

Legitimacy versus Legality Redux: Arming the Syrian Rebels

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On June 13, 2013, Deputy National Security Adviser Ben Rhodes announced that the United States had determined that Syrian forces used chemical weapons, including the nerve agent sarin, “on a small scale against the opposition multiple times in the last year.”¹ By doing so, President Bashar al-Assad’s regime allegedly crossed a “red line” set down by President Obama in August 2012.² President Obama accordingly authorized the provision of military aid to the Supreme Military Council, a unified command of various key anti-governmental rebel forces, to “strengthen the effectiveness” of the rebel forces. Among the states already providing arms to the rebels were Qatar, Saudi Arabia, Turkey, and the United Arab Emirates.

In the announcement, Rhodes stated that the Administration would first consult with Congress on the matter. That consultation slowed the process and indirectly complicated the Senate’s confirmation of General Martin Dempsey for a second term as Chairman of the Joint Chiefs of Staff. Current deliberations regarding the situation in Syria center on the extent of the humanitarian imperative, the risk the weapons might find their way into the hands of unfriendly groups, and the prospect of direct U.S. military involvement in the ongoing non-international armed conflict in the country.³

A less public, but equally important, debate has surrounded the legal issues raised by the decision to provide lethal aid. Within the Administration, doubts surfaced over the legality of such assistance. Reportedly, some of the Administration’s top legal advisors opined that aiding the rebels might violate *international* law, regardless of the legality of such action under U.S. *domestic* law.⁴ The humanitarian and strategic merits of providing military aid aside, are such legal concerns the product of unwarranted normative caution or, instead, soundly

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1. Ben Rhodes, Deputy Nat’l Sec. Advisor for Strategic Commc’n, Syrian Chemical Weapons Use (June 13, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/13/statement-deputy-national-security-advisor-strategic-communications-ben->

2. President Barack Obama, Remarks to the White House Press Corps (Aug. 20, 2012), <http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps>.

3. Mark Mazzetti, Eric Schmitt & Erin Banco, *No Quick Impact in U.S. Arms Plan for Syria Rebels*, N.Y. TIMES, July 15, 2013, at A1. As this article was being written, the House and Senate Intelligence Committees approved CIA weapons shipments to Syrian rebel forces. Karen De Young, *Congressional Panels Approve Arms Aid to Syrian Opposition*, WASH. POST, July 23, 2013, at A4.

4. Adam Entous, *Legal Fears Slowed Aid to Syrian Rebels*, WALL ST. J., July 15, 2013, at A1.

based in the extant international legal regime?⁵

This article surveys the international law norms governing the provision of lethal aid to the Syrian rebels. It begins by examining those norms that the aid might breach. Concluding that arming the rebels would violate longstanding international law prohibitions, the article then turns to possible relevant exceptions to those prohibitions. No attempt is made to assess the strategic wisdom of the policy or its moral valence; the issue is law, not legitimacy. However, the analysis hopefully will contribute to understanding the extent to which a policy of arming the Syrian rebels lies at the confluence of law and legitimacy – or at their departure point.

I. POSSIBLE VIOLATIONS OF INTERNATIONAL LAW

a. Use of Force. Most of the debate regarding the arming of the Syrian rebels revolves around the prohibition of the use of force set forth in Article 2(4) of the United Nations Charter: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁶ There is little doubt that the article generally reflects customary international law.⁷

On its face, Article 2(4) would not seem to reach the mere arming of rebels. However, in a 1986 judgment, the International Court of Justice (ICJ) came to a different conclusion. The case in question, *Military and Paramilitary Activities in and Against Nicaragua*, involved the provision of arms and training by the United States to guerillas fighting Nicaragua’s Sandanista government, which

5. There has been curiously little discussion of the subject. For brief, but incisive, comments thereon, see Ashley Deeks, *Arming Syrian Rebels: Lethal Assistance and International Law*, LAWFARE (May 1, 2013), <http://www.lawfareblog.com/2013/05/arming-syrian-rebels-lethal-assistance-and-international-law/>; Dapo Akande, *Would it be Lawful for Europe (or other States) to Provide Arms to the Syrian Opposition?*, EJIL: TALK! (Jan. 17, 2013), <http://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/>; Ashley Deeks, *Syria, Chemical Weapons, and Possible U.S. Military Action*, LAWFARE (Dec. 10, 2012), <http://www.lawfareblog.com/2012/12/syria-chemical-weapons-and-possible-u-s-military-action/>; Daniel Bethlehem, *A Brief Reply on the Legal Bases for Intervention in Syria*, OPINIO JURIS (Dec. 8, 2012), <http://opiniojuris.org/2012/12/08/a-brief-reply-on-the-legal-bases-for-intervention-in-syria/>. See also Julian Borger, *The Austrian Position on Arms Embargo in Syria – Official Document (Syria: Austrian Position on Arms Embargo (as of May 2013))*, THE GUARDIAN (May 15, 2013), <http://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf>; Rosa Brooks, *So You Want to Intervene in Syria Without Breaking the Law?* FOREIGN POL’Y (June 20, 2013), http://www.foreignpolicy.com/articles/2013/06/20/so_you_want_to_intervene_in_syria_without_breaking_the_law.

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

7. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶186–191 (June 27), [hereinafter *Nicaragua*]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, ¶87 (July 9) [hereinafter *Wall*]. See also ALBRECHT RANDELZHOFFER & OLIVER DÖRR, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 203 (Bruno Simma, et al., eds., 3d ed. 2012); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 95-98 (5th ed. 2011). For two classic works on the use of force generally, see IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963), and THOMAS FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002).

had come into power following the 1979 overthrow of President Anastasio Somoza. Relations between the United States and the Sandinistas soured in the early 1980's, purportedly because Nicaragua was supporting rebels in El Salvador, a U.S. ally. By 1983, the United States was openly backing armed opposition groups in Nicaragua, known as the contras.⁸

In April 1984, Nicaragua instituted ICJ proceedings against the United States alleging that U.S. support for the contras violated, *inter alia*, the prohibition on the use of force, and amounted to an unlawful intervention under international law. When the Court rejected U.S. jurisdictional objections,⁹ the United States withdrew from further participation in the case.¹⁰ Despite the absence of the United States, the ICJ went on to decide the case in a judgment that is generally deemed to accurately reflect the law on external aid to rebel forces.¹¹

Although the judgment did not directly address the issue of whether the United States had unlawfully used force in violation of Article 2(4), the Court found that the “United States activities in relation to the contras constitute a breach of the customary international law principle of the non-use of force.”¹² With regard to the question of aid, it held that “the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua.”¹³

Some confusion exists over the option of using intelligence agencies, rather than the military, to deliver aid to, or conduct training for, the Syrian rebels. The assumption seems to be that doing so would somehow “mitigate legal risks,” for instance, by making it less likely that the action would constitute, or be perceived to constitute, a wrongful use of force.¹⁴ In fact, the distinction is normatively meaningless. Under the law of state responsibility, “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other

8. Nicaragua, *supra* note 7, at ¶21.

9. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 392 (Nov. 26).

10. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 79 AM. J. INT'L L. 431, 438-441 (1985); Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 151, 163-165 (1986).

11. For instance, see the position taken by the International Group of Experts in TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 46 (Michael N. Schmitt gen. ed., 2013). Discussion of the decision at the time tended to focus on issues such as the jurisdiction of the Court, the threshold for self-defense, and the requirement for a victim state's request for assistance before acting in self-defense. However, the characterization of aid as a use of force did not spark great controversy, nor has it done so since. *See, e.g.*, Monroe Leigh, *Military and Paramilitary Activities in and Against Nicaragua*, 81 AM. J. INT'L L. 206, 210-211 (1987) (cataloging objections to the ICJ's judgment in *Nicaragua*). *But see*, RANDELZHOFFER & DÖRR, *supra* note 7, at 212-213 (agreeing with the ICJ *Nicaragua* case interpretation, but noting that “the scope of the prohibition of the use of force is still not sufficiently clear with regard to the problem of assistance to subversive activities.”).

12. Nicaragua, *supra* note 7, at ¶228.

13. *Id.* The ICJ found that merely funding the guerillas did not constitute a use of force.

14. Entous, *supra* note 4.

functions, whatever position it holds in the organization of the State”¹⁵ The sole international law query is whether the entities engaging in the activities qualify as organs of the state (and, if not, whether the state would nevertheless still be responsible for their actions).¹⁶ Recall, in this regard, that Central Intelligence Agency operations were at issue in *Nicaragua*.

There is, therefore, little doubt that the provision of lethal aid directly to the Syrian rebel forces would amount to a “use of force,” at least by the generally accepted standards the ICJ set forth in *Nicaragua*. Absent a justification for such use,¹⁷ the provision of lethal aid would violate the U.N. Charter’s prohibition on the use of force, as well as the analogous prohibition resident in customary international law.

Assuming for the sake of analysis that the provision of arms to the Syrian rebels would represent an unlawful use of force by the United States, the question of the Assad regime’s response options arises. Pursuant to Article 51 of the U.N. Charter, which generally reflects customary law, states may use force in self-defense against an “armed attack.” Would arming the Syrian rebel forces be an armed attack by the United States against which Syria could respond forcefully?

By the prevailing approach, it would not. In *Nicaragua*, the ICJ distinguished “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”¹⁸ Although the Court did not expound on the distinction, there is a general consensus that merely providing arms, while a use of force, is not an armed attack. Rather, an armed attack is usually understood as involving significant death, injury, damage, or destruction that is caused by a state directly or by a non-state group under another state’s direction and control.¹⁹ Therefore, even if the U.S. transfer of arms to the Syrian rebels qualifies as an unlawful use of force, Syria may not respond in self-defense with any measures that amount to a use of force.

Interestingly, the United States has, since *Nicaragua*, taken a different approach, one with which the author disagrees. As recently as September 2012, the Legal Adviser to the State Department affirmed the U.S. view: “[T]he inherent right of self-defense potentially applies against any illegal use of force.

15. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 Annex, art. 4, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) [hereinafter Articles on State Responsibility]. Note that the United States views the Articles on State Responsibility “as a guide to States and other international actors on either what the law is or how the law might be progressively developed.” U.S. MISSION TO THE UNITED NATIONS, COMMENTS OF THE UNITED STATES OF AMERICA ON FUTURE ACTION REGARDING THE DRAFT ARTICLES ON STATE RESPONSIBILITY (Feb. 5, 2010), available at <http://www.state.gov/documents/organization/179258.pdf>.

16. ARTICLES ON STATE RESPONSIBILITY, *supra*, Annex, arts. 5-11.

17. See Part II, *infra*.

18. *Nicaragua*, *supra* note 7, ¶191. Cited with approval in *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶51 (Nov. 6).

19. See, e.g., the Views of the International Group of Experts set forth in the TALLINN MANUAL, *supra* note 11, at 47, 55-56.

In our view, there is no threshold for a use of deadly force to qualify as an “armed attack” that may warrant a forcible response.”²⁰ Applying this standard to the instant case, if the U.S. provision of arms constitutes a use of force for which no legal justification exists, Syria would be entitled to respond forcefully, so long as the forceful response complied with the requirements of necessity, proportionality, imminency, and immediacy.²¹

b. Intervention. Customary international law prohibits intervention by one state in the internal affairs of another.²² In *Nicaragua*, the ICJ defined the notion:

[I]n view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of sovereignty, to decide freely. One of these is the choice of political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.²³

Does the arming of rebels amount to an intervention as a matter of law? It is clear that the use of force by one state against another is an intervention in the affairs of the latter. The ICJ confirmed this premise in *Nicaragua* when it held that

[t]he element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.²⁴

20. Harold Honju Koh, Remarks as Prepared for Delivery to the U.S. CYBERCOM Inter-Agency Legal Conference, Ft. Meade, Maryland (Sept. 18, 2012); see also William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 299-302 (2004); Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 93-96 (1989).

21. *Nicaragua*, *supra* note 7, at ¶¶176, 194; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶41 (July 8) [hereinafter *Nuclear Weapons*]; *Oil Platforms*, *supra* note 18, at ¶¶43, 73-74, 76. Necessity would require that non-forceful means be unavailable to Syria to reliably put an end to the U.S. arming of the rebels; proportionality would require that whatever force Syria employed to do so be no more than needed to achieve that end; imminency would require that the situation be one in which the Syrians need to act, lest the opportunity to do so evaporate; and immediacy would require that the arms be in the process of being transferred to the rebels or that further arms shipments be forthcoming.

22. *Nicaragua*, *supra* note 7, at ¶202.

23. *Id.* at ¶205.

24. *Id.* See also *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶164 (Dec. 19) [hereinafter *Armed Activities*].

In support of its holding, the Court pointed to the General Assembly's Declaration on Friendly Relations and Co-operation, which provides that "[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."²⁵ Although the Declaration is only a General Assembly resolution, and therefore not technically binding as a matter of law on U.N. member states, "the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question."²⁶ Assuming the validity of characterizing the arming of rebels as a use of force,²⁷ arming the Syrian rebels would appear to constitute an unlawful intervention.

The extensive state practice of arming rebel forces in other states cannot, however, be ignored in evaluating this conclusion. In *Nicaragua*, the ICJ addressed the practice head-on when it acknowledged that assistance to rebels had become a fairly widespread phenomenon. It accordingly examined whether

there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified.²⁸

Citing its judgment in the *North Sea Continental Shelf* cases, the Court concluded that crystallization of a customary norm requires both State practice and *opinio juris*.²⁹ It held that the latter was lacking and, therefore, found "that no such general right of intervention, in support of an opposition within another

25. *Nicaragua*, *supra* note 7, at ¶191, quoting 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. 2625 (XXV), Annex, U.N. Doc. A/RES/2625 (Oct. 24, 1970). The Court looked to the Declaration as one among numerous indications that states viewed the practice of states with respect to intervention as reflecting a sense of *legal obligation (opinio juris)*. See also Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), ¶2, U. N. Doc. A/RES/2131 (Dec. 21, 1965) ("[N]o State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State").

26. *Nicaragua*, *supra* note 7, at ¶191. See also *Armed Activities*, *supra* note 24, ¶162; *Nuclear Weapons*, *supra* note 21, at ¶70.

27. See notes 6-16, *supra*, and accompanying text.

28. *Nicaragua*, *supra* note 7, at ¶206.

29. *Id.* at ¶207 (citing *North Sea Continental Shelf (FRG/Den.; FRG/Neth.)*, 1969 I.C.J. 3, ¶77 (Feb. 20)). For a detailed commentary on state practice and *opinio juris*, see Allain Pellet, *Article 38*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 731, 813-832 (Andreas Zimmermann et al. eds., 2d ed. 2012). See also OPPENHEIM'S *INTERNATIONAL LAW* 27-31 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed. 1996).

State, exists in contemporary international law.”³⁰ As the Court observed, without referring to the separate prohibition on the use of force, the principle of non-intervention,

would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition.³¹

Lest the finding appear dated, note that the ICJ cited *Nicaragua* with approval in its 2005 *Armed Activities* judgment regarding the provision of training and military support to rebels in the Congo by Uganda.³² Arming rebels fighting another state categorically violates international law, absent a specific justification, and, regardless of whether the action also rises to the level of a use of force, the principle of non-intervention.

c. Arms Embargoes. The United Nations Security Council has not employed its authority under Chapter VII of the U.N. Charter to ban arms transfers to either the Syrian government or the rebel forces.³³ However, its measures prohibiting arms shipments to terrorists apply fully in the Syrian conflict. For instance, in Resolution 2083, the Council, referring to earlier resolutions, banned the

direct or indirect supply, sale, or transfer to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equip-

30. *Nicaragua*, *supra* note 7, at ¶209.

31. *Id.* at ¶246.

32. *Armed Activities*, *supra* note 24, at ¶¶161-164.

33. Although the Security Council did not impose an arms embargo related to the conflict, the European Union did so in May 2011. In a Council Decision confirmed by a Council Regulation, the E.U. prohibited the “sale, supply, transfer or export of arms and related materials” used for internal repression. In April 2013, it decided to allow the shipment of certain non-lethal aid to the rebel forces. The following month, various aspects of the arms embargo were lifted, although significant restrictions remain on goods likely to be used for internal repression by any individual or entity. While the E.U. arms embargo measures do not apply directly to the United States, they could impact U.S. transshipment of arms and other embargoed goods through European Union territory, if deemed by the transit states as likely to be used for prohibited purposes. On the actions of the European Union, *see EU Arms Embargo On Syria*, STOCKHOLM INT’L PEACH RES. INST. (June 4, 2013), http://www.sipri.org/databases/embargoes/eu_arms_embargoes/syria_LAS/eu-embargo-on-Syria.

ment, paramilitary equipment, and spare parts for the aforementioned, and technical advice, assistance or training related to military activities.³⁴

Given the involvement of a number of terrorist organizations in the fighting against Assad, including groups affiliated with al Qaeda, these resolutions merit consideration.

In particular, because Resolution 2083 bans indirect supply of arms, due care would have to be taken to ensure that arms transferred to the Supreme Military Council did not find their way to al Qaeda affiliated groups. If reasonable in the circumstances to conclude that they would likely do so, transfer of the arms would be unlawful. In fact, there have been reports that arms supplied by Qatar to the rebels have been used in the hostilities by al Qaeda. In particular, Qatar backs the Ahfad al Rasoul Brigade, which supports the al Qaeda affiliated Al Nusrah Front in northern Syria. Moreover, the al Qaeda affiliated Islamic State of Iraq and the Levant has claimed that it received arms from the Free Syrian Army, which dominates the Supreme Military Council.³⁵

d. State Responsibility for the Actions of the Rebel Forces. The United States is, of course, responsible for the conduct of its organs with regard to arming the rebels.³⁶ However, there has been some conjecture regarding U.S. responsibility for any international humanitarian law violations that might be committed by the rebels using arms provided by the United States.

According to the International Law Commission's Articles of State Responsibility, "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."³⁷ This position reflects the ICJ's finding in *Nicaragua*.³⁸ There, the question was whether the United States bore responsibility for acts contrary to human rights and humanitarian law allegedly committed by the contras. The Court held that although the United States provided "heavy subsidies and other support" to the contras, "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as

34. S.C. Res. 2083(1)(b), U.N. Doc. S/RES/2083 (Dec. 17, 2012).

35. Bill Roggio, *Qatar-funded Syrian rebel brigade backs al Qaeda groups in Syria*, THREAT MATRIX – A BLOG OF THE LONG WAR JOURNAL (July 26, 2013), http://www.longwarjournal.org/threat-matrix/archives/2013/07/qatar-funded_syrian_rebel_brig.php. See also Anne Barnard & Eric Schmitt, *As Foreign Fighters Flood Syria, Fears of a New Extremist Haven*, N.Y. TIMES (Aug. 9, 2013), at A1.

36. Articles on State Responsibility, *supra* note 15, Annex, art. 4. The Articles of State Responsibility and the commentary thereon are set forth in THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES (James Crawford ed., 2002) [hereinafter ARTICLES ON STATE RESPONSIBILITY COMMENTARY].

37. Articles on State Responsibility, *supra* note 15, Annex, art. 8.

38. *Nicaragua*, *supra* note 7, at ¶115. The ICJ held that Article 8 reflects customary international law in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*) 2007 I.C.J. 43, ¶398 (Feb. 26).

to justify treating the contras as acting on its behalf.”³⁹ In other words, since the United States did not exercise “effective control” of the group, it was not responsible for any unlawful acts of the contras. Applying the same approach to the Syrian case, the provision of lethal aid to the rebels would not implicate U.S. state responsibility for violations of international humanitarian law by rebel forces, at least absent U.S. control over their activities.

II. POSSIBLE INTERNATIONAL LAW JUSTIFICATIONS FOR U.S. ACTIONS

As the preceding analysis demonstrates, arming the Syrian rebels would arguably amount to a use of force under the *jus ad bellum* and run counter to the principle of non-intervention. But international law carves out certain exceptions to the prohibition on uses of force or other acts that would qualify as an intervention. This raises the question of whether any such exceptions apply in the instant case.

Before turning to them, it is first necessary to dispense with one possibility. International law irrefutably prohibits the use of chemical weapons during both non-international and international armed conflicts.⁴⁰ However, the law does not expressly permit the use of force (or other means of intervention) by states not party to the conflict in order to halt the employment of chemical weapons; there is no international law “red line” regarding their use. Instead, such uses of force or interventions must be grounded on a separate legal basis, such as those examined below.

a. Self-Defense. Two grounds are universally accepted as justifying a use of force – self-defense and Security Council authorization. Article 51 of the UN Charter codifies the former: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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.”⁴¹ Like the prohibition on the use of force, the right of self-defense is incontrovertibly embedded in customary international law.⁴²

Self-defense is a highly problematic basis for aid to the Syrian rebels. First, the United States has not been the victim of either an “armed attack” from Syria or of one mounted by a non-state actor that is attributable to Syria under the law

39. Nicaragua, *supra* note 7, ¶109.

40. See discussion in INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 259-263 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

41. U.N. Charter art. 51. On self-defense, see DEREK W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (1958); BROWNLIE, *supra* note 7, chs. XII–XIII; DINSTEIN, *supra* note 7, chs. 7-9; FRANCK, *supra* note 7.

42. Nicaragua, *supra* note 7, at ¶176. See also the discussion of the customary nature of the norm in Nuclear Weapons, *supra* note 21, at ¶¶38, 41; Oil Platforms, *supra* note 18, at ¶74.

of self-defense.⁴³ Second, Syria has engaged in no military operations directed against neighboring states that rise to the level of armed attack, such that those operations would open the door to U.S. action in collective defense. Even if operations of that sort had been conducted, a request for assistance from the victim state is a condition precedent to providing military support in collective self-defense; none has been forthcoming.⁴⁴ Third, arming Syrian rebels is an action that is highly attenuated from steps that might be seen as reasonably necessary to defend the United States, or other states, against an armed attack by Syria. Fourth, since there is no indication that Syria intends to conduct military operations against the United States or any other state in the immediate future, there is no basis for claiming that the arms transfers constitute an element of anticipatory individual or collective self-defense. In particular, the mere possession by an unfriendly state of dangerous, even illegal, weapons does not justify anticipatory self-defense, absent an intention on the part of that state to use the weapons against another state.⁴⁵ Finally, since only states enjoy the right of self-defense, the United States is foreclosed from engaging in collective defense of the rebel forces themselves.

b. Authorization by the Security Council. The second universally accepted exception to the prohibition of using force against another state is authorization by the U.N. Security Council in the form of a resolution pursuant to Article 42 of the U.N. Charter. The article provides: “Should the Security Council consider that [non-forceful] measures . . . would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”⁴⁶

In that the Security Council may authorize (or mandate) the actual use of military force against a state, obviously may approve the lesser step of shipping arms to those fighting its government. The obverse is true as well. Although an arms transfer might otherwise be lawful in certain circumstances, a Security Council resolution under Chapter VII imposing an arms embargo on one or more parties to a non-international armed conflict would render such assistance

43. With respect to treating the actions of a non-state group as those of a state vis-à-vis the law of self-defense, the ICJ has noted:

an armed attack must be understood as including not merely action by regular forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (*inter alia*) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein.’

Nicaragua, *supra* note 7, at ¶195.

44. *Id.* at ¶199.

45. See discussion in Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT’L L. 513, 529-536 (2003).

46. U.N. Charter art. 42.

unlawful. As a result of divergent stances taken by Permanent members of the Security Council *vis-à-vis* Syria, that body has been unable to adopt a resolution allowing military aid to the rebel groups (or, for that matter, one barring military aid to either of the parties to the conflict). Consequently, the second generally accepted basis for an exception to the prohibition on the use of force is, like the first, inapplicable in this situation.

c. Humanitarian Intervention. The suffering in Syria is severe and widespread. The U.N. High Commissioner for Human Rights estimates that by mid-2013 nearly 93,000 persons had died during the conflict.⁴⁷ Non-lethal injuries, physical destruction of property, and displacement of the civilian population exacerbate the scale and scope of the humanitarian catastrophe.⁴⁸ Assad's forces are primarily, albeit not exclusively, responsible for the situation.

As a matter of traditional international law, states enjoy no right to intervene in the internal affairs of other states, even in the face of severe suffering by their population.⁴⁹ In *Nicaragua*, the ICJ considered U.S. allegations that Nicaragua had violated its human rights obligations. The Court observed, "while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect."⁵⁰ Indeed, it specifically stated, "the protection of human rights, a strictly humanitarian objective, cannot be compatible . . . with the training, arming and equipping of the contras."⁵¹

The accepted remedy for a humanitarian crisis caused by conflict is resort to the Security Council, which, as noted, is empowered to authorize or mandate the use of force pursuant to Article 42 of the U.N. Charter to address the situation.⁵² Article VIII of the Genocide Convention also envisages a response

47. Press Release, U.N. Office of the High Commissioner for Human Rights, Updated U.N. Study Indicates at Least 93,000 People Killed in Syria Conflict (June 13, 2013), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13447&LangID=E>. The announcement was based on research compiled by the Human Rights Data Analysis Group. MEGAN PRICE, JEFF KLINGNER, ANAS QTIESH & PATRICK BALL, UPDATED STATISTICAL ANALYSIS OF DOCUMENTATION OF KILLINGS IN THE SYRIAN ARAB REPUBLIC COMMISSIONED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (2013), *available at* <http://www.ohchr.org/Documents/Countries/SY/HRDAG-Updated-SY-report.pdf>.

48. On the situation in general, *see* Report of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, ¶¶32-36, Human Rights Council, 23rd Sess., May 27–June 14, 2013, U.N. Doc. A/HRC/23/58 (July 18, 2013).

49. On humanitarian intervention generally, *see* FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1997); SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER (1996); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973).

50. *Nicaragua*, *supra* note 7, at ¶268.

51. *Id.*

52. Note that humanitarian crises can qualify as a threat to the peace under Article 39 of the Charter. This opens the door to forceful responses authorized pursuant to Article 42. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶30 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

in accordance with the U.N. Charter, which would include forceful action authorized or mandated by the Security Council.⁵³ In fact, the Security Council has authorized military intervention in the face of humanitarian crises during numerous armed conflicts, most recently in response to the 2011 non-international armed conflict in Libya.⁵⁴

Arguably, an international law norm permitting humanitarian intervention outside the Charter framework has been crystallizing over the past few decades.⁵⁵ For instance, although the Economic Community of West African States intervened in internal conflicts in Liberia and Sierra Leone without Security Council authorization in the 1990s, the Council expressed *post factum* approval of the actions.⁵⁶ Failure of the international community to intervene in the Rwandan genocide of 1993 led to widespread condemnation despite the lack of Security Council authorization, as did the reticence to intervene on behalf of the non-Arab population of Sudan's Darfur region between 2003 and 2006.⁵⁷ In 1999, NATO intervened militarily without Security Council approval in the Federal Republic of Yugoslavia to stop the slaughter of ethnic Albanians in Kosovo.⁵⁸ Participants included three permanent members of the Council, together with 16 other NATO member states. A Security Council resolution labeling NATO's unilateral use of force "a flagrant violation of the United Nations Charter" was defeated in a twelve-to-three vote.⁵⁹

However, any argument that a customary norm permitting humanitarian

53. Convention on the Prevention and Punishment of the Crime of Genocide art. 8, Dec. 9, 1948, 78 U.N.T.S. 277. Article IX grants the International Court of Justice compulsory jurisdiction in the event of a dispute regarding the Convention's application. The prohibition on genocide is clearly customary in nature. Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28).

54. S.C. Res. 1973, U.N. SCOR, 66th Sess., 6498th mtg., U.N. Doc. S/RES/1973 (Mar. 17, 2011). In another example, in 1992-1993, the Security Council mandated forceful action to create the environment for humanitarian relief in Somalia. S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992); S.C. Res. 814, U.N. Doc. S/RES/814 (Mar. 26, 1993).

55. See, e.g., Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum*, 176 MIL. L. REV. 364, 409-425 (2003); Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT'L & COMP. L.Q. 926 (2000). The British House of Commons also assessed the legality of the humanitarian intervention in Kosovo. Select Committee on Foreign Affairs, Fourth Report, 1999-2000, H.C. 28-I, ¶144 (UK).

56. U.N. Doc. S/22133 (Jan. 22, 1991); S.C. Res. 866, U.N. Doc. S/RES/866 (Sept. 22, 1993); U.N. Doc. SC/6481 (Feb. 26, 1998); S.C. Res. 1260, U.N. Doc. S/RES/1260 (Aug. 20, 1999). For a detailed overview of cases of humanitarian intervention with and without Security Council approval, see FRANCK, *supra* note 7, at 135-173.

57. See, e.g., Letter from the Secretary-General to the President of the Security Council, U.N. Doc. S/1999/1257 (Dec. 16, 1999). The U.N. Security Council eventually approved deployment of a peace force (United Nations Mission in Darfur, or UNAMID) in 2007 following the signing of the Darfur Peace Agreement in 2006. The operation continues today. S.C. Res. 1769, U.N. Doc S/RES/1769 (July 31, 2007).

58. For an excellent contemporary discussion of the Kosovo case, see Adam Roberts, *NATO's "Humanitarian War" over Kosovo*, 41 SURVIVAL no. 3 (1999), at 102.

59. U.N. Doc. S/PV.3989 (Mar. 26, 1999). China, Russia and Namibia voted in favor of the resolution.

intervention has fully emerged appears premature.⁶⁰ For instance, even in the most prominent example of extra-Security Council intervention – Kosovo – participating states appeared hesitant to style “Operation Allied Force” as precedent for future humanitarian interventions. On the contrary, they treated the situation as “unique,” although it is unclear precisely how it was so as a matter of international law.⁶¹

More controversial is the existence of a “responsibility to protect,” not a mere right of humanitarian intervention, when conflict leads to humanitarian calamities.⁶² Because the former is a moral obligation and a political choice, not a legal entitlement, a separate legal basis must exist before states may intervene to fulfill that responsibility.⁶³ For example, the U.N. Secretary-General characterized Resolution 1973 as affirming the international community’s implementation of its responsibility to protect in the Libya case.⁶⁴ But it was the resolution itself, not any purported legal justification associated with the responsibility to protect, which provided the legal ground for mounting the operations to protect the civilian population.

Whether a legal right of humanitarian intervention presently exists is a fair matter for legal debate.⁶⁵ After all, humanitarian intervention would dramatically pierce a territorial state’s sovereignty, violating a cornerstone principle in the international legal architecture. Therefore, if such a right does exist, the level of suffering on the part of the civilian population must be very high before it vests, generally at a level understood to involve “gross and systematic”

60. RANDELZHOFFER & DÖRR, *supra* note 7, at 222-226.

61. *See, e.g.*, Madeline K. Albright, Prepared Remarks at the Council on Foreign Relations (June 28, 1999) (“Some hope, and others fear, that Kosovo will be a precedent for similar interventions around the globe. I would caution against any such sweeping conclusions. Every circumstance is unique.”).

62. For the foundational document on the responsibility to protect, see INT’L COMM. ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), *available at* <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. *See also* Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFF., Nov.-Dec. 2002, at 99. The United States supports the concept of a responsibility to protect as set forth in the Outcome Document of the 2005 U.N. World Summit, G.A. Res. 60/1, ¶¶138-140, U.N. Doc. A/RES/60/1 (Oct. 24, 2005). International Conflict Resolution and Avoidance, 2012 DIGEST §17, at 570. *See also* United States Mission to the United Nations, Remarks by the United States at an Informal Discussion on “Responsibility while Protecting” (Feb. 21, 2012), *available at* <http://usun.state.gov/briefing/statements/184487.htm>.

63. *See* INT’L COMM. ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 62, at ¶6.9 (emphasizing that only the United Nations can legally intervene to safeguard “international peace and security”). Interestingly, the Commission’s report on the responsibility to protect raises the question of whether it would be legitimate to bypass the Security Council “in a conscience-shocking situation crying out for action.” *Id.* at ¶6.37. For a discussion of the various interpretations of the Responsibility to Protect, see Jose E. Alvarez, *The Schizophrenias of R2P*, in CRIMINAL JURISDICTION 100 YEARS AFTER THE 1907 HAGUE PEACE CONFERENCE 212 (Willem J.M. van Genugten et al., eds., 2009).

64. Press Release, Secretary-General Says Security Council Action on Libya Affirms International Community’s Determination To Protect Civilians from Own Government’s Violence, U.N. Press Release SC/20201 (Mar. 18, 2011). On the Responsibility to Protect, see G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Sept. 14, 2009) and documents referenced therein.

65. For an interesting discussion of the subject with robust policy recommendations, see COUNCIL ON FOREIGN REL., SPECIAL REPORT NO. 9, INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES (2009).

human rights violations.⁶⁶ The use of chemical weapons by Syria to date, while a violation of international law, does not rise to that level. Humanitarian intervention could therefore only be justified, if at all, in response to the totality of the human suffering, which, of course, would include any casualties caused by the employment of chemical weapons. Assuming, *arguendo*, that the right to humanitarian intervention applies, the exercise of that right is limited to actions strictly necessary to arrest the suffering; humanitarian intervention that is a subterfuge for other purposes clearly violates the principle of sovereignty.⁶⁷ Ultimately, without a Security Council resolution, citing humanitarian intervention as the legal basis for providing lethal aid to the Syrian rebels appears tenuous.

d. Military Aid to the "Government" of Syria. International law does not bar the transfer of arms by one state to another, absent a Security Council sanctions regime (or other applicable treaty-based regime) or use of the arms to commit human rights violations. Therefore, a possible legal justification for the provision of military aid to the Syrian rebels would be that the rebels concerned have become Syria's government under principles of international law. Indeed, if this were the case, states would be entitled to directly use force to assist the (former) rebels in their non-international armed conflict with the Assad's forces, which would now legally assume the role of "the rebels." This is precisely what occurred in Afghanistan following the ouster of the Taliban and the subsequent recognition of the Karzai government by the international community.⁶⁸ Once the insurgents and the Taliban switched roles, the international armed conflict between coalition states and Afghanistan (under the Taliban government) transmogrified into international assistance to Afghanistan under Karzai in its non-international armed conflict with the Taliban.⁶⁹

In international law, a government is entitled to represent the state internationally in terms of compliance with its obligations and enforcement and exercise of its rights. The key criterion for recognition as a government is "effective control of that state."⁷⁰ This has long been the law. For instance, in the 1923 *Tinoco Concessions Arbitration*, the arbitrator, William Howard Taft, former President and then U.S. Supreme Court Chief Justice, cited an extract from John Basset Moore's *Digest of International Law* as "the general principle which has had such universal acquiescence as to become well settled international law":

66. Vaughan Lowe & Antonios Tzanakopoulos, *Humanitarian Intervention*, in MAX PLANK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011), available at <http://opil.ouplaw.com/home/EPIL>.

67. Ian Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 217, 222-226 (John Norton Moore ed., 1974). But see Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107 (2006).

68. See S.C. Res. 1419, U.N. Doc. S/RES/1419 (June 26, 2002).

69. On the evolution of the characterization of the conflict, see Francoise J. Hampson, *Afghanistan 2001-2010*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 242 (Elizabeth Wilmsurth ed., 2012).

70. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §203 (1987).

The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing *de facto* government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and discharge its internal duties, and its external obligations.⁷¹

In November 2012, a number of opposition groups formed the National Coalition for Syrian Revolutionary and Opposition Forces (Syrian Opposition Coalition, or SOC), which claimed to be the legitimate government of Syria and agreed to set up an Interim Government upon receiving international recognition.⁷² The six states that are members of the Gulf Cooperation Council promptly recognized the SOC.⁷³ France, Turkey, and Italy soon announced that the SOC was the “legitimate representative” of the Syrian people, as did Spain, the United Kingdom, Denmark, and Norway the following month.

Other states and organizations proved more cautious. For instance, the Foreign Ministers of the European Union, who were meeting in Brussels, issued a statement that “[t]he EU considers them legitimate representatives of the *aspirations* of the Syrian people.”⁷⁴ Germany noted that the SOC “represents the legitimate *interests* of the Syrian people,”⁷⁵ while Belgium, the Netherlands and Luxembourg recognized the SOC as “the legitimate representative of the Syrian people *in this transition period* leading to a free and democratic Syria.”⁷⁶

These states carefully crafted their statements on the matter, so much so that the legal meaning to be attributed to them became abstruse. Of particular note in this regard was a description of the SOC as the “legitimate representative of the Syrian people” by a State Department spokesperson during a press briefing in November 2012.⁷⁷ The next month, the United States reiterated this characterization at the Friends of the Syrian People meeting.⁷⁸ However, lest these state-

71. Aguilar-Amory and Royal Bank of Canada Claims (Gr. Brit. v. Costa Rica), 1 R.I.A.A. 369, 378 (Oct. 1923) (quoting John Bassett Moore, 1 DIG. INT’L L. 249 (1906)).

72. Agreement on the Formation of the National Coalition of Syrian Revolutionary and Opposition Forces, Nov. 11, 2012. For a classic treatment of the law governing recognition of states, see HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW, pt. 2 (1947).

73. In March 2013, the Arab League officially granted Syria’s seat to the SOC. Ala Droubi & Rick Gladstone, *Syrian Opposition Joins Meeting of Arab League*, N.Y. TIMES, Mar. 27, 2013, at A3.

74. E.U. Council Conclusions on Syria, 16392/12, ¶2, Nov. 19, 2012 (emphasis added), available at <http://register.consilium.europa.eu/pdf/en/12/st16/st16392.en12.pdf>.

75. *Germany Expels Syrian Embassy Staff*, DEUTSCHE WELLE (Oct. 12, 2012) (emphasis added), <http://www.dw.de/germany-expels-syrian-embassy-staff/a-16442210>.

76. Benelux-messages at Group of Friends-meeting Marrakech (Dec., 12, 2012) (emphasis added), available at <http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2012/12/13/benelux-messages-at-group-of-friends-meeting-marrakech-12-december-2012.html>. On the issue of terminology, see STEFAN TALMON, UNIV. OF BONN, BONN RESEARCH PAPERS ON PUBLIC INTERNATIONAL LAW NO. 1/2013: RECOGNITION OF OPPOSITION GROUPS AS THE LEGITIMATE REPRESENTATIVE OF A PEOPLE (2013).

77. David Toner, U.S. Dep’t of State Deputy Spokesperson, Press Briefing at the State Department (Nov. 13, 2012), available at <http://www.state.gov/r/pa/prs/dpb/2012/11/200477.htm#SYRIA>.

78. DIGEST, *supra* note 62, at 281.

ments be misconstrued, the State Department noted in its 2012 *Digest of U.S. Practice in International Law* that “[t]he United States does not recognize the SOC as the government of Syria.”⁷⁹

The United States had drawn a distinction between representation of the Syrian people on the basis of legitimacy and representation of the Syrian state on the basis of international law. Whether other states intended to make the same distinction remains unclear. Nevertheless, only U.S. recognition of the rebels as a government would provide a colorable legal basis for treating them as entitled to receive U.S. lethal aid. The express U.S. rejection of such recognition rules out this basis for arms transfers.

It is a rejection that appears well founded in law, given the rebels’ lack of control over the organs of the state or significant areas of the country, especially its capital Damascus. Recognizing the SOC as the government would have raised difficult legal questions. As noted in the *Restatement (3d) of Foreign Relations Law*:

Recognizing or treating a rebellious regime as the successor government while the previously recognized government is still in control constitutes unlawful interference in the internal affairs of that state. If recognition or acceptance of the rebellious regime is accompanied by military support, it may violate Article 2(4) of the United Nations Charter as a use or threat of force against the political independence of the other state.⁸⁰

Since the United States does not recognize the SOC or any other rebel group as the government of Syria, it may not transfer arms to them on the basis of state-to-state assistance in a non-international armed conflict.

e. Self-Determination. Any argument that lethal aid may be provided to the Syrian rebels based on the principle of self-determination is questionable at best.⁸¹ This is so even though the right accrues to “peoples”⁸² and the SOC is widely labeled the legitimate representative of the Syrian people. Traditionally, the right of self-determination has been viewed as applicable only to instances

79. *Id.*

80. RESTATEMENT (THIRD), *supra* note 70, §203 cmt. g.

81. On this issue, see Dapo Akande, *Self Determination and the Syrian Conflict*, EJIL: TALK! (Dec. 6, 2012), <http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/>. *The right of self-determination has been affirmed in numerous ICJ judgments and opinions. See, e.g., East Timor (Portugal v. Australia) 1995 I.C.J. 90, ¶¶31, 37 (June 30); Wall, supra note 7, at ¶118.*

82. International Convention on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Convention on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

of colonial domination, alien occupation, and racist regimes.⁸³ As the situation in Syria does not fit easily into any of these narrow categories, application to the Syrian case would require a very liberal interpretation of the concept.

Even if the right of self-determination applied in Syria, it remains unsettled whether external states are entitled to provide military aid to peoples fighting for self-determination. Of course, arming national liberation movements was relatively common during the latter half of the 20th century. Indeed, on numerous occasions the General Assembly spoke approvingly of providing aid to national liberation movements involved in armed self-determination struggles.⁸⁴ Nevertheless, many states, including the United States, treated such assistance as unlawful. It would be paradoxical if the United States now embraced such an argument to justify its support of the Syrian rebels. Moreover, as one commentator has perceptively noted, “if the rule which permits foreign support to those fighting for self-determination were extended to cases like Syria, i.e., cases of opposition forces fighting against the government of an independent state, this exception to the principle of non-intervention and the prohibition of the use of force threatens to swallow up the rule.”⁸⁵

f. Countermeasures. Under the law of state responsibility, “the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State.”⁸⁶ In other words, a state victimized by another state’s unlawful act or omission may sometimes respond with its own otherwise unlawful measure to induce that state to act lawfully.⁸⁷

The possibility of styling a response to another state’s unlawful act as a countermeasure is often overlooked. However, there are two significant hurdles to treating the arming of the Syrian rebels as such. First, countermeasures are generally only available in order to prompt compliance with an obligation owed to the state conducting them.⁸⁸ It is difficult to identify the breach of any obligation owed the United States by Syria. Even if such a breach existed, it is unclear how arming the Syrian rebels would remedy it.

The United States – or any other state – might, however, seek to justify its arming of Syrian rebels as countermeasures in response to the breach of norms

83. For instance, see the reference to self-determination in Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1(4), June 8, 1977, 1125 U.N.T.S. 3.

84. G.A. Res. 2625 (XXV) (Oct. 24, 1970); G.A. Res. 3070 (XXVII) (Nov. 30, 1973); G.A. Res. 35/227 (Mar. 6, 1981).

85. Akande, *Self Determination and the Syrian Conflict*, *supra* note 81.

86. Articles on State Responsibility, *supra* note 15, art. 22.

87. It must be cautioned that countermeasures are subject to a number of strict requirements, such as proportionality. *Id.*, arts. 51-52.

88. *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, ¶83 (Sept. 25).

and obligations owed to the international community as a whole.⁸⁹ In this regard, the ICJ has identified both the prohibition of genocide and self-determination as obligations owed the entire international community.⁹⁰ The difficulty of applying the self-determination label to the rebel cause in Syria has been discussed, while it is far from certain that the Syrian crisis has crossed the genocide threshold. Moreover, it is unsettled whether states other than those directly injured by the breach may engage in countermeasures to put an end to the offending activity. As noted in the commentary on the Articles on State Responsibility, “the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of states. At present, there appears to be no clearly recognized entitlement of [all states] to take countermeasures in the collective interest.”⁹¹

Even more problematic is a second hurdle – the limitation of countermeasures to non-forceful actions. The Articles on State Responsibility expressly provide that “[c]ountermeasures shall not affect . . . the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”⁹² Assuming the validity of characterizing the arming of the Syrian rebels as a use of force,⁹³ discussed earlier, this rule would preclude portraying the transfer of weapons as a lawful countermeasure. It deserves noting that former ICJ Judge Bruno Simma articulated a minority view on the subject in his separate *Oil Platforms* opinion.⁹⁴ Simma argued that countermeasures could involve a use of force that did not rise to the level of an armed attack when responding to another state’s use of force. This would allow victim states a means to react to uses of force that did not meet the threshold requirement for self-defense. Simma’s position is particularly relevant in the case of arming rebels, which is a use of force but not an armed attack. Even if the Simma approach were applied, however, the Syrian situation is complicated by the fact that the United States is not an injured party.

g. Armed Conflict. The concepts of “use of force” and “armed attack” are often confused with that of “armed conflict.” Doing so conflates two distinct bodies of law – the *jus ad bellum* and the *jus in bello*. The former addresses the legality of a state’s resort to force, whereas the latter governs how hostilities may be conducted. Application of the norms set forth in the *jus in bello*, or “international humanitarian law,” occurs only once a situation qualifies as a

89. Articles on State Responsibility, *supra* note 15, art. 48(1)(b). See also *Barcelona Traction, Light and Power Company, Limited, Second Phase (Belg. v. Spain)*, 1970 I.C.J. 3, ¶33 (Feb. 5).

90. *Barcelona Traction*, *supra* note 89, at ¶34. On self-determination, see *East Timor*, *supra* note 81, at ¶29.

91. ARTICLES ON STATE RESPONSIBILITY COMMENTARY, *supra* note 36, at 139, ¶(6).

92. Articles on State Responsibility, *supra* note 15, art. 50(1)(a).

93. See notes 6-16, *supra*, and accompanying text.

94. *Oil Platforms*, *supra* note 18, at ¶¶12-13 (separate opinion of Judge Simma).

non-international or international “armed conflict” (a “war,” in lay usage).⁹⁵

The arming of rebel forces in a *non*-international armed conflict (a conflict between a government and an organized armed group) or in the absence of an armed conflict is either an unlawful use of force or an illegal intervention (absent a specified international law justification).⁹⁶ By contrast, a state involved as a belligerent party in an *international* armed conflict (an armed conflict between states) may lawfully arm insurgents fighting its enemy. As the United States is not engaged in an armed conflict with Syria, this basis for arming rebels is irrelevant.

Questions have been raised as to whether arming the rebels would nevertheless *initiate* an international armed conflict between the United States and Syria. The Chairman of the Joint Chiefs of Staff may unintentionally have suggested this possibility when, in a letter to the Senate Committee on Armed Services outlining options for responding to the situation in Syria, he stated, “I know that the decision to use force is not one that any of us takes lightly. It is no less than an act of war.”⁹⁷ Additionally, some senior government lawyers reportedly took the position that providing military aid would start an armed conflict with Syria in which American soldiers could be considered legitimate targets.⁹⁸

The legality of an action that initiates an international armed conflict, however, is determined by the *jus ad bellum*, the principle of non-intervention, and any other relevant legal prohibitions and obligations, such as those residing in a treaty or Security Council resolution.⁹⁹ Yet, even though military aid to rebels is a use of force, it does not alone initiate an armed conflict. International armed conflicts require “hostilities,” a legal term of art, between states. Although controversy exists over the requisite level of hostilities for an international armed conflict,¹⁰⁰ no state has adopted the position that merely providing arms

95. See Jelena Pejic, *Status of Armed Conflicts*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 77 (Elizabeth Wilmschurst & Susan Breau eds., 2007); Dapo Akande, *Classification of Armed Conflicts Relevant Legal Concepts*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32 (Elizabeth Wilmschurst ed., 2012); *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, INT’L COMM. RED CROSS, (Mar. 17, 2008), <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>.

96. This is so even if the situation is recognized as a “belligerency.” In such a case, other states apply the principles and rules set forth in the law of neutrality. While this would affect their right to provide arms to the government, it would not affect their obligation to desist from doing so to the rebels. On belligerency, see Valentina Azarov & Ido Blum, *Belligerency*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2011). See also Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109 (2000).

97. Letter from Gen. Martin E. Dempsey, Chairman, Joint Chiefs of Staff, to Sen. Carl Levin, Chairman, Armed Serv. Comm., July 19, 2013. “Act of war” is lay usage for the legal concept of international armed conflict.

98. Entous, *supra* note 4.

99. This being so, an action that amounts to a use of force under the *jus ad bellum* need not necessarily result in an armed conflict under the *jus in bello*. The obverse is also possible *de jure* (although unlikely *de facto*) since there is no direct normative link between the two concepts.

100. The author agrees with the position set forth in the ICRC Commentaries to the 1949 Geneva Conventions: “Any difference arising between two States and leading to the intervention of armed

to rebels involved in a non-international armed conflict internationalizes an armed conflict, such that an armed conflict between the two states exists. Instead, to “internationalize” a non-international armed conflict, an external state must exercise “overall control” over the rebel group in question. The International Criminal Tribunal for the Former Yugoslavia’s Appeals Chamber, in a widely accepted pronouncement, has held that overall control “must comprise more than the mere provision of financial assistance or military equipment or training.”¹⁰¹ In any event, it is inconceivable that a state could be permitted to act illegally to create the conditions that would render its unlawful actions legal.

It thus appears clear that arming the Syrian rebels will not launch an armed conflict between the United States and Syria; it is not an “act of war.” Similarly, it would not allow Syrian forces to target U.S. military personnel.¹⁰²

CONCLUSION

The provision of lethal aid to the Syrian rebels appears questionable from a purely legal perspective. It would arguably amount to a use of force. Neither of the traditional legal justifications for the use of force – self-defense and authorization by the Security Council – applies in this case. While humanitarian intervention arguably offers a (weak) basis for the use of force, States would be wise to hesitate before embracing a liberal right to humanitarian intervention, because such operations can serve as convenient subterfuges for armed intervention. In few situations would this risk for misuse of the justification be greater than in those involving lethal aid to rebels seeking to overthrow the government in a non-international armed conflict. Complicating matters in the Syrian case is the fact that the rebel forces include groups and individuals that have themselves committed atrocities.

Even if the provision of arms is not a use of force, the principle of non-intervention would appear to preclude the transfer of arms to the Syrian rebels. The aid cannot convincingly be labeled a countermeasure, and any assertion

forces is an armed conflict” COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean Pictet ed., 1952); COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA 28 (Jean Pictet ed., 1960); COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 OF AUGUST 12, 1949 (Jean Pictet ed., 1960); COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 20 (Jean Pictet ed., 1958).

101. Prosecutor v. Tadić, Case No. IT-94-I-A, Appeals Chamber Judgment, ¶137 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

102. This is so unless they engaged in activities that amounted to direct participation in hostilities. On the subject of direct participation, see INT’L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). Whether generally training rebel forces to use the weapons is direct participation is a grey area of international humanitarian law. There is consensus, however, that training them to conduct a particular attack would constitute direct participation. *Id.* at 53.

that the situation is one implicating the right to self-determination is fraught with difficulty. Recognition of the SOC as the government of Syria (in what would be a legal fiction) might have provided a colorable basis for the military aid, but the State Department's confirmation that the United States had not recognized the group forecloses that option, as does the fact that recognition would be both counter-factual and counter-normative.

Simply put, no justification for providing arms to the Syrian rebels is likely to survive objective legal examination. This conclusion is not meant to suggest that arming them would necessarily be illegitimate. NATO's air campaign against the Federal Republic of Yugoslavia in 1999 is a case in point. No clear legal basis for conducting Operation Allied Force existed, but 19 normatively mature states launched a deadly air campaign to stop the killing. Many observers, including the author, agreed that the campaign, while unlawful, was legitimate.¹⁰³

States should be very cautious about using legitimacy as a justification for violating international law; to accept legitimacy as trumping legality is to risk admitting an exception that swallows the rules. But it must be acknowledged that because international law norms emerged in response to past events, they may prove lacking in the present political, operational, and moral context. The international community may begin ignoring or reinterpreting extant norms and new ones may materialize through treaty-making or the crystallization of customary law. This is a natural process of law development by which legitimate actions can become lawful ones. Arguably, and only arguably, this dynamic is underway in the Syrian case, perhaps through a broadening of the purported right of humanitarian intervention.

In this respect, it would be wise to heed the advice of former State Department Legal Adviser Harold Koh. Speaking to the American Society of International Law in 2012, he cautioned international lawyers "confronting complexity" to avoid "short-sighted solutions in favor of thoughtful, nuanced approaches that might deliver *lawful* and durable solutions to complex global problems."¹⁰⁴ It would also be wise to bear in mind that state practice engaged in out of a sense of *opinio juris* contributes to the emergence of new norms.¹⁰⁵ Before it arms Syrian rebels, the United States needs to be comfortable with the prospect of contributing to the crystallization of a customary norm allowing other states to arm rebel groups in similar circumstances before it proceeds.

103. For a discussion on legality and legitimacy, see FRANCK, *supra* note 7, at 174-191.

104. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Statement Regarding Syria at the American Society of International Law Annual Meeting (Mar. 30, 2012) (emphasis added).

105. On customary international law, see Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 RECUEIL DES COURS (2006). See also Pellet, *supra* note 29 and OPPENHEIM'S INTERNATIONAL LAW, *supra* note 29.