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The 2018 Airstrikes in Syria: Not yet a Law-Making Moment under Customary International Law

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Abstract

After the 2018 airstrikes in Syria, the U.K. provided a reason for using force in the Syrian case: using force to deter human suffering from chemical weapons. Based on the fact that unprecedented understanding of other states and international consensus on prohibiting chemical weapons in Syria, the action is very special compared to previous cases. If state practice and *opinio juris* as two elements of the customary rule are concomitant for using force to deter human suffering from chemical weapons, a new exception to the norm of prohibition of the use of force under the customary international law will be formed. This article argues that the 2018 airstrikes in Syria were not yet a law-making moment for a modification to the norm of the prohibition on the use of force, which is generally agreed as a norm of *jus cogens*.

Keywords: use of force; *opinio juris*; *jus cogens*; chemical weapons; Syria

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I. Introduction

Since the Syrian Civil War began in 2011, there have been repeated chemical attacks against civilians. From 2013 to 2018, several chemical attacks happened and were confirmed by the investigation of the United Nations Mission, the Organization for the Prohibition of Chemical Weapons-UN Joint Investigative Mechanism (OPCW-UN JIM), and the Organization for the Prohibition of Chemical Weapons (OPCW). However, due to differences between the United Nations Security Council (UNSC) members, it was hard for the UNSC to take further measures to resolve the issue of using chemical weapons in Syria and deter human suffering from chemical attacks. The repeated chemical attacks in Syria and inaction by the UNSC triggered special military action, the 2018 airstrikes.

After several proposals were rejected in the UNSC meetings, a chemical attack against civilians happened again on 4 April 2018. In response to the alleged use of chemical weapons in Syria, on 13 April 2018, the U.S., France, and the U.K. launched airstrikes in Syria, called the 2018 airstrikes. Then, the U.K. provided a reason for the use of force in the Syrian case: using force to deter human suffering from chemical weapons.¹ Although the U.K. government has already put forward a similar legal position regarding the legality of military action in Syria in 2013, the 2018 airstrikes were the first in practice. Furthermore, there is no precedent for using force to address the humanitarian consequences of the use of chemical weapons. Based on the fact that unprecedented understanding of other states and international consensus for prohibiting chemical weapons in Syria, the action was also special compared to the previous cases of unauthorized use of force to deter human suffering from the use of chemical weapons.

Since 2013, some scholars had discussed the possibility of using force to deter human suffering from the use of chemical weapons in Syria. Some believed that “in the case of Syria, there was no lawful alternative to deter human suffering, so a new exception to the principles of prohibition on the use of force is needed.”² However, in 2013, most states believed that there were still alternative paths to the use of force and were also worried that such a new exception would be a pretext for war.³ Therefore, at that time, few scholars thought it was a suitable time to make a new law.

Then, based on the repeated chemical attacks in Syria and inaction by the UNSC, more scholars paid attention to the possibility of using force to deter human suffering from the use of chemical weapons in Syria. However, some scholars still hold negative attitudes towards a new exception to the principles of the

¹ “Syria action–UK government legal position, Policy Paper of the United Kingdom” United Kingdom Prime Minister’s Office (14 April 2018), online: United Kingdom Prime Minister’s Office <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>

² Harold Hongju KOH, “Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)” *EJIL: Talk!* (4 October 2013), online: EJIL: Talk! <https://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward/>

³ Carsten STAHN, “Between Law-breaking and Law-making: Syria, Humanitarian Intervention and ‘What the Law Ought to Be’” (2014) 19 *Journal of Conflict and Security Law* 35.

prohibition on the use of force, even though it aims to deter human suffering from the use of chemical weapons. After the unauthorized use of force by the U.S. in 2017, although it was an operation against the use of chemical weapons in Syria, “state practice is far too scarce to lend much support to the conclusion that international law should have changed sufficiently to accommodate the kind of use resorted to by the United States.”⁴ After the 2018 airstrikes, the operation received unprecedented political support. However, “‘support’ and ‘understanding’ did not form an *opinio juris* relevant for the process of modification of CIL (customary international law)”⁵

On the contrary, Scharf, as a representative scholar, makes such an argument that 2018 airstrikes would accelerate the development of customary international law and strike a *Grotian Moment*.⁶ It means that the 2018 airstrikes have crystallized an emerging customary norm, thereby representing a historic development in international law on the non-UN-sanctioned military intervention for deterring human suffering from chemical weapons.⁷

In order to discuss whether the 2018 airstrikes were indeed a law-making moment, the assessment should be made under the theories of customary international law. If state practice and *opinio juris* as two elements of the customary rule are concomitant for using force to deter human suffering from chemical weapons, a new exception to the norm of prohibition of the use of force under the customary international law will be formed.

This article is divided into three parts. Firstly, the article begins by setting forth the background and uniqueness of the 2018 airstrikes. Next, under current international law, the article analyzes strong norms against using chemical weapons, which reflects the international consensus on prohibiting chemical weapons, and then proves the legality of using force to deter human suffering from chemical weapons by assessing the principles of the prohibition on the use of force. Finally, the article discusses whether the 2018 airstrikes have met the conditions of forming a new law under customary international law by analyzing specific statements from the international community.

It concludes that, under customary international law, the 2018 airstrikes were not yet a law-making moment for a new exception in respect of the prohibition on the use of force: using force to deter human suffering from chemical weapons.

⁴ Anders HENRIKSEN, “Trump’s Missile Strike on Syria and the Legality of Using Force to Deter Chemical Warfare” (2018) 23 *Journal of Conflict and Security Law* 46.

⁵ Kleczkowska, AGATA, “Changing Customary Law: The Shape of the Prohibition of the Use of Force after the 2017 and 2018 Airstrikes in Syria” (2019) 21 *International Community Law Review* 385.

⁶ Michael P. SCHARF, “Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention” (2019) 19 *Chicago Journal of International Law* 586 at 605.

⁷ *Ibid.*

II. The Case of 2018 Airstrikes in Syria

A. *Facts: Use of Chemical Weapons and (In)action by the UNSC*

Since the Syrian Civil War began in 2011, there have been repeated chemical attacks against civilians.

According to the 2013 Report of the United Nations Mission to Investigate allegations of the use of chemical weapons in Syria, there is evidence that chemical weapons have been used in the conflict, as well as against civilians, including children.⁸ The investigation conclusion of the OPCW-UN JIM's fourth report indicates that the Syrian Arab Armed Forces used chemical weapons on 21 April 2014, 16 March 2015, and 16 March 2015.⁹ Besides, ISIL was involved in using sulphur mustard on 21 August 2015.¹⁰ Then, the OPCW-UN JIM also provides sufficient evidence in the final report to prove that ISIL had used sulfur mustard on 15 and 16 September 2016, and the Syrian Arab Republic used sarin on 4 April 2017.¹¹ After the OPCW-UN JIM mandate ended on 16 November 2017, the OPCW continued the investigation work in Syria. There were still several more chemical attacks in 2017 and 2018, which were confirmed by the Organization for the Prohibition of Chemical Weapons (OPCW) reports in 2020¹², 2021¹³, and 2023¹⁴.

Based on the conclusion of the report, both the Syrian Arab Republic and the Islamic State in Iraq and the Levant (ISIL) were responsible for using chemical weapons in the Syrian Civil War. More seriously, the reports indicate that chemical weapons have been used in populated areas, resulting in the suffering of civilians, including children.

In fact, UNSC has done much work to resolve the use of chemical weapons in Syria. The UNSC adopted UNSC Resolution 2118 (2013) to guide controlling and eliminating chemical weapons in Syria.

⁸ *Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013*, United Nations General Assembly (UNGA), A/67/997-S/2013/553 (2013).

⁹ *Letter dated 21 October 2016 from the Secretary-General addressed to the President of the Security Council*, United Nations Security Council (UNSC), UN Doc S/2016/888 (2016).

¹⁰ *Ibid.*

¹¹ *Letter dated 26 October 2017 from the Secretary-General addressed to the President of the Security Council*, United Nations Security Council (UNSC), UN Doc S/2017/904 (2017).

¹² *First Report by the OPCW Investigation and Identification Team (IIT) Pursuant to Paragraph 10 of Decision C-SS-4/DEC.3 "Addressing the Threat from Chemical Weapons Use" Ltamenah (Syrian Arab Republic) 24, 25, and 30 March 2017*, Organization for Prohibition of Chemical Weapons (OPCW), S/1867/2020 (2020).

¹³ *Second Report by the OPCW Investigation and Identification Team Pursuant to Paragraph 10 of Decision C-SS-4/DEC.3 "Addressing the Threat From Chemical Weapons Use" Saraqib (Syrian Arab Republic) – 4 February 2018*, Organization for Prohibition of Chemical Weapons (OPCW) S/1943/2021 (2021).

¹⁴ *Third Report by the OPCW Investigation and Identification Team Pursuant to Paragraph 10 of Decision C-SS-4/DEC.3 "Addressing the Threat from Chemical Weapons Use", Douma (Syrian Arab Republic) - 7 April 2018*, Organization for Prohibition of Chemical Weapons (OPCW), S/2125/2023 (2023).

Resolution 2118 (2013) was not adopted under Chapter 7¹⁵ of the U.N. Charter and only regulated the obligations of the Syrian Arab Republic. However, as the main resolution for controlling and eliminating chemical weapons in Syria, its implementation is highly dependent on the cooperation of the parties in Syria. The ongoing chemical weapons attacks have proven that this resolution cannot resolve the chemical weapons problem in Syria. The UNSC Resolution 2209 (2015) reaffirmed the obligations of all Syrian parties to control and eliminate chemical weapons. More importantly, this resolution was finally adopted under Chapter 7. Besides, OPCW-UN JIM was the primary mechanism for the U.N. to work on the Syrian chemical weapons issue and had finished several times its investigating works. Nevertheless, it was clear that the above measures did not stop the use of chemical weapons by the parties in Syria or fully protect the civilians.

Then, when the UNSC wanted to take further measures to deal with the use of chemical weapons in Syria, especially in 2017, the following proposals were continually rejected by one or two permanent members.

On 28 February 2017, China and Russia rejected the draft resolution intended to impose sanctions on entities and individuals deemed to be involved in the production or use of chemical weapons in Syria.¹⁶ Russia cast a veto of doubts about the OPCW-UN JIM's investigation reports, pointing out that the Syrian government did not use chemical weapons but was discredited by the rebels. However, Russia did not provide any evidence for its doubts or other proposals to resolve the use of chemical weapons in Syria. China insists on peace negotiations to solve the problem.

After the chemical attack on 4 April 2017, the Security Council failed to adopt a resolution proposed to expand investigative access rights of the OPCW Fact-Finding Mission and the OPCW-UN JIM, following a veto by Russia on 12 April 2017.¹⁷ The draft again emphasized Syria's obligation to control chemical weapons and tended to provide immediate and unfettered access to and the right to inspect all sites for the OPCW Fact-Finding Mission and the OPCW-UN JIM. Russia still doubted the impartiality of the investigating institutions, believing that there were some fundamental flaws of the OPCW-UN JIM, so Russia cast a veto and requested an independent investigation.

Next, due to the divergence between permanent members of the Security Council on the investigation mechanism, four proposals aiming to renew the mandate of OPCW-UN JIM were rejected.

¹⁵ Chapter 7 of the UN Charter sets out the UN Security Council's powers to take military and nonmilitary action with respect to threats to the peace, breaches of the peace, and acts of aggression.

¹⁶ *Press Release: Double Veto Prevents Security Council from Adopting Draft Resolution Intended to Impose Sanctions for Use of Chemical Weapons in Syria*, United Nations, SC/12737 (2017).

¹⁷ *Press Release: Security Council Fails to Adopt Resolution Condemning Chemical Weapons Use in Syria, Following Veto by Russian Federation*, United Nations, SC/12791 (2017).

On 24 October 2017, the Security Council failed to renew the mandate of OPCW-UN JIM in Syria, as Russia cast its veto.¹⁸ Before this meeting, Russia had made a procedural proposal to adjourn the meeting until 7 November, waiting for the OPCW-UN JIM's report. However, Russia's proposal was defeated by the Council. Russia believed it was not the right time to discuss the extension in this case.

On 16 November 2017, the Security Council failed again to adopt two draft resolutions regarding the mandate of OPCW-UN JIM.¹⁹ Bolivia and Russia rejected one draft tabled by the U.S. on extending the OPCW-UN JIM because the draft did not address the flaws in the mechanism's operations. Bolivia's representative then tabled the Russian Federation's draft, which pointed out the flaws in the work of the OPCW-UN JIM and expressed doubts about the investigation conclusions. Russia's draft was rejected by 7 states (France, Italy, Sweden, Ukraine, United Kingdom, United States, and Uruguay).

On 17 November 2017, the Security Council failed for the fourth time to renew the mandate of the OPCW-UN JIM investigating chemical weapons attacks in Syria.²⁰ It is worth mentioning that Japan tabled this draft in a neutral position in order to avoid political divergence. Japan says, "despite all differences, there was agreement in the Security Council that the Joint Investigative Mechanism should continue to work."²¹ Due to the neutral nature of the draft, it received a large majority of support compared to the previously mentioned draft. It got 12 states' support with 1 abstention (China) out of 15 votes. However, the draft resolution was still rejected due to the veto of Russia.²² Russia insisted that fundamental flaws should be rectified first. There is little doubt that it is difficult for the UNSC members to reach an agreement on resolving the chemical weapons issue in Syria due to differences. Wu Haitao of China said in this meeting, "because, given the differences expressed, the vote did not contribute to the issue of chemical weapons in Syria nor its political situation."²³

In summary, in all of the above meetings, there was at least a consensus among states to condemn the use of chemical weapons against civilians in Syria. Nevertheless, political divergence among permanent members makes it difficult for the UNSC to take further measures and even lose the OPCW-UN JIM. The UNSC deadlocked addressing the use of chemical weapons against civilians in Syria, but chemical attacks continued to happen.

¹⁸ *Press Release: Security Council Fails to Renew Mandate of Joint Investigative Mechanism on Chemical Weapons Use in Syria, as Permanent Member Casts Veto*, United Nations, SC/13040 (2017).

¹⁹ *Press Release: Security Council Fails to Adopt 2 Draft Resolutions on Extending Mandate of Joint Mechanism Investigating Chemical Weapons Attacks in Syria*, United Nations, SC/13072 (2017).

²⁰ *Press Release: Security Council Fails for Fourth Time to Renew Mandate of Joint Mechanism Investigating Chemical Weapons Attacks in Syria*, United Nations, SC/13076 (2017).

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

After several attempts by the UNSC failed, on 4 April 2018, a chemical attack against civilians happened again in Syria.²⁴ In response to the 2018 chemical attack, the U.S., France, and the U.K. launched airstrikes on 13 April 2018 in Syria.²⁵ The airstrikes attacked the following targets: a scientific research center, a chemical weapons storage facility, an equipment storage facility, a command post, and some buildings related to the use and storage of chemical weapons.²⁶

The U.S., the U.K., and France launched the 2018 airstrikes without the UNSC's authorization and then justified the legitimacy of the airstrikes.

French President Emmanuel Macron said, "France's red line has been crossed." and "There is no doubt that the Syrian government is responsible."²⁷ In addition, in the UNSC's meeting after the airstrikes, the speaker of France holds, "The Charter was not designed to protect criminals, and France's action was in line with its goals and values,"²⁸ which suggests France's attitude towards the 2018 airstrikes was that it is legitimate to intervene because the chemical attacks in Syria had broken international laws.

U.S. President Trump declared in the speech, "The purpose of our actions tonight is to establish a strong deterrent against the production, spread and use of chemical weapons,"²⁹ which implies the legitimacy of the 2018 airstrikes is to deter the future use of chemical weapons.

U.K. Prime Minister Theresa May said it had been "right and legal" to take action. She believed that there was "no practicable alternative to the use of force" and that the "limited and targeted strikes" had degraded Syria's ability to use chemical weapons.³⁰ Furthermore, in the policy paper of the U.K.

²⁴ *Note by the Technical Secretariat: Third Report by the OPCW Investigation and Identification Team Pursuant to Paragraph 10 of Decision C-SS-4/DEC.3 "Addressing the Threat from Chemical Weapons Use", Douma (Syrian Arab Republic) - 7 April 2018*, Organization for Prohibition of Chemical Weapons (OPCW), S/2125/2023 (2023).

²⁵ Prime Minister's Office, "Press release: PM statement on Syria: 14 April 2018" (April 2018), online: Prime Minister's Office <https://www.gov.uk/government/news/pm-statement-on-syria-14-april-2018>

²⁶ US Department of Defense, "Press release: Department of Defense Press Briefing by Pentagon Chief Spokesperson Dana W. White and Joint Staff Director Lt. Gen. Kenneth F. McKenzie Jr. in the Pentagon Briefing Room" (April 2018), online: US Department of Defense <https://www.defense.gov/News/News-Stories/Article/Article/1144601/trump-orders-missile-attack-in-retaliation-for-syrian-chemical-strikes/>

²⁷ Permanent mission of France to the United Nations in New York, "Press Release: Syria: silence is no longer an option" (April 2018), online: Permanent mission of France to the United Nations in New York <https://web.archive.org/web/20180716194746/https://onu.delegfrance.org/Syria-silence-is-no-longer-an-option>

²⁸ *Press Release: Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression*, United Nations, SC/13296 (2018).

²⁹ United States White House, "Press Release: Joined by Allies, President Trump Takes Action to End Syria's Chemical Weapons Attacks" (April 2018), online: United States White House <https://trumpwhitehouse.archives.gov/articles/joined-allies-president-trump-takes-action-end-syrias-chemical-weapons-attacks/>

³⁰ United Kingdom Prime Minister's Office, *supra* note 25.

government issued on 14 April 2018, the U.K. officially declared that the 2018 airstrikes are to “alleviate the extreme humanitarian suffering of the Syrian people by degrading the Syrian regime’s chemical weapons capability and deterring their further use.”³¹

From the perspective of this article, it is important to emphasize the fact that in its April 2018 policy paper, the U.K. provides a new reason for the use of force in the Syrian case: using force to deter human suffering from chemical weapons. There is no precedent for using force to address the humanitarian consequences of the use of W.M.D.s, including chemical weapons.

Undoubtedly, the 2018 airstrikes have raised the international community’s concern about whether force shall be allowed to deter human suffering from chemical weapons without the authorization of the UNSC.

B. *Distinction from the 2003 Iraq Case*

However, as the military action aimed to stop the possible use of, and destroy the W.M.D.s, what is the difference between 2018 Syria and 2003 Iraq? Why has the international community demonstrated different attitudes toward two military actions, generally acquiescent in Syria and generally critical in Iraq? The U.S.-led coalition’s military action in Iraq was considered an invasion mainly because of the lack of evidence of Iraq’s ability to continue using W.M.D.s or retain biological weapons.³² Before the invasion, the UNSC had already passed Resolution 687 to control and destroy the W.M.D.s in Iraq, and UNSCOM was responsible for excising the resolution.³³ Besides, after the invasion, David Kay, heading the Iraq Survey Group, and the Intelligence Capabilities of the United States both reported that assessments of Iraq’s W.M.D. capabilities before the U.S. invasion were wrong.

On the contrary, the use of chemical weapons in Syria was evident and supported by several reports of the OPCW. In addition, unlike continuing to use chemical weapons to harm civilians after the adoption of U.N. resolutions and started to solve the problem of its use of chemical weapons in Syria, Iraq’s destruction of W.M.D.s was generally within a controllable range after the adoption of U.N. resolutions and intervention of the UNSC. The dangers of W.M.D.s in the Iraq and Syria cases, and whether they are controllable and resolvable are pretty different, which leads to different legal assessments of the use of force not authorized by the UNSC in the two cases.

C. *Distinction from Previous Syrian Airstrikes: Legal Justification*

As a matter of fact, the 2018 airstrikes were not the first time such military intervention was taken without

³¹ “Syria action—UK government legal position, Policy Paper of the United Kingdom” *United Kingdom Prime Minister’s Office* (14 April 2018), online: United Kingdom Prime Minister’s Office <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>

³² *Press Release: Security Council Holds First Debate on Iraq Since Start of Military Action; Speakers Call for Halt to Aggression, Immediate Withdrawal*, United Nations, SC/7705 (2003).

³³ Åke SELLSTRÖM, “Lessons from Weapons Inspections in Iraq and Syria” (2021) 115 *AJIL Unbound* 95.

UNSC authorization to resolve the use of chemical weapons in the Syrian Civil War. As the airstrikes that also took place in Syria, what made the 2018 airstrikes unique in the history of international law regulating the use of force and regained international attention compared to the 2014 and 2017 airstrikes?

In August 2012, then-U.S. President Obama said he would use military force in Syria if the red line had been violated. He said, “that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized.”³⁴ However, the U.S. launched airstrikes in 2014, declaring that the purpose of the airstrikes was to counter the terrorist group ISIS rather than destroy or prevent the use of chemical weapons, which is not a practice for the debate on the new law on the use of force to prevent the use and destruction of chemical weapons.

On 4 April 2017, the Syrian government launched a chemical weapons attack on its citizens.³⁵ In response to the use of chemical weapons, U.S. President Trump launched airstrikes in Syria and declared, “It is in the vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons.”³⁶ After the 2017 airstrikes in Syria, the UNSC met immediately but did not authorize the use of force.³⁷

From the perspective of international law, after the 2018 airstrikes, the states involved in this military intervention attempted to present a legal rationale for the airstrikes, which was different from similar military interventions in the past. Concerning the 2017 airstrikes, the Trump administration did not offer any legal justification for the use of force in Syria after the attack. Without an explicit declaration of legal aspects, a simple explanation of the action’s purpose is not a sufficient legal rationale in international law.

On the contrary, after the 2018 airstrikes, the U.K. declared the legal basis for the 2018 airstrikes, which is a significant difference compared to the 2017 airstrikes, although the U.S. and France still avoided declaring a legal basis. As one of the states participating in the airstrikes, the U.K. government announced in the policy paper as follows:

This is the government’s position on the legality of U.K. military action to alleviate the extreme humanitarian suffering of the Syrian people by degrading the Syrian regime’s chemical weapons

³⁴ Tanya SOMANADER, “President Obama Delivers a Statement on Airstrikes in Syria” *The White House Blog* (23 September 2014), online: The White House Blog <https://obamawhitehouse.archives.gov/blog/2014/09/23/president-obama-delivers-statement-airstrikes-syria>

³⁵ *Letter dated 26 October 2017 from the Secretary-General addressed to the President of the Security Council*, United Nations Security Council (UNSC), S/2017/904 (2017).

³⁶ Jim GARAMONE, “Trump Orders Missile Attack in Retaliation for Syrian Chemical Strikes” *US Department of Defense News* (16 April 2017), online: US Department of Defense News <https://www.defense.gov/News/News-Stories/Article/Article/1144601/trump-orders-missile-attack-in-retaliation-for-syrian-chemical-strikes/>

³⁷ *Letter dated 27 March 2017 from the Secretary-General addressed to the President of the Security Council*, United Nation Security Council (UNSC), U.N. SCOR, 72d Sess., 7915 mtg, U.N. Doc. S/PV.7915 (2017).

capability and deterring their further use, following the chemical weapons attack in Douma on 7 April 2018.³⁸

Then, the U.K. proved that the legal basis for using force is humanitarian intervention and listed some conditions for taking humanitarian intervention as an exceptional basis, following the detailed explanation to support how the 2018 airstrikes have met those conditions.³⁹ As a result, Scharf believes that the U.K.'s explicit legal rationale has made the 2018 airstrikes unique and remarkable under customary international law.⁴⁰

Moreover, the states' attitudes toward the 2018 airstrikes were also different. On the one hand, the multilateral nature of the 2018 airstrikes, as a military operation conducted jointly by three states, makes the 2018 airstrikes more representative. On the other hand, unlike other non-authorization military actions, the 2018 airstrikes seem to elicit more understanding from other states. Russia asked for a UNSC meeting and proposed recognizing the 2018 airstrikes in Syria as aggression, condemning this action. However, the draft resolution was rejected by a recorded vote of 8 against (Côte d'Ivoire, France, Kuwait, Netherlands, Poland, Sweden, United Kingdom, United States), 3 in favour (Bolivia, China, Russian Federation) with 4 abstentions (Equatorial Guinea, Ethiopia, Kazakhstan, Peru).⁴¹

Can we then consider a new practice that had begun to emerge, which may contribute to the formation of a new exception to the international law prohibiting the use of force, based on the uniqueness of the 2018 airstrikes, especially given that Russia's proposal was rejected? According to the ICJ judgment of the *Nicaragua v. United States (Merits)* case, "the instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as an indication of the recognition of a new rule".⁴² *In contrario*, it could be argued that if a conduct has not been "generally treated as breaches", such a conduct can indicate a recognition of a new rule. Thus, the legal significance of the rejection of Russia's proposal should be examined more carefully (see Chapter IV below).

III. Using Force to Deter Human Suffering from Chemical Weapons

Before examining whether the 2018 airstrikes and the consequent legal justification by the U.K. and the rejection of the Russian proposed resolution in the UNSC can be considered as an emerging customary practice to allow unilateral use of force to deter human suffering from chemical weapons, it is necessary to

³⁸ United Kingdom Prime Minister's Office, *supra* note 25.

³⁹ *Ibid.*

⁴⁰ Michael P. SCHARF, *supra* note 6 at 605.

⁴¹ *Press Release: Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression*, United Nations, SC/13296 (2018).

⁴² *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 at 88.

analyse the 2018 airstrikes under current international law. First of all, it is essential to discuss the norms against the use of chemical weapons, reflecting the international consensus on prohibiting chemical weapons, which are also the legal basis for the possible solutions to the Syrian issue. Then, an assessment of the prohibition on the use of force is made by discussing the interpretation of related articles of the UN Charter. By doing so, it can be argued that the 2018 airstrikes can only be considered illegal under current international law.

First, there are already some clear norms against the use of chemical weapons. Although these norms failed to resolve Syria's issue directly, they reflect the international consensus on prohibiting chemical weapons.

A. *Geneva Protocol and Rome Statute*

As early as 1925, in the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol), the use of chemical and biological weapons in war had been prohibited. It provided that: "whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world."⁴³ Syria did accede to the Geneva Protocol in 1968. Nevertheless, the term "the use in war of" in "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices" of the Geneva Protocol is interpreted as dealing with the use of chemical weapons only in international armed conflicts.⁴⁴ Thus, the 1925 Geneva Protocol cannot apply to the chemical attacks in the Syrian Civil War.

The Rome Statute of the International Criminal Court (Rome Statute) is another treaty that makes it a war crime to use "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices."⁴⁵ However, Syria has not signed the Rome Statute. Thus, Syria is not a party to the Rome Statute. According to Article 12 and Article 13 of the Rome Statute, the precondition for the ICC's jurisdiction over the events in Syria is a referral from the UNSC.⁴⁶ Therefore, the decision-making on Syria comes back to the UNSC.

B. *Chemical Weapons Convention (CWC) and the UNSC's Resolutions*

The most relevant treaty in this regard is the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction (CWC), which comprehensively tries

⁴³ *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*. 94 LNTS 65 (adopted 17 June 1925, entered into force 8 February 1928) [Geneva Protocol].

⁴⁴ R. R. BAXTER and Thomas BUERGENTHAL. "Legal Aspects of the Geneva Protocol of 1925." (1970) 64 *The American Journal of International Law* 855.

⁴⁵ *Rome Statute of the International Criminal Court*, 2187 UNTS 3 (adopted 17 July 1998, entered into force 1 July 2002) [Rome Statute].

⁴⁶ Dapo AKANDE, "Can the ICC Prosecute for Use of Chemical Weapons in Syria?" *EJIL Talk!* (23 August 2013), online: *EJIL Talk!* <https://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>

to control and eliminate chemical weapons and prohibit the development, production, acquisition, stockpiling, retention, transfer, and use of chemical weapons by States Parties. The CWC entered into force on 29 April 1997.⁴⁷ Although Syria had not signed the CWC when the first chemical attack happened in August 2013, after that, Syria officially acceded to the CWC as part of an agreement to destroy Syria's chemical weapons. On 14 October 2013, the Convention entered into force for Syria.⁴⁸ After that, the Organization for the Prohibition of Chemical Weapons (OPCW), in charge of the implementation of the CWC, was involved and started an investigation in Syria. In the meantime, Syria declared that Syria would fully cooperate with OPCW and fulfil its obligations under the Convention. In fact, the use of chemical weapons in Syria has been investigated and confirmed by the OPCW on several occasions. For example, according to OPCW-UN JIM's fourth report, the Syrian Arab Armed Forces used chemical weapons on 21 April 2014, 16 March 2015, and 16 March 2015, and ISIL was involved in using sulphur mustard on 21 August 2015.⁴⁹ Besides, the OPCW-UN JIM's final report in 2017 confirmed the use of chemical weapons by ISIL on 15 and 16 September 2016 and by the Syrian Arab Republic on 4 April 2017.⁵⁰

Then, according to Article XII (4) of CWC, when a State Party's activities have caused severe damage to the object and purpose of the CWC, the Conference shall bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the UNSC.⁵¹ Thus, in the case of Syria, the joint implementation mechanism between the OPCW and the United Nations (OPCW-UN JIM) was essential in addressing the Syrian chemical weapons issue. On 27 September 2013, the OPCW Executive Council adopted a historic decision EC-M-33/DEC.1 to guide the destruction work of chemical weapons in Syria, which was endorsed by the unanimous adoption of the UNSC resolution 2118 (2013) on the same day.⁵² Then, UN Secretary-General Ban Ki-moon and OPCW Director-General Ahmet Üzümcü recommended setting up the OPCW-UN JIM, which was subsequently endorsed by the Council. As a result,

⁴⁷ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1975 UNTS 3 (adopted 3 September 1992, entered into force 29 April 1997) [CWC].

⁴⁸ Organization for Prohibition of Chemical Weapons, "Press Release: Syria's Accession to the Chemical Weapons Convention Enters into Force" (14 October 2013), online: OPCW <https://www.opcw.org/media-centre/news/2013/10/syrias-accession-chemical-weapons-convention-enters-force>

⁴⁹ Letter dated 21 October 2016 from the Secretary-General addressed to the President of the Security Council, United Nations Security Council (UNSC), UN Doc S/2016/888 (2016).

⁵⁰ Letter dated 26 October 2017 from the Secretary-General addressed to the President of the Security Council, United Nations Security Council (UNSC), UN Doc S/2017/904 (2017).

⁵¹ CWC, *supra* note 47.

⁵² Press Release: Security Council Requires Scheduled Destruction of Syria's Chemical Weapons, Unanimously Adopting Resolution 2118 (2013), SC/11135 (2013).

the OPCW-UN Joint Mission in Syria was formally established on 16 October 2013.⁵³ At that time, the mandate of the OPCW-UN JIM was the destruction of chemical weapons in Syria. The OPCW-UN JIM successfully completed the destruction work of all declared chemical weapons in Syria and came to a close on 30 September 2014.⁵⁴

However, the chemical attacks continued in Syria. Facing the situation, the UNSC unanimously adopted Resolution 2235 (2015) and established the OPCW-UN JIM again on 7 August 2015 to investigate the use of chemical weapons in Syria and identify the responsible individuals or groups.⁵⁵ On 17 November 2016, the UNSC extended the mandate of the OPCW-UN JIM by unanimously adopting Resolution 2319 (2016).⁵⁶ Finally, due to the divergence between the UNSC members, the UNSC failed to extend the mandate of the OPCW-UN JIM on 17 November 2017. Thus, it was set to expire at midnight on 17 November 2017.⁵⁷ During the mandate period, the OPCW-UN JIM launched an investigation in several towns and cities in Syria where the alleged chemical attacks happened and submitted seven reports in all to confirm the several chemical attacks, mentioned above. There is little doubt that the OPCW-UN JIM plays an essential role in the investigation of using chemical weapons in Syria.

As mentioned above, the UNSC has adopted several resolutions regarding the prohibition of the use of chemical weapons. The UNSC Resolution 1540 (2004) affirms that the proliferation of nuclear, chemical, and biological weapons and their means of delivery threatens international peace and security.⁵⁸ In the UNSC Resolution 2118 (2013), the U.N. set the goal of destroying Syria's chemical weapons.⁵⁹ The Resolution itself was not expressly adopted under Chapter VII of the U.N. charter, but it maintained the prerogative of the Council to decide on further action. Then, the UNSC Resolution 2209 (2015), adopted under Chapter VII of the U.N. charter, declared that the UNSC can take necessary actions, including military action if some states do not cooperate with the work of Resolution 2118 (2013).

C. *Violations of the principle of the prohibition of the use of force*

⁵³ United Nations, "Statement: Joint Statement from the Organisation for the Prohibition of Chemical Weapons (OPCW) and the United Nations (UN)" (16 October 2013), online: United Nations <https://www.un.org/sg/en/content/sg/note-correspondents/2013-10-16/joint-statement-organisation-prohibition-chemical-weapons>

⁵⁴ Organisation for the Prohibition of Chemical Weapons - Un Joint Mission, "Press Release: Closure of OPCW-UN Joint Mission." (1 October 2014), online: OPCW-UN JIM <https://opcw.unmissions.org/opcw-un-joint-mission-draws-close>

⁵⁵ *Press Release: Security Council Unanimously Adopts Resolution 2235 (2015), Establishing Mechanism to Identify Perpetrators Using Chemical Weapons in Syria*, United Nations, SC/12001 (2015).

⁵⁶ *Press Release: Unanimously Adopting Resolution 2319 (2016), Security Council Extends Mandate of Mechanism to Identify Perpetrators Using Chemical Weapons in Syria*, United Nations, SC/12594 (2016).

⁵⁷ *Press Release: Security Council Fails for Fourth Time to Renew Mandate of Joint Mechanism Investigating Chemical Weapons Attacks in Syria*, United Nations, SC/13076 (2017).

⁵⁸ United Nations Security Council, Res 1540. UN Doc S/RES/1540 (2004).

⁵⁹ United Nations Security Council, Res 2118. UN Doc S/RES/2118 (2013).

In light of the above international law on the use of chemical weapons in civil war as it stood at the beginning of 2018, can we say that the 2018 airstrikes by the U.S., U.K., and France can be considered an internationally lawful action against the Syrian use of chemical weapons in its own territory causing tremendous human suffering amongst its own peoples? This article argues that the answer is clearly no.

As a military action without the UNSC's authorization, the 2018 airstrikes clearly violate current international law on the use of force. First of all, the 2018 airstrikes were an apparent violation of Article 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, or in any other manner inconsistent with the Purposes of the United Nations.⁶⁰

Scholars have thoroughly discussed the interpretation of Article 2(4) of the UN Charter. Most scholars support the interpretation that the threat or use of force is prohibited by Article 2(4), with the only legal exception in the cases of using force with UNSC's authorization, and for self-defence. According to this view, in relation to the Syrian case where there was no UNSC resolution on collective measures under Art.42 of the Charter, and unless the U.S., U.K., and France airstrikes were to be justified under the legal regime of self-defence, those airstrikes are illegal under the UN Charter as well as under the general international law. This majority view of scholars underlines the UN's unshaken attitude towards the prohibition of using force. "The U.N. Charter was made after World War Two, under the circumstance that the failure of the Covenant and the Pact of Paris, and thus, has become by far the most successful system for the prohibition on using force."⁶¹ Regarding whether states on their own could decide that using force was prohibited or not, the only retained wording, "or in any other manner inconsistent with the Purposes of the United Nations," permitting the use of force in some conditions, is also intended to give effect to the exceptions to the use of force under the Chapter VII.⁶² Even for this retained wording, many states still proposed to delete this part to prove that the prohibition on the use of force was absolute,⁶³ because "the legislative history of the UN Charter illustrates a clear intention by its drafters to render illegal all "excuses" for resorting to military force, except for those explicitly stated in the Charter."⁶⁴

Based on this interpretation, it is clear that the 2018 airstrikes were illegal according to the current interpretation of Article 2(4) of the U.N. Charter.

⁶⁰ *Charter of the United Nations*, United Nations, art.2, para.4.

⁶¹ Vaughan LOWE, *International Law* (Oxford: Oxford University Press, 2007) at 268.

⁶² Nico SCHRIJVER, "The Ban on the Use of Force in the UN Charter", in Mark WELLER, eds., *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2016), at 468.

⁶³ *Ibid.*, at 469.

⁶⁴ Kirthi JAYAKUMAR, "Humanitarian intervention: A legal analysis." (2012) SSRN at 2.

However, in discussing the Syrian case, some scholars put forward different opinions. “According to the UN Charter’s preamble, the United Nations’ compelling objective shall be saving succeeding generations from the scourge of war and safeguarding fundamental human rights.”⁶⁵ What’s more, “an analysis that simply relies on the prohibition of the threat or use of force in Article 2(4) of the UN Charter and its related principles of non-intervention and sovereignty, is overly simplistic,”⁶⁶ because “a ‘per se illegal’ rule is plainly overbroad. If no self-defence considerations arose, such a rule would permanently disable any external collective action, for example, to protect the population of any U.N. permanent member state from genocide.”⁶⁷ Therefore, “Article 2(4) of the UN Charter...bars any and all other forms of intervention without express Security Council authorization,” is not really fit what international law requires today.⁶⁸ This overly simplistic legal design has caused the dilemma that, as in the case of Syria, “international law offers no lawful alternative to prevent the slaughter.”⁶⁹ Consequently, “a narrow ‘affirmative defence’ to Article 2(4) should be defined to protect the civilians in the cases similar to Syria.”⁷⁰

However, some scholars argue that the prohibition against using force is a fundamental principle of international law and is also identified as a norm of *jus cogens*.⁷¹ Schrijver contends that the prohibition on using force has met three criteria for a norm to become a norm of *jus cogens*: (1) widely accepted and recognized norms of general international law; (2) a majority of states have accepted and recognized a norm as “peremptory”; (3) no derogation from the norm is permitted.⁷² Although these criteria were controversial because of unclear scope and applicability, “the only generally accepted examples of *jus cogens* are the prohibitions on the use of force and on aggression, genocide, slavery, racial discrimination, torture and crimes against humanity.”⁷³

There are indeed some states’ proposals to re-interpret Article 2(4) to justify some actions violating this article, such as Israel’s narrow interpretation of Article 2(4) over the Entebbe incident in 1976, U.S.’s justification of its invasion of Grenada in 1983, and NATO’s military action in Kosovo in 1999. Regarding

⁶⁵ Sir Daniel Bethlehem K.C, “Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention.”, *EJIL: Talk!* (12 September 2013), online: *EJIL: Talk!* <https://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Harold Hongju KOH, *supra* note 2.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Nico SCHRIJVER, *supra* note 62, at 485.

⁷² *Ibid.*, at 478.

⁷³ Anthony AUST, *Handbook of International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2010) at 10.

these cases, “although there are some debates on Article 2(4) in some cases, the practices for re-interpretation of Article 2(4) are still limited and did not get general support.”⁷⁴, and “the framework of *jus ad bellum* both under customary law and the U.N. Charter has proved to be rigorous and robust enough to withstand the pressures for momentous and situational change.” Thus, “the argument against the *jus cogens* status of the prohibition of the use of force is unlikely to produce an effect.”⁷⁵ As a result, although many scholars and a few state practices have proposed a new interpretation, the prohibition on using force is still generally agreed as a norm of *jus cogens*. Therefore, it is hard to say that the 2018 airstrikes were legal before the international community changed the norm of the prohibition on the use of force.

Another exception for the use of force in the U.N. charter is Article 51.

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. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁷⁶

Article 51 allows the right of self-defence as an exception to take military force in another state’s territory. Some scholars may argue that it was a legal basis for the 2018 airstrikes because President Trump said that “establish a strong deterrent against the production, spread, and use of chemical weapons” fit with the “vital national security interest of the United States.”⁷⁷ In his speech, he underlined the vital national security interest, which hinted that the use of chemical weapons in Syria posed a possible threat to U.S. national security. However, it is hard to say that the threat of the proliferation of chemical weapons in Syria is an imminent threat to the states participating in the 2018 airstrikes.⁷⁸ Compared to the NATO’s use of force in Kosovo, “As long as humanitarian crises do not transcend borders, as it were (in the case of

⁷⁴ Christine GRAY, *International law and the use of force*, 4th ed. (Oxford: Oxford University Press, 2018) at 32.

⁷⁵Alexander ORAKHELASHVILI, “Changing Jus Cogens Through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions”, in Mark WELLER eds., *The Oxford Handbook of the Use of Force in International Law*. (Oxford: Oxford University Press, 2016), 175.

⁷⁶ *Charter of the United Nations*. art.51.

⁷⁷ Trump White House, “Press Release: Joined by Allies, President Trump Takes Action to End Syria’s Chemical Weapons Attacks” (14 April 2018), online: Trump White House <https://trumpwhitehouse.archives.gov/articles/joined-allies-president-trump-takes-action-end-syrias-chemical-weapons-attacks/>

⁷⁸ Mika HAYASHI, “The U.S. Airstrike After the Use of Chemical Weapons in Syria: National Interest, Humanitarian Intervention, or Enforcement Against War Crimes?” (2017) 21 *American Society of International Law*. https://www.asil.org/insights/volume/21/issue/8/us-airstrike-after-use-chemical-weapons-syria-national-interest#_edn18.

Kosovo), and lead to armed attacks against other states, recourse to Article 51 is not available.”⁷⁹ Similarly, the chemical attacks in Syria did not lead to any attacks in the U.S. territory. Therefore, not many states recognize self-defence as a justification for the 2018 airstrikes, and the U.S. did not declare self-defence as its legal position after President Trump’s speech.

Consequently, based on the current interpretation of the related articles of the U.N. Charter as well as general international law, there was no international law, both in treaties and customary law, that allowed states to use force against another state, even in the case of using chemical weapons in civil wars that have caused and would cause tremendous human sufferings without the authorization of the UNSC. Obviously, the 2018 airstrikes by the U.S., U.K., and France were military intervention in Syria’s territory without any authorization from the UNSC and, consequently, violated the international law prohibiting the use of force as it stood on 13 April 2018.

IV. Were the 2018 airstrikes in Syria a law-making moment?

This article has demonstrated that, under the international law prohibiting the use of force as it stood on 13 April 2018 when the airstrikes by the U.S., U.K. and France against Syria were conducted, those airstrikes can only be considered illegal under international law. According to the ICJ judgment of the *Nicaragua v. United States (Merits)* case, the practice of states generally considered a violation of international law would not be considered as the constitutive element of new customary international law. However, on the basis of the very unique situation surrounding the 2018 airstrikes in Syria, Michael P. Scharf believes that these airstrikes would accelerate the development of customary international law and strike a *Grotian Moment* on the non-UN-sanctioned military intervention for deterring human suffering from chemical weapons.⁸⁰ Then the question arises: Were the 2018 airstrikes in Syria a law-making moment under customary international law that will allow military intervention to deter human suffering from the use of chemical weapons even in the context of civil strifes?

This article argues it is not, first, by criticizing Scharf’s argument based on the theory of customary international law, and then by assessing states’ statements on the 2018 airstrikes to evaluate whether state practice and *opinio juris* is concomitant.

A. Scharf’s Argument and the Theory of Customary International Law

In order for a new customary rule to emerge, certain conditions need to be met. According to ICJ’s explanation of forming a new customary law, there are two elements for forming a new customary law: state practice and *opinio juris*. Did the 2018 airstrikes meet these conditions?

⁷⁹ Bruno SIMMA, “NATO, the UN and the Use of Force: Legal Aspects”, in James PATTISON eds., *Humanitarian Intervention Volume II: The International Law on Humanitarian Intervention*. (Los Angeles, Washington DC, Toronto: SAGE Publications Ltd, 2014), 5.

⁸⁰ Michael P. SCHARF, *supra* note 6 at 605.

Scharf believes that the 2018 airstrikes meet the requirements for law-making, citing these three elements: (1) multilateral nature, (2) clear legal rationale, and (3) consensus of the international community.⁸¹

It is true that one of the most striking differences between the 2018 strikes and other previous airstrikes in Syria was their so-called multilateral nature. Scharf points out that “(it) is harder for critics to argue pretext when a country acts in concert with others for a humanitarian goal.”⁸² Scharf here is trying to counterargue the practical difficulties surrounding the theory of humanitarian intervention, where the critics of such theory argue the unilateral determination of what is “humanitarian” by the powerful intervening state. Scharf’s argument on the “multilateral nature” of intervention by the U.S., U.K., and France tries to justify the objectivity of the reasons (preventing human suffering of the local peoples rather than promoting hidden national interests) of the intervention.

However, since the participating countries are all NATO allies, namely the U.S., U.K., and France, the “multilateral nature” of the 2018 airstrikes cannot be considered an essential reference element under customary law. Firstly, although there is a consensus on the humanitarian suffering caused by the use of chemical weapons, using force to address the use of chemical weapons in Syria is far from being recognized as a multilateral consensus. Secondly, from the views of previous votes on the Syrian issue in the UNSC meetings, the U.S., U.K., and France have similar interests on the Syrian issue and always hold the same or similar positions against Russia. Thirdly, before the 2018 airstrikes, while there were some states, China as a representative, insisting on a political solution to the Syrian issue, it is hard to say the use of force is multilateral when it neglects these states’ views. Thus, this article argues that the criteria of whether the airstrikes are truly “humanitarian” in their nature should be based not on the multilateral nature of the intervention, but on the attitude of other states.

Besides, the *opinio juris* is usually identified through the declaration by the practising state on its legal necessity and/or legal position. Indeed, after the 2018 airstrikes, one of the states involved, the U.K., put forward a legal position for its military action, whereas France and the U.S. did not set out an explicit legal basis for their action. On this point, Scharf believes that the U.S. and France have accepted the legal position proposed by the U.K. as a common legal basis for the 2018 airstrikes.⁸³ He cites the words of the U.S. Ambassador spoken to the U.N. on 14 April 2018, “We worked in lockstep: we were in complete agreement.” to acknowledge that the U.S. had accepted the U.K.’s legal basis.⁸⁴

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Michael P. SCHARF, “Responding to Chemical Weapons Use in Syria” (2019) 51 Case Western Reserve Journal of International Law 196.

⁸⁴ *Ibid.*

However, in this author's view, no other evidence can support this interpretation. In addition, President Trump's speech was closer to suggesting self-defence as a legal basis, which used the term "vital national security interest." Although the Office of Legal Counsel of the U.S. Department of Justice's official opinion mentions the "human suffering," "humanitarian crisis", and "the use of chemical weapons in Syria", it uses the term "Syria's use of chemical weapons in the ongoing civil war threatens to undermine further peace and security of the Near East, a region that remains critically important to our national security,"⁸⁵ which is similar to President Trump's opinion. In this context, the United Nations International Law Commission (ILC) explains that the requirement of *opinio juris* "must be distinguished from other extralegal motives for action such as comity, political expediency or convenience."⁸⁶ Thus, *opinio juris* requires that, in order for the practice to be considered as a constitutive element of a new customary law, such practice must accompany evidence that the practising state was under a legal obligation rather than acting on political reasons. Therefore, without other evidence, it is hard to ascertain whether the U.S. Ambassador's words were supporting U.S. legal position or political position. Similarly, France did not explicitly accept or comment on the U.K.'s legal position, either. Thus, this article argues that Scharf's second criterion of "clear legal rationale" of the U.K. was not shared by the U.S. and France.

B. *Reactions of the International Community*

According to Scharf, the practice of 2018 airstrikes with an *opinio juris* as expressed by the U.K. has received a consensus of the international community and, thus, could be considered as a *Grotian Moment* of new rule-making on the use of force to deter human sufferings from chemical weapons. This article, however, demonstrates that, through a meticulous examination of actual statements of U.N. members, the 2018 airstrikes cannot be considered as generally accepted as law-making practice.

The 2018 airstrikes received some political support from other states. In the UNSC meeting after the 2018 airstrikes, the Council failed to adopt a draft resolution submitted by the Russian Federation to condemn the aggression.⁸⁷ In the UNSC meeting, eight states (Côte d'Ivoire, France, Kuwait, Netherlands, Poland, Sweden, the United Kingdom, and the United States) voted against Russia's proposal. Three states (Bolivia, China, and the Russian Federation) supported it, and four (Equatorial Guinea, Ethiopia, Kazakhstan, and Peru) abstained from voting. Scharf insists that most states have reached a consensus on the 2018 airstrikes, and only a few states disapprove.⁸⁸ However, it is necessary to make assessments on specific statements of other states when considering the formation of a new customary international law.

⁸⁵ United States Department of Justice, "April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities" (May 2018), online: USDJ <https://www.justice.gov/olc/opinion/april-2018-airstrikes-against-syrian-chemical-weapons-facilities>

⁸⁶ *Draft Conclusions on Identification of Customary International Law, with commentaries*, United Nations International Law Commission, UN doc.A/73/10 (2018) at 138.

⁸⁷ United Nations, *supra* note 28.

⁸⁸ Michael P. SCHARF, *supra* note 6 at 608.

1. Statements of the UNSC Members

Due to the UNSC's decision-making status to take action of using force, the opinions of the UNSC members are more influential. Except for the permanent members, other members of the UNSC are elected by the General Assembly, holding geographic representation for different areas. To some extent, their views can be considered to be representative of the general views of the international community. Therefore, the analysis of the statements of UNSC members has a certain priority over the views of other states. Thus, this article discusses the specific statements of states following the order that first UNSC members' statements and then other states' statements outside of the UNSC meeting.

In order to visualize more clearly the views of States, this article divides the states' statements into several groups of different kinds of attitudes towards the 2018 airstrikes: (1) supporting the action without the assertion of legality, (2) strong opposition to using force with the assertion of illegality, (3) emphasizing that action should be taken under the U.N. Charter, and (4) neutral stance.

Except for the states participating in the 2018 airstrikes, as the UNSC members, Poland and the Netherlands support the action without asserting legality. Seven states (Russia, China, Kuwait, Côte d'Ivoire, Kazakhstan, Bolivia, and Equatorial Guinea) strongly oppose using force with the assertion of illegality. Three states (Ethiopia, Peru, and Sweden) emphasize that action should be taken under the UN Charter.

As a representative, Poland showed its explicit support for the 2018 airstrikes, as follows:

We fully understand the reasons behind the action taken last night by the United States, the United Kingdom and France against Syrian chemical-weapons capabilities. We support that action, as it is intended to deter chemical-weapons attacks against the people of Syria.⁸⁹

Poland is the only state that explicitly supports the action and mentions that the reasons behind the action are to “deter chemical weapons attacks against the people of Syria”. However, Poland did not try to support the action with asserting legality or support the U.K.'s legal positions, but just showed its understanding.

The Kingdom of the Netherlands had a positive attitude towards the 2018 airstrikes but only shows vague support for using force without authorization. The Netherlands declared in the meeting, “The response by France, the United Kingdom, and the United States is understandable.”⁹⁰ It is worth mentioning that Netherlands underlined the human suffering caused by chemical attacks in Syria in the speech, saying, “...the chemical weapons attacks are among the most gruesome. The world hardly needs reminding of the unspeakable suffering that countless Syrian men, women, and children have endured.”⁹¹

⁸⁹ *U.N. SCOR*, 73d Sess., 8233 mtg., U.N. Doc. S/PV.8233 (2018) at 11.

⁹⁰ *Ibid.*, at 13.

⁹¹ *Ibid.*

However, Netherlands did not indicate that deterring human suffering from chemical weapons is an exception for using force. It used “understandable” but not “justified” or explicit support expressions.

Besides, It repeatedly emphasized other collective actions rather than the use of force, “The Kingdom of the Netherlands welcomes every option to establish an independent and impartial mechanism, whether within the framework of the United Nations framework or of other relevant international organizations.”⁹² It also explained that the Netherlands voted against Russia’s proposal because “It (Russia’s proposal) ignores the very essence of the action that must be taken by the Council.”⁹³ Therefore, it is suitable to interpret the Netherlands’ statement as vague support.

Under the circumstance that only a few states support the action, these states’ ambiguous expressions without a legal argument will undoubtedly affect the effectiveness of supporting the forming of a new norm under customary international law. It would be an overstatement to say that most states support using force to deter human suffering from chemical weapons.

On the contrary, in the second group, many states declared strong opposition to an exception for using force, including some states that voted against Russia’s proposal. In the UNSC meeting, seven UNSC members (Russia, China, Bolivia, Kuwait, Côte d’Ivoire, Kazakhstan, and Equatorial Guinea) and the Syrian Arab Republic held strong opposition to using force without the authorization of the UNSC with the assertion of illegality.

The most vigorous opposition came, of course, from the Syrian Arab Republic and Russian Federation. The President of Russia, Vladimir Putin, made a statement after the airstrikes that the airstrikes were “an act of aggression against a sovereign state”⁹⁴ and emphasized that it is an action “without a mandate from the UNSC and in violation of the U.N. Charter and norms and principles of international law.”⁹⁵

Then, Russia submitted a proposal to condemn the aggression to the UNSC. There is no doubt that Russia clearly expressed its opposition to the action and the justification for using force.

The Syrian Arab Republic, the direct target of this operation, also indicated its opposition. In its statement, the Syrian Arab Republic considered it to be aggression. It underlines that it is a violation of provisions of the United Nations Charter, “in particular those pertaining to respect for the sovereignty of States and to the non-use of force in international relations.”⁹⁶

⁹² *Ibid.*

⁹³ *Ibid.*, at 24.

⁹⁴ Office of the President of Russia, “Press Release: Statement by President of Russia Vladimir Putin” (April 2018), online: Office of the President of Russia <http://en.kremlin.ru/events/president/news/57257>.

⁹⁵ *Ibid.*

⁹⁶ U.N. SCOR, *supra* note 89 at 20.

Syria and Russia, as parties of interest in the event, may be seen by some as being political in their opposition. However, their statements are undoubtedly explicit legal opinions that emphasize that the 2018 airstrikes violate the U.N. charter and principle of prohibiting the use of force.

In addition, China has taken more diplomatic measures to condemn the 2018 airstrikes and reject any exception for using force without authorization of the UNSC. China voted in favour of Russia's proposal in the UNSC meeting and declared as follows:

Any unilateral military actions that circumvent the Security Council contravene the purposes and principles of the Charter of the United Nations, violate the basic norms enshrined in international law and those governing international relations, and would hamper the settlement of the Syrian issue with new compounding factors.⁹⁷

Supporting the Russian proposal reflects the stance that China considers the 2018 airstrikes an act of aggression. Based on the vote and statement of China, China's position rejects any unilateral military actions. Except for the UNSC meeting speech, China also commented on the 2018 airstrikes that China opposes using force in international relations and condemns any unilateral military action bypassing the Security Council because it violates the U.N. Charter's and international law's principles.⁹⁸

In a word, China's opposition to using force without authorization of the UNSC is clear, no matter that using force is aimed at alleviating human suffering as a result of chemical weapons.

The Plurinational State of Bolivia also supported Russia's proposal and held a similar position to China. Bolivia declares its legal position as follows:

Any such action must be authorized by the Security Council under the Charter of the United Nations.

All unilateral actions run counter to international law, as well as to the values and principles of the Charter. Bolivia rejects the use and the threat of the use of force.⁹⁹

From its legal position, Bolivia believes that any military action must be authorized by the Security Council, which, in effect, underlines that a use of force is only permissible when it meets the conditions under the U.N. Charter. However, there is no doubt that the 2018 airstrikes did not meet any conditions where using force is allowed, thus violating the principles of prohibiting using force.

All three countries above that voted for the Russian proposal expressed explicit opposition to an exception to the use of force, regardless of whether using force is aimed at alleviating human suffering from using chemical weapons.

⁹⁷ *Ibid.*, at 10.

⁹⁸ Ministry of Foreign Affairs of the People's Republic of China, "Press Release: Foreign Ministry Spokesperson Hua Chunying's Remarks" (April 2018), online: Ministry of Foreign Affairs of the People's Republic of China https://www.fmprc.gov.cn/eng/xwfw_665399/s2510_665401/2535_665405/201804/t20180414_696873.html

⁹⁹ U.N. SCOR, *supra* note 89 at 14.

Although five members (Kuwait, Côte d'Ivoire, Kazakhstan, and Equatorial Guinea) did not vote for Russia's proposal, they also showed strong opposition to a new exception for using force.

As for Kuwait, although Kuwait voted against Russia's proposal in the meeting, it rejected any use of force violating the U.N. Charter. Kuwait declares, "It is certain that there is no military solution to the Syrian crisis."¹⁰⁰ After the vote, Kuwait emphasized that the 2018 airstrikes violated the principle of prohibiting the use of force, as follows:

At the time when the State of Kuwait reiterates adherence to the purposes and principles of the Charter of the United Nations, which prohibits the threat or use of force as a means to settle disputes and requires them to be settled by peaceful means, yesterday's use of force was the result of efforts to disrupt the will of the international community.¹⁰¹

From this statement, it is clear that Kuwait rejects any use of force violating the U.N. Charter and emphasizes the critical standing of the principle of prohibiting the threat or use of force. Thus, although Kuwait voted against Russia's proposal in the meeting, it opposed the 2018 airstrikes and any exception for using force bypassing the UNSC.

Then, as one of the states that voted against Russia's proposal, Côte d'Ivoire actually did not accept any military action without authorization of the UNSC. Côte d'Ivoire recalls the original purpose of establishing the U.N., "By signing the Charter of the United Nations in 1945, the founding Members sought to establish a new world order based on multilateralism and its resolve to make peace a universal common good."¹⁰² Next, he shows Côte d'Ivoire's legal position on prohibiting the use of force as follows,

Based on its strong conviction in the virtues of multilateralism, my country therefore believes that resorting to force in order to maintain international peace and security must be authorized by the Security Council in order to preserve its essential legal authority and to thereby prevent any deviation or abuse.¹⁰³

In this statement, Côte d'Ivoire uses the term "resorting to force...must be authorized by the Security Council," which shall be interpreted as a rejection of any use of force bypassing the UNSC. Therefore, Côte d'Ivoire holds a negative attitude towards a new exception for using force, though it also voted against Russia's proposal.

Then, Kazakhstan declared, "Whatever action taken under whatever good pretext cannot and will not justify the military use of force."¹⁰⁴ It can be interpreted that Kazakhstan rejected any new exception for

¹⁰⁰ *Ibid.*, at 15.

¹⁰¹ *Ibid.*, at 24.

¹⁰² *Ibid.*, at 18.

¹⁰³ *Ibid.*, at 18.

¹⁰⁴ *Ibid.*, at 10.

using force, even though military action was launched to deter human suffering from chemical weapons. Furthermore, Kazakhstan puts forward its legal position as follows:

Kazakhstan's position has always been, and continues to be, that military action is the last resort, to be used only in cases approved by the Security Council. There was no approval by the Council of the military strikes that took place yesterday.¹⁰⁵

According to Kazakhstan's position, Kazakhstan believes that military action should be used only in cases approved by the Security Council, which means rejecting military action without the authorization of the UNSC. Therefore, although Kazakhstan abstained from voting, it actually opposed the U.K.'s legal position.

Equatorial Guinea held a similar attitude to Kazakhstan. In its statement, Equatorial Guinea also emphasized that using force is only allowed when the UNSC authorizes the action. Equatorial Guinea declared, "We accept its use only when it is in line with the principles of international law and the provisions of the Charter of the United Nations."¹⁰⁶

Then, the third group, three states (Ethiopia, Peru, and Sweden) emphasized that action should be taken under the U.N. Charter.

One of the states was Sweden. Although Sweden voted against Russia's proposal in the UNSC meeting, its statement shows that Sweden did not support using force without the authorization of the UNSC. Even if Sweden underlines that chemical weapons have been used repeatedly in Syria, Sweden still holds a very cautious attitude toward the 2018 airstrikes. Sweden insists, "We have tried to ensure that all peaceful means to respond are exhausted...find a way for the Council to shoulder its responsibility in accordance with the Charter."¹⁰⁷ Sweden also cites the U.N. Secretary-General's words¹⁰⁸, demonstrating that any action should be under the U.N. charter and international laws.¹⁰⁹ Sweden did not show any support for the 2018 airstrikes or use of force in its statement, but it did not express condemnation or objection, either.

Regarding Peru, while Peru did not directly oppose the use of force, it stressed the need to act in accordance with the U.N. Charter. Peru makes a statement that "any response to the crimes committed in Syria, as well as a solution to the conflict in Syria overall, must be consistent with the Charter, with international law and with the Council's resolutions."¹¹⁰

¹⁰⁵ *Ibid.*, at 10.

¹⁰⁶ *Ibid.*, at 17.

¹⁰⁷ *Ibid.*, at 12.

¹⁰⁸ The U.N. Secretary-General says, "From the beginning, we have witnessed systematic violations of international humanitarian law, international human rights law and international law *tout court* — in utter disregard for the letter and the spirit of the United Nations Charter".

¹⁰⁹ U.N. SCOR, *supra* note 89 at 12.

¹¹⁰ *Ibid.*, at 18.

Ethiopia explained why they chose to abstain. Ethiopia declared, “We abstained on the grounds of pragmatism. We know that even if it had received nine votes, it would have been vetoed. Therefore, it would have had only symbolic value.”¹¹¹ Therefore, it is difficult to reflect on the true position of Ethiopia just from its abstention. In fact, Ethiopia implicitly stated that the 2018 airstrikes violated the U.N. Charter. Ethiopia says, “We know that we are all disappointed by the current deadlock, but that should not justify overlooking the obligation to adhere to the principles of the Charter.”¹¹²

2. Other States’ and Organizations’ Declarations

Outside of the UNSC meeting, some states and international organizations also made statements about the 2018 airstrikes.

The first group was the states that supported the action but did not make any legal opinions about using force under international law. These states, or international organizations’ statements, show an understanding of the 2018 airstrikes and the action’s purpose but deliberately bypassed the legal argument concerning the use of force. NATO declared, “Allies expressed their full support for this action intended to degrade the Syrian regime’s chemical weapons capability and deter further chemical weapon attacks against the people of Syria.”¹¹³ Although NATO fully supported the action, they did not make legal opinions or accept the U.K.’s legal position. NATO’s statement was the most direct and representative support for the action. Other states’ statements were more ambiguous than NATO’s statement. They use the terms “understand,” “appropriate,” “justified,” and so on.

More importantly, those states use these vague words only to support the action, but not the unauthorized use of force. None of these states made explicit statements supporting a new exception for using force under customary international law or the U.K.’s legal position. In this case, Scharf believes, “they can be read as a statement regarding legality under the circumstances.”¹¹⁴ However, aside from whether forming a new customary international law to revise a *jus cogens* requires a higher quality legal statement, those vague terms and limited support to the action are also hard to read as an acceptance of a new exception to using force. Except for NATO, 11 states that made similar statements were Australia, Colombia, Georgia, Israel, Japan, Qatar, Saint Lucia, Sultanate of Oman, Ukraine, United Arab Emirates, and the Republic of Korea.

As for the second group, five states (South Africa, Costa Rica, Cuba, Venezuela, and Iran) also declared strong opposition to such a use of force without the authorization of the UNSC. For instance, South Africa declared, “The alleged use of chemical weapons in Syria cannot justify military airstrikes in a territory of a

¹¹¹ *Ibid.*, at 23.

¹¹² *Ibid.*, at 16.

¹¹³ North Atlantic Treaty Organization, “Press Release: Statement by the North Atlantic Council on Actions taken against the use of chemical weapons in Syria” (April 2018), online: NATO https://www.nato.int/cps/en/natohq/news_153670.htm?utm_source=twitter&utm_medium=smc

¹¹⁴ Michael P. SCHARF, *supra* note 6 at 610.

sovereign state without the authorization of the UNSC.”¹¹⁵ Similarly, Cuba stated, “Cuba expresses its strongest condemnation of the new attack...using as a pretext the alleged use by the Syrian Government of chemical weapons against civilians.”¹¹⁶ Cuba also emphasizes the illegality of the 2018 airstrikes: “ This unilateral action, outside the Security Council of the United Nations, constitutes a flagrant violation of the principles of International Law and the Charter of that organization and constitutes an outrage against a sovereign State....”¹¹⁷ These states explicitly rejected such a use of force even if it was an action to deter human suffering from chemical weapons.

Furthermore, in the third group, some states emphasized that action should be taken under the U.N. Charter and relevant international law. Malaysia’s statement is representative of this kind of attitude. Malaysia declares, “Malaysia has always believed that in dealing with matters of peace and security, all parties must act in a manner consistent with the Charter of the United Nations and international law.”¹¹⁸ Although these states did not directly state that the 2018 airstrikes were illegal, they emphasized the relevant international law. Based on the fact that we are discussing whether it is a law-making moment, no international law allows the 2018 airstrikes. As mentioned above, the 2018 airstrikes are undoubtedly illegal under current international law. Under this premise, interpreting the statements of these states as support or acquiescence to the 2018 airstrikes is clearly not in line with their intentions. Therefore, it is more appropriate to interpret these statements as vague objections to the airstrikes. Twelve states and one intergovernmental organization hold this position: Argentina, Austria, African Union, Brazil, Guatemala, Ivory Coast, Indonesia, Mexico, Malaysia, Pakistan, Thailand, Uruguay, and Vietnam.

Last but not least, some states hold a neutral stance. They only commented on the solution to the Syria issue but not the 2018 airstrikes. For example, Iraq commented, “The Iraqi Foreign Ministry is concerned about recent developments in Syria and calls on the international community to step up efforts to find political solutions to the Syrian crisis.”¹¹⁹ Seven states hold similar views: Algeria, Chile, Panama, Greece, India, Iraq, and the Philippines.

¹¹⁵ South African Government, “Press Release: Government on airstrikes conducted in Syrian Arab Republic” (April 2018), online: South African Government <https://www.gov.za/speeches/south-africa-opposed-air-strikes-being-conducted-territory-syria-16-apr-2018-0000>

¹¹⁶ Cuba’s Representative Office, “Press Release: Cuba strongly condemns aggression against Syria” (April 2018), online: Cuba’s Representative Office <https://misiones.cubaminrex.cu/en/articulo/cuba-strongly-condemns-aggression-against-syria>

¹¹⁷ *Ibid.*

¹¹⁸ Ministry of Foreign Affairs of Malaysia, “Press Release: Statement by the Ministry of Foreign Affairs, Malaysia On the Situation in Syria” (April 2018), online: Ministry of Foreign Affairs of Malaysia http://www.kln.gov.my/web/guest/press-release/asset_publisher/FCK0...ia-on-the-situation-in-syria?redirect=%2Fweb%2Fguest%2Fpress-release

¹¹⁹ Ministry of Foreign Affairs of the Republic of Iraq, “Press Release: Foreign Ministry is concerned about recent developments in Syria” (April 2018), online: Ministry of Foreign Affairs of the Republic of Iraq <http://www.mofa.gov.iq/en/news.php?articleid=2547>

Overall, except for the U.K., no state made an explicit statement to support an exception for using force to deter human suffering from chemical weapons under customary international law. The remaining Twenty-eight NATO states (including the U.S., France, and other 2 UNSC members) and 11 states participate or support the action without the assertion of legality. Twelve states (including 7 UNSC members) made clear statements to emphasize the illegality of the 2018 airstrikes and rejected the use of force. Fifteen states (including 3 UNSC members) and one intergovernmental organization emphasized that any action should have been taken under the U.N Charter and relevant international law, which can be interpreted as vague opposition. Seven states hold a neutral stance.

C. *Modifying a Norm of Jus Cogens*

Based on these statements above, at best, the international community's attitudes toward the 2018 airstrikes, and military action without the authorization of the UNSC, have reached an unprecedented balance. The human suffering caused by chemical weapons is indeed repeated in some states' statements, which means there is an international consensus against using chemical weapons in Syria. Although, in states' statements, they have underlined the use of chemical weapons to discuss the situation in Syria, they try not to mention an exception for using force under customary international law.

What is more, it is discussed above that prohibiting the use of force is an essential principle in international law and international security and is recognized as a norm of *jus cogens*. Thus, the international community shall be more cautious about modifying such a norm of *jus cogens*. Strictly speaking, based on the criterion of *jus cogens* that no derogation from the norm is permitted, one question remains whether a change under customary international law could modify such a norm of *jus cogens* because any modification is not allowed. With the assumption that such modifications are permitted, there is little doubt that any attempt to make a change to such a norm of *jus cogens* entails a heavy burden of proof.¹²⁰

Any modification of the international legal framework concerning the prohibition on the use of force, as a pioneering category of *ius cogens*, requires not only support of very significant number of States, but also very significant quality of their statements.¹²¹

Then, it is hard to conclude that some states' vague support without legal argument, such as "support" and "understanding", can be recognized as "significant quality". Although, if states continue to offer "support" in the future, it would influence the shape of the customary norm prohibiting the use of force, this kind of "support" and "understanding" did not form an *opinio juris* in the 2018 airstrikes case.¹²² What's more, many states' direct opposition with clear legal reasons is still a strong obstacle to such a modification.

¹²⁰ Ondřej SVÁČEK, "Humanitarian Intervention: Fairy Tale about One Swallow Which Made Summer?" (2019) 19 *International and Comparative Law Review* 145.

¹²¹ *Ibid.*, at 150.

¹²² Kleczkowska, AGATA, *supra* note 5 at 389.

Therefore, it is difficult to interpret that the quantity and quality of states' statements in 2018 airstrikes as sufficient to modify a norm of *jus cogens*.

V. Conclusion

The repeated chemical attacks in Syria and the UNSC's stalled decision-making set the stage for the 2018 airstrikes. Then, the U.K. provided a new reason for the use of force in the Syrian case: using force to deter human suffering from chemical weapons. As an unauthorized use of force, it was unique and typical compared to previous cases because of its purpose in response to the chemical attacks against civilians and the understanding it got from other states. The uniqueness of the 2018 airstrikes offers possibilities for discussing whether the 2018 airstrikes are a law-making moment under customary international law.

However, from the specific statements of states, it can only be concluded that the international community's attitudes toward the 2018 airstrikes have reached an unprecedented balance. Responding to the 2018 airstrikes, the states that support the action only use vague terms without legal arguments, while many states show direct opposition with clear legal reasons. As a modification to the norm of the prohibition on the use of force, which is generally agreed as a norm of *jus cogens*, there shall be higher requirements. Therefore, the 2018 airstrikes are still insufficient to be a law-making moment under customary international law for a new exception to the prohibition of using force.

Take a step back. The international community's attitude toward the unauthorized use of force in response to chemical attacks against civilians is gradually changing. In the future, with more similar state practices and more support from states, using force to deter human suffering from chemical weapons may be formed as a new exception to the prohibition on the use of force under customary international law. At that time, new questions will arise. How would a new exception to the prohibition of the use of force formed under customary international law affect the relevant international law, such as Article 2(4) of the U.N. Charter? This is an issue for future research to explore.