is particularly troubling to those acutely aware of the continuing savagery in Syria. For this reason a separate humanitarian intervention “exception” to the traditional use of force paradigm has reemerged as a distinct and separate concept from the contemporary version of R2P.⁴⁸

Proponents of action in Syria are again arguing “that there exists a right to intervene within the territory of another state (without that state’s consent, and without [Security Council] authorization) in order to prevent certain large scale atrocities or deprivations.”⁴⁹ Particularly vocal in embracing the doctrine of humanitarian intervention is the U.K., which openly states that the concept provides legal justification for a

45. *See id.* (“In the wake of the flagrant shattering of the international norm against chemical weapons use, Russia continues to hold the council hostage and shirk its international responsibilities, including as a party to the chemical weapons convention.”).

46. Williams, Ulbrick & Worboys, *supra* note 43, at 476. *But see* GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 27 (2012) (discussing the first successful “exercise of R2P” by the United Nations in March 2011 to stop the Libyan state from killing civilians who were attempting to overthrow the Qaddafi regime).

47. David Kaye, *The Legal Consequences of Illegal Wars*, FOREIGN AFFAIRS SNAPSHOT 3 (Aug. 29, 2013), available at <http://www.foreignaffairs.com/articles/139886/david-kaye/the-legal-consequences-of-illegal-wars> (stating that an intervention in Syria may be moral and just “but it won’t be legal, and no creative amount of lawyering can make it so”).

48. Massingham, *supra* note 23, at 825 (“Indeed the R2P effectively concedes that morally legitimate but illegal military interventions will continue to take place in order to protect populations due to inactivity by the Security Council.”).

49. CORN ET AL., *supra* note 46, at 27.

military operation against Syria.⁵⁰ The U.K. has gone so far as to articulate the conditions that trigger the legal right to intervene for humanitarian purposes. These conditions include:

- (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;
- (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).⁵¹

Professor Michael Schmitt notes that there is arguably a fourth criterion—“the intervention must be likely to significantly alleviate the suffering to a degree not possible through non-forceful measures”—prior to a legal humanitarian intervention.⁵² Assuming these conditions are met, humanitarian interventionists believe that international law allows for military action “to alleviate the scale of the overwhelming humanitarian catastrophe in Syria” even if action is blocked in the Security Council.⁵³

50. UK Prime Minister, *Chemical Weapon Use by Syrian Regime: UK Government Legal Position*, GOV.UK (Aug. 29, 2013), available at <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 Government Legal Position*] (discussing how eventually the U.K. Parliament rejected the idea of intervening in Syria). See *Syrian Crisis: Cameron Loses Commons Vote on Syria Action*, BBC, available at <http://www.bbc.com/news/uk-politics-23892783> (last visited Mar. 18, 2014).

51. *UK Government Legal Position*, *supra* note 50.

52. Schmitt, *supra* note 4, at 754-55.

53. *UK Government Legal Position*, *supra* note 50.

Whether humanitarian intervention is a legal justification for violating state sovereignty remains an extremely controversial issue.⁵⁴ Yet for those who believe state actors are morally obligated to intervene to avert a humanitarian crisis this is not a difficult question.⁵⁵ To humanitarian interventionists moral legitimacy equates to legal justification regardless of the Security Council deliberations.⁵⁶ While this clearly expedites use of force decisions, a humanitarian intervention is not without consequence. The moral legitimacy of a military intervention, even if widely accepted by the international community, requires a subjective determination that an offending state is violating their fundamental obligations. This determination, done outside of the collective judgment of the Security Council, allows individual states the future discretion to determine when a humanitarian intervention is a moral imperative and legally justified. Thus, while the legal concept of humanitarian intervention may allow for a solution to an immediate crisis, such as that in Syria, it may also allow for an opportunist state, such as Russia, to exploit the amorphous nature of morality to justify an intervention into a coveted territory, such as the Ukraine, for geographic or political

54. See Schmitt, *supra* note 4, at 752-54 (discussing whether humanitarian intervention as a legal concept, though not discussed in any conventional law, “has crystallized into customary law over the past decades”); CORN ET AL., *supra* note 46, at 27-28 (“[T]he international community is still deeply divided on the legality of humanitarian intervention.”). One alternative argument is that a humanitarian intervention does not violate Article 2(4) “because the purpose is not to affect the territorial integrity or political independence of the State.” *Id.* at 27. As a result, “the intervening State bears the heavy burden of proving its ‘pure motive’” with any aggressive perceptions undermining the intervention. *Id.* This is a questionable assertion as any intervention will violate the territorial integrity of a state acting contrary to the well-established belief in the inviolability of state sovereignty. See U.N. Charter art. 2, ¶ 7. Additionally, the purpose of the intervention will undoubtedly be to depose the political rulers responsible for the atrocities.

55. See, e.g., *UK Government Legal Position*, *supra* note 50 (stating that even if the United Nations blocked a resolution to act in Syria “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.”).

56. See Massingham, *supra* note 23, at 825.

purposes.⁵⁷ The potential risks to the international order of allowing decentralized use of force decisions based upon subjective moral judgments is therefore obvious and requires a more detailed analysis.

III. IS THERE A CONNECTION BETWEEN LAW AND MORALITY IN USE OF FORCE DETERMINATIONS?

Whether there is a necessary connection between law and morality is a long-standing debate amongst legal philosophers.⁵⁸ On one side are natural law theorists who assert that a connection does exist. To these natural law adherents there are moral rules or principles that inform any legitimate body of law.⁵⁹ Written, or positive law, must be in congruity with these moral principles or it is deemed “immoral,” “wrong,” or “unjust.”⁶⁰ If the positive law is disconnected from the prevailing view of morality there are a variety of natural law responses. A “traditional” natural law theorist will ignore the immoral positive law as they believe “there *can* be laws that are so unjust, so socially detrimental that . . . their very character as laws [] must be denied.”⁶¹ To a “new” natural law

57. See, e.g., Harriet Torry & Bertrand Benoit, *Watchdog Sees No Threat to Ethnic Russians*, WALL ST. J., Mar. 12, 2014, at A10 (noting that the Council of Europe, an organization that eschews political judgment, made clear that there was no legal justification for Russia’s intervention into Crimea and quoting Thorbjorn Jagland, Secretary-General of the Council of Europe, as saying “[w]e don’t actually see any signs of real threat to the minorities or the Russian majorities [in Ukraine]”).

58. This topic, and particularly how the post-World War II German legal system should respond to Nazi crimes, was famously debated in the 1958 Harvard Law Review between the preeminent legal positivist H.L.A. Hart and the equally well-known natural law theorist Lon Fuller. Compare H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), with Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). The debate stands as the most important discussion on these topics and remains extraordinarily relevant in the contemporary legal environment. For a more detailed discussion see Editorial Board, *Foreword: 50 Years Later*, 83 N.Y.U. L. REV. 993 (2008).

59. See ANDREW ALTMAN, ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 42 (2nd ed. 2001) (“[N]atural law claims to be universally valid, imposing obligations on every individual in every country and historical era.”).

60. See *id.*

61. Gustav Radbruch, *Five Minutes of Legal Philosophy*, rpt. in PHILOSOPHY OF LAW 103-04 (J. Feinberg & H. Gross eds., 1991); St. Thomas Aquinas, SUMMA

theorist any genuine system of law will abide by certain moral principles.⁶² A positive law inconsistent with these principles may not necessarily be ignored, but will raise legitimacy concerns about the legal system in which the statute was promulgated.⁶³ Other contemporary natural law adherents will apply moral judgments when interpreting a written provision allowing for alternative interpretations of the positive law.⁶⁴ Despite the differences among the various natural law theories all commonly hold the belief that there is an important and necessary connection between law and morality, which explains when a legal obligation or right exists.

On the other side of this debate are the legal positivists who deny any such connection exists between law and morality. Believing that individuals must distinguish the law as it is from the *law that ought to be*, positive law theorists separate the idea of legal and moral rights.⁶⁵ In contrast to the natural law theorists, legal positivists view any deviation from the written law as dangerously arbitrary regardless of the “merit or demerit” of the provision.⁶⁶ To a legal positivist moral judgments are irrelevant as the written law controls when an obligation is imposed. The law is therefore not defined by the subjectivity of moral rights and wrongs but rather through objective and enforceable rules. These rules derive their power not from moral virtue—as morality is different for all—but rather from the decision to enforce the law and hold accountable those who violate these binding provisions.⁶⁷

THEOLOGICA QUESTIONS 90-97 97(Gateway ed. 1992) (“[A] law that is not just, seems to be no law at all.” (quoting St. Augustine)).

62. ALTMAN, *supra* note 59, at 54.

63. See generally LON FULLER, *THE MORALITY OF LAW* (1964) (discussing the natural laws required to create a functioning legal system).

64. See RONALD DWORKIN, *LAW’S EMPIRE* 17 (1986)(stating “judges before whom a statute is laid need to construct the ‘real’ statute—a statement of what difference the statute makes to the legal rights of various people—from the text in the statute book.”).

65. H.L.A. Hart, *supra* note 58, at 593.

66. See JOHN AUSTIN, *LECTURES ON JURISPRUDENCE OR, THE PHILOSOPHY OF POSITIVE LAW* 220 (Robert Campbell 3rd ed. 1869) (“A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text by which we regulate our approbation and disapprobation.”).

67. ALTMAN, *supra* note 59, at 66-76.

Each particular legal philosophy obviously has strengths and weaknesses. The connection between morality and law espoused by natural law theorists ensures that evil actions are not ignored or shielded by illogical positive law. However, reliance on morality as the basis for determining legal obligations and rights also injects subjectivity, arbitrariness, and unpredictability into this determination. By disconnecting the law from morality legal positivists eliminate moral discernments from discussions concerning legal obligations and rights. Yet by disallowing moral judgment, grossly immoral acts and injustices may exist if the positive law allows, or inadvertently protects, for such acts.⁶⁸ Though both philosophies are imperfect each offers distinct and unique virtues to those trying to determine when a legal obligation or right exists.⁶⁹

Understanding the general contours of this philosophical debate helps answer how and why international law regulates use of military force determinations. Both natural law and legal positivism underlie a portion of the law of armed conflict, known as *jus ad bellum*, which “refers to the conditions under which one may resort to war or to force in general.”⁷⁰ *Jus ad bellum* is “governed by an important, but distinct, part

68. The Nuremberg Trial is a dramatic example of when these “opposing theories of the nature of law came into collision.” *Id.* at 49. Both natural law and legal positivism “were part of the debate over Nuremberg” as the trial and the crimes charged were unprecedented. *Id.* For an excellent discussion on how the Nuremberg Trial was a natural law and legal positivism amalgamation. *See id.* at 43-49.

69. An alternative to both natural law and legal positivism is legal realism. A legal realist dismisses natural law’s reliance on morality and legal positivism’s sometimes absurd results. *See generally* Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897). Realism instead is the “accurate recording of things as they are, as contrasted with things as they are imagined to be or wished to be or as one feels they ought to be.” N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 192 (1997). Thus, legal realists are pragmatic in their approach to the law focusing on “the ends sought to be attained and the reasons for desiring them.” Holmes Jr., *supra* note 69, at 474. This often means that a realist will make situation specific decisions based upon a conflux of concerns including what the law says, moral judgment, social concerns and political realities. *See id.* However, this pragmatic approach to legal determinations suffers from the same flaws as natural law; namely, arbitrariness and subjectivity.

70. Robert Kolb, *Origin of the Twin Terms Jus Ad Bellum/Jus In Bello*, 320 INT’L REV. RED CROSS 553, 553 n.1, (Oct. 31, 1997), available at

of the international law set out in the United Nations Charter.”⁷¹ The U.N. Charter, drafted as a response to the naked aggression of the Axis powers,⁷² prohibits the threat or use of force by any state.⁷³ This prohibition is absolute with only two generally recognized exceptions.⁷⁴ The first exception reserves to the Security Council the right to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and the power to “decide what measures shall be taken . . . to maintain or restore international peace and security.”⁷⁵ The second exception ensures that states retain the “inherent” right of

<http://www.icrc.org/eng/resources/documents/misc/57jnuu.htm> (last visited June 22, 2013). In contrast, *jus in bello* “governs the conduct of belligerents during a war, and in a broader sense comprises the rights and obligations of neutral parties as well.” *Id.* *Jus ad bellum* and *jus in bello* together are the law of armed conflict. See Reeves & Lai, *supra* note 20, at 140-42.

71. ICRC, Advisory Service on International Humanitarian Law, *What is International Humanitarian Law?* 1, available at https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (last visited Oct. 16, 2014). See also DESKBOOK, *supra* note 9, at 29 (“modern *jus ad bellum* (the law governing a State’s resort to force) is reflected in the United Nations (UN) Charter.”).

72. See U.N. Charter pmbl. (“We the Peoples of the United Nations Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”).

73. *Id.* at art. 2, ¶ 4 (“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 . . .”). The U.N. Charter’s general prohibition on the use of force echoes the ban on wars of aggression, or “the renunciation of war as an instrument of national policy” agreed to in the Kellogg-Briand Pact of 1928. See Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57.

74. “Consent” is considered by some as a third exception to the general prohibition on the use of force. The U.N. Charter allows nations to deal with internal domestic matters. See U.N. Charter art. 2, ¶ 7. If a nation requests “the aid of a fellow nation or ally, that fellow nation or ally is free to use force within the boundaries of the requesting nation.” CORN ET AL., *supra* note 46, at 17. But see DESKBOOK, *supra* note 9, at 31 (“Consent is not a separate exception to Article 2(4). If a state is using force with the consent of host state, then there is no violation of the host state’s territorial integrity or political independence; thus, there is no need for an exception to the rule.”).

75. U.N. Charter at art. 39.

individual or collective self-defense if they are the victims of an armed attack.⁷⁶

The U.N. Charter's clear prohibition on an individual state threatening or using force is not an accident. The unprecedented destruction and devastation of World War II, coupled with the ineffectiveness of earlier attempts to end aggressive war,⁷⁷ demonstrated to world powers the need for a collective body of the international community to maintain peace and security.⁷⁸ The result was the creation of the United Nations and the drafting of the U.N. Charter.⁷⁹ The U.N. Charter expressly outlines the rights and responsibilities of the collective known as the United Nations.⁸⁰ Chief among these responsibilities is an obligation to suppress "acts of aggression or other breaches of the peace"⁸¹ and, if necessary, to use armed force for the collective good.⁸² The decision whether there exists a threat to international peace, and if a military response is justified, is left to the subset of nations that comprise the U.N. Security Council.⁸³ The Security Council, empowered by the rest of the

76. *Id.* at art. 51.

77. These earlier attempts, such as the League of Nations and the Kellogg-Briand Pact, however did lay the intellectual foundation for the universally recognized ban on aggressive war. *See* DESKBOOK, *supra* note 9, at 15. For a broader discussion on the failure of the pre-World War II attempts at regulating the use of force *see* CORN ET AL., *supra* note 46, at 2-4.

78. *History of the Nations: Moscow and Teheran Conferences*, UN.ORG, <http://www.un.org/en/aboutun/history/moscowteheran.shtml> (last visited Mar. 12, 2014) ("[B]y 1943 all the principal Allied nations were committed to outright victory and, thereafter, to an attempt to create a world in which 'men in all lands may live out their lives in freedom from fear and want.'"); DESKBOOK, *supra* note 9, at 15 (discussing how post-World War II the international community recognized the need for a world body with greater power to prevent war).

79. *See* U.N. Charter pmbl.

80. *Id.* at art. 1.

81. *Id.*

82. *Id.* at pmbl.

83. *Id.* at art. 39. The Security Council "consists of fifteen members, five of which are permanent—China, Russia, France, the United Kingdom, and the United States—and ten of which are elected for two-year terms, based on geographical representation." CORN ET AL., *supra* note 46, at 6. Each member has "one vote and nine votes are sufficient to take an action, but no resolution, except those of a procedural nature, can pass over the veto of one of the permanent five members." *Id.*

international community, is the final arbiter of these decisions and the only source of authority allowing for a military intervention.⁸⁴ Individual nations, therefore, do not have discretion to initiate a war as the U.N. Charter makes clear that all states are disallowed from the aggressive use of force.⁸⁵

The nations who formulated the U.N. Charter envisioned a system in which the United Nations, through the Security Council, would control the use of force in international law.⁸⁶ There is no doubt that this vision is now reality, and the use of force regulatory framework established in the U.N. Charter is binding on the entirety of the world body whether through membership⁸⁷ or customary international law.⁸⁸ The document embodies the legal positivist belief in strict adherence to the law as this ensures that individual states are precluded from waging aggressive war.

84. *See id.* at 24 (“[M]embers confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”).

85. *See History of the United Nations: Dumbarton Oaks and Yalta*, UNITED NATIONS, http://www.un.org/en/aboutun/history/dumbarton_yalta.shtml (last visited Sept. 8, 2014) (noting “[t]he essence of the plan was that responsibility for preventing future war should be conferred upon the Security Council.”); CORN ET AL., *supra* note 46, at 4 (“One of the key goals of the Charter was to establish a presumptive prohibition on the use of force by States.”).

86. *See* CORN ET AL., *supra* note 46, at 12.

87. *U.N. Member States: On the Record*, UNITED NATIONS, <https://www.un.org/depts/dhl/unms/whatisms.shtml> (last visited Mar. 13, 2014) (“Currently there are 193 Member States of the United Nations.”); *see also* U.N. Charter art. 25 (Each member agrees to “accept and carry out the decisions of the Security Council.”).

88. *See Military and Paramilitary in and Against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, 1986 I.C.J. 14, ¶¶ 187-190 (June 27) [hereinafter *Nicaragua v. United States*] (finding that the U.N. Charter is customary international law). Customary international law results from the general and consistent practice of States followed from a sense of legal obligation. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 102(2) cmt. c. (1987); *see also Customary IHL: Introduction*, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin_#Fn_29_14 (last visited Mar. 13, 2014) (stating “customary international law require[d] the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinion juris sive necessitates*).”).

While a state may disagree with the Security Council's use of force decision they are bound by the U.N. Charter to accept that decision.⁸⁹ Allowing a state to act outside the U.N. constructed framework invites a return to the arbitrary and subjective wars that led to World War II. Thus, the U.N. Charter makes clear that deviations from the Security Council's decision, for any reason, are simply not allowed, as this is the only way to "save succeeding generations from the scourge of war."⁹⁰

The U.N. Charter's bifurcation of a state's legal authority to engage in aggressive warfare from its belief in the wisdom of engaging in aggressive warfare is clearly based upon legal positivist reasoning.⁹¹ However, the U.N. Charter is not devoid of the influence of natural law as the document allows a state to make an individual use of force determination if exercising their inherent right of self-defense.⁹² This right was a well-established international norm prior to the drafting of the U.N. Charter and is generally recognized as customary international

89. Of course the Security Council's decisions may be construed as subjective; however, the international community empowered the Security Council with this authority and thus their decisions are lawful commands. *See generally* ALTMAN, *supra* note 59, at 45-47. Some question whether positive law can be the source for international law as "there is no global sovereign who enforces international treaties and agreements." *Id.* at 46. Others reject this premise by arguing that states have consented to be obligated by, and held accountable to, international law. *See id.* at 47-48.

90. *See* U.N. Charter pmbi.

91. As the U.N. Charter is the unquestioned authority on use of force decisions, semantics and definitions are clearly important. However, the U.N. Charter does not define what "use of force" means leaving some discretion to individual states. The International Criminal Tribunal for the Former Yugoslavia somewhat addressed this issue by stating "an armed conflict exists whenever there is a resort to armed force between State or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Prosecutor v. Tadic*, Case No. IT-94-1AR721, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Though not addressing the definition directly, this statement infers "that activities that directly lead to an armed conflict may be a use of force." CORN ET AL., *supra* note 46, at 15.

92. U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

law.⁹³ The customary definition, most famously outlined in the Caroline Doctrine,⁹⁴ allows a state to use force if they “show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁹⁵ But, even if force is necessary, it cannot be “unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”⁹⁶ Using force in self-defense, according to this customary definition, is therefore allowed if it is necessary and used in a proportionate manner.⁹⁷

Customary international law thus imparts on the state’s independent authority to determine when it is necessary to exercise this inherent right. According to the language expressed in the Caroline Doctrine, this authority is broad and may include using force in an anticipatory manner

93. See *Nicaragua v. United States*, *supra* note 88, at § 187 (“The exception of the right of individual or collective self-defence is also, in the view of States, established in customary law, as is apparent for example from the terms of Article 51 of the United Nations Charter, which refers to an ‘inherent right.’”); See also YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF DEFENSE* 181 (2005).

94. A 1837 incident on Lake Erie between the United States and the British concerning the *Caroline*, a U.S. flagged ship, led to correspondence between Secretary of State Daniel Webster and the British Foreign Officer Lord Ashburton concerning a state’s right to assert self-defense. See generally John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 59-61 (2010).

95. In this correspondence Webster posited that a State does have an inherent right to self-defense, but can only exercise that right if they “show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” Letter from Daniel Webster, Sec’y of State, to Lord Ashburton, British Foreign Officer (Apr. 24, 1841) [hereinafter Webster Letter], available at http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2.

96. *Id.*

97. Necessity is generally understood to mean that force should be used as a last resort. DESKBOOK, *supra* note 9, at 35. To comply with proportionality “[s]tates must limit the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack.” *Id.* Some argue for a third defining criteria which is immediacy. DINSTEIN, *supra* note 93, at 242 (noting “war may not be undertaken in self-defence long after an isolate armed attack.”); CORN ET AL., *supra* note 46, at 19-22 (“Three major principles are generally accepted as governing self-defense actions under Article 51: necessity, proportionality, and timeliness.”).

to stymie an imminent armed attack.⁹⁸ Some disagree vehemently with this idea arguing that a plain reading of the U.N. Charter's Article 51 supplants the expansive customary definition of self-defense and any independent right asserted by a state.⁹⁹ Noting that the language of Article 51 only allows for self-defense after an armed attack and then only until the Security Council takes action these "strict constructionists" believe the Charter has preempted the customary understandings.¹⁰⁰ Yet this argument is incomplete as it does not account for the Charter's express recognition that it cannot *impair the inherent right* of self-defense nor does it address what constitutes an *armed attack*. Further, even under the most restrictive interpretation of Article 51 the document recognizes that an actual armed attack will necessitate a proportionate self-defense response.¹⁰¹ While "[t]here is clearly no common understanding of the application" of Article 51 to state action it is apparent that some authority exists for a state to act in self-defense.¹⁰²

The U.N. Charter expressly enshrines the inherent right of self-defense in recognition that reason and instinct will drive a state to respond to an attack. While there is a debate whether this inherent right is

98. See Webster Letter, *supra* note 95; DESKBOOK, *supra* note 9, at 37 ("Secretary Webster posited that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self defense . . .").

99. See DINSTEIN, *supra* note 93, at 183. However, Professor Dinstein does allow for anticipatory action if an armed attack has been launched in an irrevocable way. *Id.* at 191.

100. This group believes that "the right [to self-defense] is no more than as granted in the Charter and must, therefore, be understood in conjunction with other Charter provisions limiting the resort to force." CORN ET AL., *supra* note 46, at 22. Under this restrictive view a state acting in self-defense would need to gain authority from the Security Council prior to responding with force. *Id.* See also Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 706-17 (addressing to what extent a customary international law right to self-defense exists and coining the term U.N. "strict constructionists"); Merriam, *supra* note 94, at 62-68.

101. There is a general consensus on the principles that apply to a use of force in self-defense. See CORN ET AL., *supra* note 46, at 19.

102. *Id.* See also TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 63 (Michael Schmitt ed., 2013) ("Textually, Article 51 of the United Nations Charter refers to a situation in which 'an armed attack occurs.' Clearly, this covers incidents in which the effects of the armed attack have already materialized . . .").

expansive or restrictive what is inarguable is that in certain self-defense circumstances a state determines if proportionate force is necessary to respond.¹⁰³ It is this independent discretion in exercising the inherent right that echoes the natural law theorist belief that a connection exists between law and morality.¹⁰⁴ The ambiguities in Article 51 invite a state to use moral judgment to interpret the provision and determine when the inherent right of self-defense is triggered.¹⁰⁵ This allows a state to equate the legal right to use force in self-defense with the moral determination that it is necessary. Additionally, interpreting the U.N. Charter to prohibit a state from defending itself from an attack is easily dismissed as an “injustice”¹⁰⁶ and raises legitimacy issues for the remainder of the U.N. use of force framework. Exercising the inherent right of self-defense is therefore intentionally at the subjective discretion of a victimized state as attempting to eliminate independent moral judgment from this decision subverts the state’s inalienable right to respond to an armed attack.¹⁰⁷

The U.N. Charter relies on both natural law and legal positivism in the development of the modern *jus ad bellum* with both traditions informing the law that governs when a state may resort to using force. The Charter, however, only allows for a “moral” or independent use of force determination when a state is exercising the inherent right of self-

103. See *Nicaragua v. United States*, *supra* note 88, at § 187 (“The Parties, who consider the existence of this right to be established as a matter of customary international law, agree in holding that whether the response to an attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.”); CORN ET AL., *supra* note 46, at 19; DESKBOOK, *supra* note 9, at 35 (“Inherent in modern *jus ad bellum* is the customary requirement that all uses of force satisfy both the necessity and proportionality criteria.”).

104. See, e.g., TALLINN MANUAL, *supra* note 102, at 62 (“Necessity is judged from the perspective of the victim State.”).

105. See CORN ET AL., *supra* note 46, at 19-26 (noting that there are a variety of different viewpoints on the inherent right of self-defense amongst states).

106. See Merriam, *supra* note 94, at 58 (“Self-defense under natural law is unrestricted because, while it can be limited to some extent, it can never be taken away entirely; a law that purports to eliminate the right to self-defense would be unjust.”).

107. See *id.* at 61 (stating “when Webster articulated his famous formula for anticipatory self-defense in the language of the natural law, it was easily understood and accepted by his British counterparts because they drew on the same natural law tradition of self-defense”).

defense. This allowance for subjective moral judgments in self-defense determinations is recognition that prohibiting a sovereign state from protecting their population and territory is impractical, unreasonable,¹⁰⁸ and contrary to the purpose of the Charter.¹⁰⁹ This exception aside,¹¹⁰ the remainder of the document is an example of the positivist belief that compliance with the written law is non-negotiable regardless of subjective intent and perceived moral imperatives. This is particularly important as the Charter absolutely prohibits military intervention outside of the collective judgment of the international community.¹¹¹ Knowing, from personal experience, the consequences of states possessing independent authority to initiate a war, the post-World War II world body intentionally divorced moral reasoning from legal justification in use of force decisions.¹¹² The U.N. Charter makes clear that any independent threat or use of force, not an exercise of the inherent right of self-defense, is illegal and violates international law.

108. *See id.* at 65-67 for an excellent argument on why the inherent right of self-defense is an expression of natural law.

109. The purpose of the United Nations is to ensure that “the territorial integrity or political independence of any state” is not threatened or violated by force. U.N. Charter art. 2, para. 4. Prohibiting a state from protecting their territorial integrity or political independence in self-defense is the antithesis of this idea.

110. It is possible to argue that by allowing a state to subjectively determine when it may act in self-defense allows for acts of aggression. However, a state is still prohibited from using force unless it has complied with both the necessity and proportionality criteria. *See Nicaragua v. United States*, *supra* note 88, at § 187; *DESKBOOK*, *supra* note 9, at 35. Additionally, if the state is acting in anticipation of an imminent attack it must demonstrate that “a failure to act at that moment would reasonably be expected to result in the State being unable to defend itself effectively when that attack actually starts.” *TALLINN MANUAL*, *supra* note 102, at 65. Though outside the scope of this article, what is a legal act in self-defense becomes a more difficult question when a state invokes the right to use force to preempt an attack in contrast to responding to an imminent attack. *See generally* Michael Schmitt, *Preemptive Strategies in International Law*, 24 *MICH. J. INT’L L.* 513 (2003).

111. *See supra* text and accompanying notes 77-90.

112. *See* U.N. Charter pmb. (“We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . .”).

IV. INTERNATIONAL LAW, HUMANITARIAN INTERVENTION, AND UNINTENDED CONSEQUENCES

A use of force justified under the concept of humanitarian intervention is a clear violation of the U.N. Charter and is without the force of law.¹¹³ The foundation of a humanitarian intervention is the belief that a moral imperative to stop an ongoing crisis legally justifies using military force.¹¹⁴ A state relying on this use of force concept is not invoking their inherent right of self-defense¹¹⁵ but rather claiming the moral authority to act despite the general prohibition outlined in Article 2(4) of the U.N. Charter. The U.N. Charter, however, does not conflate a moral right with a legal right except in a case of self-defense. A subjective determination, based upon a moral judgment, that force is necessary to stop an ongoing humanitarian crisis is not an individual state decision as the international community reserved that right in their crafting of the modern *jus ad bellum*. Any state action not authorized by the Security Council is, without exception, presumptively illegal. In contrast to R2P, which relies on Security Council approval before using force to avert or stop a mass atrocity situation, humanitarian intervention is a unilateral use of force.¹¹⁶ This independent decision to conduct a humanitarian intervention ignores the Security Council's non-derogated authority to control use of force determinations and is therefore illegal under international law.

For those frustrated with the slaughter in Syria, the inability to legally justify an intervention may be viewed as an unconscionable result and a clear example of when the legal positivist approach to the U.N. Charter should make way for the natural law theorists. This instinct is understandable as the atrocities in Syria are terrible; however, the unintended consequences of allowing for subjective use of force determinations are likely worse. Circumventing the U.N. Charter delegitimizes international law and those institutions, including the Security Council, constructed to maintain international peace and

113. Kaye, *supra* note 47, at 3.

114. See *supra* text and accompanying notes 49-57.

115. See generally Anderson, *supra* note 5.

116. See *supra* text and accompanying notes 38-42.

order.¹¹⁷ If the international community loses the legal control over the use of force states will again define for themselves when acts of aggression are morally justified. The world saw tens of millions of deaths in World War I and II as a result of states subjectively determining when to wage war¹¹⁸ and it was this specific reason that first the League of Nations¹¹⁹ and later the U.N. Charter were created. Only by centralizing control of use of force decisions could the world body significantly reduce the devastation caused by international armed conflicts.¹²⁰

Humanitarian interventionist may dismiss the idea that attempting to stop a mass atrocity, in a place such as Syria will usher in a return of aggressive warfare. They may believe that stopping the ongoing

117. See Kaye, *supra* note 47.

118. Death totals for World War I and II are estimates as the vast number casualties make a calculation almost impossible. One estimate puts the death total in World War I at approximately 20,000,000. SOURCE LIST AND DETAILED DEATH TOLLS FOR THE PRIMARY MEGADEATHS OF THE TWENTIETH CENTURY, <http://necrometrics.com/20c5m.htm#WW1> (last visited Mar. 19, 2014). World War II estimated deaths are approximately 60,000,000. See THE NATIONAL WWII MUSEUM, BY THE NUMBERS: WORLD WIDE DEATHS IN WORLD WAR II, <http://www.nationalww2museum.org/learn/education/for-students/ww2-history/ww2-by-the-numbers/world-wide-deaths.html> (last visited Mar. 19, 2014).

119. See generally League of Nations Covenant pmbl., http://avalon.law.yale.edu/20th_century/leagcov.asp (creating an obligation for states to not resort to war to resolve conflicts).

120. An international armed conflict exists in “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6.3 U.S.T. 3114, 75 U.N.T.S. 31. Additionally, Protocol I, which supplements the Geneva Conventions, also applies “in the situation referred to in Article 2” as well as in those “armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) Art 1, June 8, 1977, 1125 U.N.T.S. 3. ¶ 3-4. See also INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet et. al. ed., 1960) (“Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.”).

humanitarian crisis is so morally compelling that the vast majority of the international community would recognize the need for the intervention. While this may be true as an actual humanitarian intervention is assuredly well-intended and executed for noble reasons the idea is also easily manipulated to justify violating the territorial integrity of a sovereign state. For example, in 1939 Nazi Germany claimed a moral obligation to protect the ethnic German minority in Czechoslovakia.¹²¹ Hitler “built his case against the country upon the grievances of its German minority in the western fringe area called the Sudetenland”¹²² and claimed that Germany had a responsibility to protect this group.¹²³ This claim was obviously a subterfuge as Hitler coveted Czechoslovakia as “*lebensraum*,” or living space, for his greater vision of Germany.¹²⁴ Additionally, Hitler’s “campaign against the Jews” was part of his external policy and “it is clear that the conquest of space and the destruction of Jewry were inextricably connected in his thoughts.”¹²⁵ It was this ability to use a moral argument, no matter how false, coupled with the prerogative to threaten or wage war that inspired the world body to prohibit states from subjective determinations concerning the use of force.¹²⁶

V. CONCLUSION

The Ukrainian crisis is again, unfortunately, highlighting how easily a state may claim the authority to use force to avert a humanitarian crisis.

121. See GORDON A. CRAIG, *GERMANY 1866-1945* 703 (1978).

122. *Id.*

123. *Id.* In a speech given on September 12, 1938, Hitler stated, “This is a question of German folk-comrades! I have no intention of allowing a second Palestine to be formed here in the heart of Germany by the labours of other statesmen. . . . The Germans in Czechoslovakia are neither defenceless nor abandoned. Of that you can rest assured!” *Id.* at 704-05 (citing MAX DOMARUS, *HITLER: SPEECHES AND PROCLAMATIONS 1932-1945* VOL. 2 904 (1962)).

124. See CRAIG, *supra* note 121.

125. *Id.* at 709.

126. See Schmitt, *supra* note 4, at 753 (“States have been reticent to openly embrace the doctrine for fear that other states will misuse it in order to interfere in the affairs of their neighbors.”).

On March 1, 2014, Russia invaded the Crimean peninsula, a recognized territory of the Ukraine, and occupied the region.¹²⁷ Russian President Vladimir Putin claimed the intervention, in large part, was to defend Russian-speaking minorities in the region from “real threats” to life and their health,¹²⁸ to protect against anti-Semitic violence,¹²⁹ and for a number of other humanitarian purposes.¹³⁰ While these claims are dubious¹³¹ the arguments used are those of a humanitarian interventionist. It is outrageous that President Putin has hijacked the concept of humanitarian intervention for his nationalistic agenda and it is true that there is no comparison to the atrocities in Syria and the claimed humanitarian distress in the Ukraine. Yet this is the consequence, well known by those international actors who watched the horrors of the first half of the 20th Century, of allowing states to use force on their own terms. The desire to stop the mass atrocities in Syria and other humanitarian disasters inadvertently undermines the U.N. Charter’s well thought out use of force construct and consequently has led the world back to the brink of the unthinkable: an international war in the Ukraine.¹³²

127. Tim Sullivan & Vladimir Isachenkov, *Russian Troops Take Over Ukraine’s Crimea Region*, YAHOO! NEWS (Mar. 1, 2014), <http://news.yahoo.com/russian-troops-over-ukraines-crimea-region-200052097.html> (“Russian troops took over the strategic Crimean peninsula . . . without firing a shot.”).

128. *Id.*

129. Isi Leibler, *Candidly Speaking: Putin, Ukraine and the Jews*, JERUSALEM POST (Mar. 19, 2014), <http://www.jpost.com/Opinion/Columnists/Candidly-speaking-Putin-Ukraine-and-the-Jews-345546> (“The Russian president has included radical nationalism and anti-Semitism in the Ukraine as major justifications for his intervention.”).

130. *See Transcript: Putin defends Russian Intervention in Ukraine*, *supra* note 17.

131. Samantha Power, U.S. Permanent Representative to the United Nations, Remarks by Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, at a UN Security Council Meeting on Ukraine, (Mar. 1, 2014), *available at* <http://usun.state.gov/briefing/statements/222780.htm>; Torry & Benoit, *supra* note 57, at A10.

132. Garry Kasparov, *Cut Off the Russian Oligarchs and They’ll Dump Putin*, WALL ST. J., MAR. 7, 2014 at A15 (“If Mr. Putin succeeds—and if there is no united Western response he will have succeeded regardless of whether or not Russian troops stay in Crimea—the world, or at least the world order, as we know it, will have ended.”).

So what can be done to address the violence in Syria? While a military intervention is prohibited by international law,¹³³ there are a wide range of measures available that fall below the threshold of force that triggers the Article 2(4) prohibition.¹³⁴ A non-exhaustive list of options may include providing political, economic, diplomatic, and tangential military support for those trying to stop the humanitarian crisis. These same tools are also available to internationally isolate those responsible for the Syrian crisis. It is also possible to force the benefactors and facilitators of this particular mass atrocity situation to explain to the entirety of the international community why they are shielding a regime capable of using chemical weapons on their own people. Those desiring to stop the crisis should work within the traditional legal framework of the U.N. Charter to repeatedly make a case for Security Council Resolutions authorizing the use of force. Though these measures will be vetoed over and over again the willingness to protect genocidal war criminals can only diminish the international moral stature of the vetoing state.

Sadly, the humanitarian crisis in Syria is one mass atrocity situation among many and these suggestions are insufficient and are not a long-term solution. Force is often the only way to stop a state from committing mass atrocities against its own population and perhaps a more assertive form of R2P is yet to emerge that will finally combine “R2P as law” and “R2P as a set of normative ideals.”¹³⁵ However, the solution must include the U.N. Charter’s methodology for regulating use of force. The document is not an anachronism from another era but rather a form of protection from the brutality and savagery of aggressive war.

133. See generally Schmitt, *supra* note 4, at 744-56 (analyzing all possible legal justifications for a military intervention in Syria).

134. For a discussion on what constitutes a “use of force,” see TALLINN MANUAL, *supra* note 102, at 45-48. See also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 25/2625, Annex, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970), available at <http://www.un-documents.net/a25r2625.htm> (listing activities that constitute a use of force).

135. Kersten, *supra* note 21 (“R2P as law and R2P as a set of normative ideals are often in tension.”).

The Ukrainian crisis illustrates just how fragile the modern *jus ad bellum* legal construct is and how quickly we could see the reemergence of an international armed conflict. Abba Eban, the famous Israeli foreign minister, once stated that “international law is that law which the wicked do not obey and the righteous do not enforce.”¹³⁶ The incontrovertible evidence of mass atrocities in Syria and the indefensible act of aggression by Russia against the Ukraine reinforces the truth that the wicked continue to ignore international norms. The challenge for the United States and its allies is to prove Mr. Eban wrong by enforcing international law. The question is whether they can remain righteous in doing so.

136. Nora Ryell, *Professor Spent His Lifetime Defending International Law Around the World*, GLOBALLIFE (Jan. 27, 2012), <http://v1.theglobeandmail.com/servlet/story/LAC.20120127.OBGREENATL/BDAStory/BDA/deaths>.

