

The United States use of force against the Syrian government

Legal or illegal under domestic and international law?

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For those who supported and guided me during these academic years, I dedicate this research paper to you.

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ABBREVIATIONS

CWC	Chemical Weapons Convention
GA	General Assembly
OPCW	Organization For The Prohibition Of Chemical Weapons
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution

INTRODUCTION

In 2011, another civil uprising was making the headlines of most of the press. The beginning of the Syrian civil war was at first viewed as, in the continuation of the different uprisings in the middle east, going to bring about regime change and oust President Bashar al-Assad. Seven years later, with millions of civilians internally displaced, millions of refugee outflows, more than a hundred thousand casualties and with the rise of the terrorist group ISIS, President Assad is still in power¹. In light of the crisis at hand, one could not argue that a solution by the international community is required. This leads us to the question of military intervention. Indeed, one of the humanitarian concerns lead the United States to take action, the alleged use of chemical weapons by the Syrian government. This accusation, made on multiple occasions, unleashed a chain of retaliations that are of grave concern to the rules governing the collective security system established by the United Nations. This will be the object of our study hereafter.

In response to the allegations of the use of chemical weapons, the United States launched two cruise missile strikes (the first in 2017 and the second in 2018) against the Syrian government in the attempt to deter the future use of the banned weapons. Our aim is to examine the legality of this military intervention under both domestic and international law. In so doing, we shall proceed by examining Syria's commitment to the rules governing the use of chemical weapons (chapter I). This will set the context for our analysis of the United States justifications under U.S. domestic law (chapter II) and under international law (chapter III). Finally, we'll look into the legitimacy of the strikes (chapter IV).

¹ See C. GLASS, *Syria burning: ISIS and the Death of the Arab Spring*, OR Books, New York, 2015; See U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. doc. A/HRC/37/72, 23 March 2018

CHAPTER I: SYRIA'S COMMITMENT TO THE CHEMICAL WEAPONS CONVENTION

Although the main issue in Syria is the continued civil war that has resulted in millions of internally displaced citizens as well as refugee outflows. Another issue has caught the attention of the international community and especially the United States which is the alleged continued use of chemical weapons by the Syrian government resulting in civilian casualties.

In this chapter we shall examine at first the present state of international law regarding the use and proliferation of chemical weapons (section I). Secondly, we will look at the different accusations made towards the Syrian government (section II). Finally, we shall present the chain of retaliations that followed involving the use of force by the United States government (section III).

SECTION I – INTERNATIONAL LAW AND THE USE OF CHEMICAL WEAPONS

On 14 September 2013, the Syrian Arab Republic acceded to the Chemical Weapons Convention (CWC). Until then it hadn't attempted or made no indication of its intention to join the CWC. This convention entered into force on April 29, 1997. It includes most member states of the United Nations². The CWC is a multilateral treaty that bans chemical weapons and requires their destruction within a specified period of time. It is more comprehensive than the 1925 Geneva Protocol, which prohibits the use but not the possession of chemical weapons.

Under the convention, the Organization for the Prohibition of Chemical Weapons (OPCW) was established in order to supervise its implementation, conduct international verification of compliance with its provisions, and act as a forum of consultation and cooperation among its member states on all issues related to the implementation of the convention³.

² Syria was the one hundred and ninetieth State to join the convention in 2013. Today States that are not party to the convention include for example Egypt, North Korea and South Sudan. Israel has signed but not ratified the convention.

³ R. TRAPP, 'Elimination of the Chemical Weapons Stockpile', *Journal of Conflict & Security Law* (2014), Vol. 19 No. 1, p. 8; Chemical Weapons Convention (CWC) Article VIII, online: <https://www.opcw.org/chemical-weapons-convention/download-the-cwc/>

The sanctions provided by the CWC include collective punitive measures or the OPCW could bring the case before the UNSC and the General Assembly⁴.

In addition to the CWC, there is some that consider that in light of state practice and *opinio juris* the use of chemical weapons should be considered as a violation of customary international law⁵. Others go further and state that the prohibition of the use of chemical weapons in any form is a *ius cogens* norm⁶. This means that it enters the category of norms that are so fundamental that no derogation from them can be accepted. This claim is sharply disputed and even so there is no clear framework upholding these types of norms⁷.

Nonetheless, the Syrian government, in acceding to the CWC, committed to the destruction of their chemical weapons stockpile as well as to cease using these prohibited weapons. We shall see that according to different reports and allegations, the Syrian government didn't hold their end of the bargain.

SECTION II – BACKGROUND OF THE USE OF CHEMICAL WEAPONS BY THE SYRIAN GOVERNMENT

After the repeated allegations⁸ of chemical weapons attacks orchestrated by the Syrian government, the UN Secretary General upon request of the Syrian Government conducted an investigation based

⁴ Chemical Weapons Convention (CWC) Article XII, online: <https://www.opcw.org/chemical-weapons-convention/download-the-cwc/>

⁵ We shall not dive into the crystallization of a customary international law norm. The idea is that in light of the number of states that have adhered to the convention one could consider it being in addition to treaty law also customary international law.; see J. BLAKE and A. MAHMUD, 'A Legal 'Red Line'?: Syria and the Use of Chemical Weapons in Civil Conflict', 61 *UCLA L. REV. DISC.*, 2013, p. 244-260, online: <https://www.uclalawreview.org/pdf/discourse/61-16.pdf>

⁶ See C. HYUN, 'The Prohibition of Chemical Weapons: Moving toward *Jus Cogens* status', *Southern California Law Review*, 2015, p. 3, online: https://southerncalifornialawreview.com/wp-content/uploads/2018/01/88_1463.pdf

⁷ An extensive analysis can be done on the character and effects of these types of norms but this is not the aim of this paper. We only attempt to point out the importance of the prohibition of the use of chemical weapons which shall be of some relevance further in our study related to the legality of the cruise missile strikes under international law.

⁸ See OPCW Executive Council, Decision on destruction of Syrian chemical weapons EC-M-33/Dec.1 (27 September 2013)

on the authority granted to him under UN General Assembly and Security Council Resolutions⁹. Reports then emerged about a major chemical weapons attack on different populated areas in Damascus. The UN confirmed that chemical weapons had indeed been used¹⁰.

In light of the alleged use and proliferation of chemical weapons by the Syrian government, the United States of America decided to not let these events go unpunished. Indeed, the first response was made by the Obama administration in 2013 when he made a statement threatening the use of force against the Syrian government in retaliation for its alleged use of chemical weapons (see *infra*.)¹¹. However, a different route of negotiations and diplomacy was taken in part due to the fact that collective action authorized by the United Nations Security Council seemed farfetched because of a consistent Russian veto in the matter. This back and forth diplomatic effort between Russia and the United States led to an agreed framework for the elimination of the Syrian chemical weapons¹². This resulted in a UNSCR on the matter and a joint UN-OPCW mission was formed to implement the measures related to verify the elimination of Syria's chemical weapons programme¹³.

Nonetheless, subsequent events involving the use of chemical weapons by the Syrian government occurred. Indeed, on April 4 2017, the Syrian government allegedly launched a chemical weapons attack on its own population resulting in the death of dozens of civilians. Moreover, according to the United States intelligence committee, the Syrian government used sarin in November 2017 in

⁹ GA Res. 42/37 C and SC Res. 620; See United Nations, 'United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic' Final Report (December 2013) available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/12/report.pdf> accessed 3 February 2014.

¹⁰ R. TRAPP, 'Elimination of the Chemical Weapons Stockpile', *Journal of Conflict & Security Law* (2014), Vol. 19 No. 1, p. 9; See also United Nations, 'United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic' Final Report (December 2013), *Op. Cit.*, p. 2-6

¹¹B. OBAMA, Statement by the President on Syria, The White House, February 4, 2012, online: <http://www.whitehouse.gov/the-press-office/2012/02/04/statement-president-syria>; See also E. STERNER, 'Dictators and Deterrence: Syria's Assad, Chemical Weapons, and the Threat of U.S. Military Action', *Comparative Strategy*, Taylor & Francis Group, 2014

¹² US Department of State Office of the Spokesperson, Framework for the Elimination of Syrian Chemical Weapons (14 September 2013) online: <http://www.state.gov/r/pa/prs/ps/2013/09/214247.htm>

¹³ S/RES/2118 (2013), United Nations Security Council Resolution, 27 September 2013

the suburbs of Damascus and in an April 2017 attack on Khan Shaykhun¹⁴. They also claim that it dropped chlorine bombs three times in just over a week during spring 2018 (April 7, 2018) and launched at least four chlorine rockets in January 2018 in Duma¹⁵. The U.S. government has assessed that the regime used chemical weapons more than fifteen times since June 2017 in the suburb of East Ghutah¹⁶. This leads the US government to believe that action must be taken in order to deter the Syrian government in the future use of chemical weapons.

SECTION III – THE U.S. CRUISE MISSILE STRIKES

In response to the alleged chemical weapons attack by the Syrian government, the Trump administration took a different approach compared to the Obama administration. President Trump ordered a cruise missile strike on April 7 2017 a few days after the alleged chemical weapons attack occurred. They responded with fifty-eight missiles aimed at the Shayrat airfield, which damaged or destroyed Syrian fuel and ammunition sites, air defense capabilities, and twenty percent of the Syrian Air Force's operational aircraft¹⁷.

The second strike of April 13 2018 was quite different in nature and scope to the first. Indeed, this was a coordinated effort between the United Kingdom France and the United States. Together, they attacked three facilities associated with Syria's use of chemical weapons: The Barzeh Research and Development Center, the Him Shinshar chemical-weapons storage facility, and the Him Shinshar chemical weapons bunker facility¹⁸.

¹⁴ S. A. ENGEL, 'April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities', Opinion of Assistant Attorney-General, in *Opinions of the Office of Legal Counsel*, Vol. 42, May 31, 2018, p. 2, online: <https://www.justice.gov/olc/opinion/file/1067551/download>

¹⁵ *Ibid.*, p. 2

¹⁶ *Ibid.*, p. 2

¹⁷ J. MATTIS, "Remarks on Syria Operations"; Statement by Secretary of Defense Jim Mattis on the U.S. Military Response to the Syrian Government's Use of Chemical Weapons (Apr. 10, 2017), <https://www.defense.gov/News/News-Releases/NewsRelease-View/Article/1146758/statement-by-secretary-of-defense-jimmattis-on-the-us-military-response-to-the-source/GovDelivery/>.

¹⁸ S. A. ENGEL, 'April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities', Opinion of Assistant Attorney-General, *Op. Cit.*, p. 2-3; See also 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 (Apr. 14, 2018) (statement of Lt. Gen. McKenzie) ("DoD Briefing"), online: <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1493749/department-of-defensepress-briefing-by-pentagon-chief-spokesperson-dana-w-whit/>.

The aim was to damage the chemical-weapons program rather than engage in a prolonged military operation against the Syrian government. Whereas the first strike only targeted the airfield from which the Syrian government launched the weapons.

In light of these events, different questions arise regarding the legality of the strikes under domestic and international law. Indeed, we shall now examine the legality of the intervention under U.S. domestic law.

CHAPTER II: THE LEGALITY OF THE CRUISE MISSILE STRIKES UNDER U.S. LAW

After stating the facts of the Syrian conflict and the use of chemical weapons. We shall, before diving into the legal rationale under international law and *ius ad bellum*, examine the legality of the strikes in 2017 and 2018 under U.S. domestic law. It's crucial in foreign relations to understand the allocation of authority over the use of military force. Especially in the case of the United States who is frequently involved in military activities abroad. A starting point is the separation of powers between Congress, Executive and Judiciary. Indeed, in most constitutional democracies, military action has to be approved by the legislative body duly elected by its citizens. However, in the case of the United States, history tells us otherwise, there have been multiple cases of presidential unilateralism where the use of force has been initiated without congressional approval.

Our aim is to establish whether in the case of the Syrian strikes, the Trump administration acted within the scope of its executive war powers or whether it exceeded them. In doing so we shall first consider the exercise of war powers in the United States (Section I) especially after World War II then we shall dive into congressional and judicial checks on presidential uses of military force (section II) before finally applying the principles set out in U.S. domestic law to the Syrian cruise missile strike (section III).

SECTION I – THE CONSTITUTIONAL TEXT AND PRESIDENTIAL WAR POWERS

Throughout history two competing constitutional visions of foreign affairs have been put forward, a notion of shared power derived from *Youngstown Sheet & Tube Co. v. Sawyer* and the opposing vision of unilateral executive decision making fostered by *United States v. Curtiss-Wright Export Corp*¹⁹(*voy. Infra*).

Some indication on presidential war powers and the notion of shared powers can be found in the U.S. Constitution. We must look at the ‘original intent’ of the Framers. Indeed, the Constitution assigns a variety of war-related powers to Congress like the powers to raise and support the military, to appropriate and spend money and to declare war²⁰. The U.S. Constitution also refers to the President as the Commander-in-Chief of the armed forces²¹. Looking at the military history of the United States, there have only been five declarations of war adopted by Congress and the last one was during World War II²². Nonetheless, the question remains as whether Congress has the sole power to authorize the use of force absent a declaration of war.

Moreover, one can also consider that not all uses of force amount to an act of war. Let us examine the first intention of the framers of the Constitution.

§1 – Congressional authority, the starting point

Following the birth of the new nation, two important challenges came with independence. First, was foreign interference with U.S. maritime commerce and the second challenge lay in the prospect of U.S. ships and its goods becoming entangled in the cross fire of the wars between European powers (on the oceans surrounding the U.S.)²³. At that time the general view was that the President had to obtain congressional authorization before using military force against another state, the only exception to this principle would be in cases of self-defence²⁴. The first President, George Washington, stated “ the Constitution vests the power of declaring war in Congress; therefore no

¹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Known as the steel seizure case; *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

²⁰ U.S. CONST. art. I, §8

²¹ U.S. CONST. art. II, §2

²² During these separate wars, eleven declarations of war were made against foreign nations; See R. F. GRIMETT, ‘Instances of Use of United States Armed Forces Abroad, 1798-2010’, *Congressional Research Service*, 2011, p. 1, online: <https://fas.org/sgp/crs/natsec/R41677.pdf>

²³ P. IRONS, *War Powers ‘How the Imperial Presidency Hijacked the Constitution’*, Metropolitan books, 2005, p. 29

²⁴ L. FISHER, *Presidential War Power*, University Press of Kansas, 2013, p. 8-9

offensive expedition of importance can be undertaken until they have deliberated on the subject, and authorized such a measure²⁵”. An exception of self-defence can be derived from this statement. Nonetheless, uncertainties regarding when congressional authorization was required remained.

One has to look at the notion of war because there are some instances that can fall short of war and might not therefore necessitate congressional authorization. On this issue the constitutional question that arises is “For the purposes of Article I of the Constitution, is this war?”. In cases where the use of force entails something less than “war” then it is considered that the President can initiate it without congressional approval (see *infra*)²⁶. During the Clinton Administration, Walter Dellinger, then-Assistant Attorney General for the Office of Legal Counsel, argued that the President may engage a lawful use of force if there is a compelling national interest and that the “nature, scope, and duration” of the action demonstrates that the Commander-in-chief is not taking the country to a “war” that requires prior congressional approval (see *infra*)²⁷.

During the nineteenth century and twentieth century, different military operations were initiated by the President without congressional approval²⁸.

The main approach to interpreting war powers between the President and Congress is based on these elements:

- (a) “The making of foreign policy was the shared responsibility of the president and Congress.
- (b) In what Corwin refers to as the Constitution’s “invitation to struggle” for control of foreign affairs, the president is well positioned to lead.

²⁵ Letter from George Washington to Governor William Moultrie (Aug. 28 1793), in G. WASHINGTON, *The writings of George Washington*, Jared Sparks, New York, 1847, p. 366-367

²⁶ See Testimony of H.H. KOH Legal adviser to U.S. Department of State, U.S. State Department, *On Libya and War Powers*, Before the Senate Foreign Relations Committee, July 28 2011, online: <https://2009-2017.state.gov/s/l/releases/remarks/167250.htm>

²⁷ Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173 (1994); See also D. JOHNSON, ‘When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law’, 53 *HOUS. L. REV.* 1065, 1073 (2016).

²⁸ For example, in 1900 President McKinley sent 5,000 US Troops to China during the Boxer Rebellion as part of a multinational coalition saying that there was no war with China and it was justified to “secure wherever possible the safety of American life and property in China”, President William McKinley, Message to Congress, Dec. 3 1900, in CONG. REC., Part I, p. 2 (1901), online: <https://www.gpo.gov/fdsys/pkg/GPO-CRECB-1901-pt1-v34/pdf/GPO-CRECB-1901-pt1-v34-1.pdf>; other military operations without congressional approval can be found in R. F. GRIMETT, ‘Instances of Use of United States Armed Forces Abroad, 1798-2010’, *Congressional Research Service*, 2011, p. 1, online: <https://fas.org/sgp/crs/natsec/R41677.pdf>

- (c) In war, only the Congress is authorized to declare or initiate military action.
- (d) Once declared or authorized, the president, as commander in chief, takes on added authority to conduct or prosecute the war.
- (e) During war, the Congress maintains its authority to determine the course of war via the purse, its possession of legislative authority and through oversight.
- (f) All presidential actions in wartime are reviewable by both the Congress and the courts.²⁹

These elements constitute the joint responsibility in the making of foreign policy between Congress and the President.

Looking back at the *United States v. Curtiss-Wright Export Corp* case we see an evolution in the sharing of war powers and foreign policy between Congress and the President. This case paved the way for the “sole organ” doctrine wherein the President is considered having exclusive power in the field of international relations. The background of the case dates back to 1933 and the “delegation doctrine” where congress passed laws delegating regulatory powers to the President in matters related to commerce. These statutes were immediately challenged in the federal courts and ruled as unlawful delegations of legislative power³⁰. In the *Curtiss-Wright* case the President was granted powers related to the war between Bolivia and Paraguay at the time. He was authorized by Congress to issue a proclamation that made it unlawful for U.S. companies to sell arms to either nation³¹. President Roosevelt at the time issued a statement banning arms sales to the two nations and when the war ended in 1935 the embargo was revoked. Nevertheless, Curtiss-Wright company was prosecuted for conspiracy to sell arms during the time of the embargo and they argued that Congress had improperly delegated legislative power to the executive branch³².

The case went all the way to the Supreme Court where the “sole organ” doctrine came to existence. The idea is that there is a fundamental difference between domestic affairs and foreign policy. For some judges Congress has no part to play in international relations. Justice Sutherland stated that

²⁹ M. A. GENOVVESE and D. G. ADLER, *The War Power in an Age of Terrorism*, Macmillan, 2017, p. 48-49

³⁰ P. IRONS, *War Powers 'How the Imperial Presidency Hijacked the Constitution'*, Metropolitan books, 2005, p. 122-123

³¹ M. A. GENOVVESE and D. G. ADLER, *The War Power in an Age of Terrorism*, *Op. Cit.*, p. 30

³² P. IRONS, *War Powers 'How the Imperial Presidency Hijacked the Constitution'*, *Op. Cit.*, p. 125

“[...] exclusive power of the President as the sole organ of the federal government in the field of international relations³³”. This reasoning lacks constitutional provisions so one could consider it exceeding executive powers. Indeed, the President has the power to conclude treaties with the advice and consent of the Senate, he is also the Commander-in-Chief of the army but also with respect to congressional approval in cases of war. Many scholars are against this concept of ‘sole organ’ but nevertheless the decision had an effect on presidential war powers³⁴. It remains one of the most cited case concerning presidential national security powers³⁵.

The idea is that the President has the power to move quickly and is more flexible, adaptable. In contrast, Congress being a legislative body, moves more slowly and is more reactionary in matters of policy-making. This means that the President has an ‘*adaptation capability*’³⁶. In the case of the Syrian cruise missile strike for example, the Trump administration decided to act directly after receiving the relevant information provided by their intelligence agencies. This quick reaction doesn’t mean that it may lead to a good outcome which leaves the question, beyond the legality of the action, of the legitimacy of unilateral structures. Furthermore, the scope of the executive powers depends on the matter at hand. Indeed, as stated in the *Curtiss-Wright* case, there is a difference between domestic policy and foreign policy. In matters of the latter there is a difference between crisis and war. “The United States has one president, but it has two presidencies; one presidency is for domestic affairs, and the other is concerned with defence and foreign policy. Since World War II, presidents have had much greater success in controlling the nation’s defence and foreign policies than in dominating its domestic policies.... In the realm of foreign policy there has not been a single major issue on which presidents, when they were serious and determined, have failed.”³⁷

Let us briefly dive into relevant military operations cases involving unilateral presidential action without congressional approval before looking at judiciary checks and balances and the Syrian cruise missile strikes.

³³ United States v. Curtiss-Wright Corp., 299 U.S. 304, 1936, 319-320

³⁴ L. FISHER, *Presidential War Power*, University Press of Kansas, 2013, p. 68-69

³⁵ See R. E. BROWNELL II, “The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence,” *The Journal of Law and Politics* 16 (Winter 2000): 1–111.

³⁶ M. A. GENOVVESE and D. G. ADLER, *The War Power in an Age of Terrorism*, Macmillan, 2017, p. 49

³⁷ A. WILDAVSKY, “The Two Presidencies,” *Trans-actions*, December 1966, p. 7 –8.

§2 – The President and the extent of his war making capabilities

As a reminder, our intent is not to make an extensive analysis on the scope of Presidential war powers but merely to state different factors that are relevant to the Syrian Cruise missile strikes. Indeed, the matter at hand is very sensitive and involves lengthy debates and studies that can be found in multiple publications³⁸. We shall limit ourselves to considering war powers in cases where the President has committed troops or engaged in military action without congressional approval but where the justification involves the United Nations collective security system.

The evolution of presidential war powers shows us an increase in cases of military action without congressional approval post World War II, leading eventually to the adoption of the War Powers resolution by Congress in order to ascertain their congressional authority on the matter.

Before this resolution another complication was added to the doctrine of shared powers between congress and the president concerning the use of force. The end of World War II gave birth to the United Nations and the UN Charter giving the United Nations Security Council the authority to authorize the use of force to address threats to the peace, breaches of peace and acts of aggression. Indeed, article 42 of the UN Charter provides for this principle. This collective security system gave birth to the principle of the prohibition of the use of force with exceptions provided for only by the charter (voy. *Infra*). The question that arose is whether Council authorization removes the need to seek congressional approval³⁹?

A direct application of this issue was the military campaign initiated by President Truman in 1950 where he sent American troops to assist South Korea in the Korean War. This operation wasn't a one-off strike or operation; it was quite substantial and involved tens of thousands of U.S. casualties

³⁸ In addition to the authors cited above see, for example: J. GOLDSMITH, *The Terror Presidency: Law and Judgement Inside the Bush Administration*, Norton, 2009; and J. P. PFEFFNER, *Power Plays: The Bush Presidency and the Constitution*, Brookings, 2009

³⁹ The U.S. Senate approved the Charter including its delegation of authority to the Council but it doesn't necessarily mean that the UNSC overrides the U.S. domestic law regarding its allocation of powers in war making matters; See T.M. FRANCK & F. PATEL, *UN Police Action in Lieu of War: "The Old Order Changeth"*, AM. J. INT'L. L. 63, 72 (1991)

lasting several years. Nevertheless, the President did not seek any congressional approval⁴⁰. The idea was that the Security Council authorized the use of force so the President wasn't required to seek congressional approval⁴¹. This reasoning was also cited by the Bush administration to justify its military operation in Iraq without congressional approval in 1990⁴². Nonetheless, this wasn't the aim of the United States in its commitment to the United Nations and its collective security system. Indeed, it is clearly mentioned in the UN participation act of 1945 at its section 6 that "agreements shall be subject to approval of the Congress by appropriate Act or joint resolution⁴³". Presidents may commit armed forces to the UN after congressional approval. In the Korean war, the facts show us otherwise, President Truman committed forces to the conflict before the UNSC called for military action⁴⁴. In his memoirs, Secretary of State Acheson at that time, stated that "some American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution.⁴⁵"

Why this sets an important precedent is due to the scale and importance of the Korean War. Indeed, the general view was that the operation amounted to war and required congressional approval. Considering this, one would think Congress would have acted but instead it remained passive, only a small group of republicans made a real objection⁴⁶.

Congressional concern about war making powers intensified after the Korean War leading to the adoption in 1973 of the War Powers Resolution⁴⁷. Indeed, this period was marked by the controversial Vietnam War that lasted nearly ten years but which was to some extent authorized by

⁴⁰ L. FISHER. "The Korean War: On What Legal Basis Did Truman Act?" *The American Journal of International Law*, vol. 89, no. 1, 1995, pp. 21–39. JSTOR, JSTOR, online: www.jstor.org/stable/2203888, p. 21

⁴¹ See SC. Res. 82 (June 25, 1950), UN SCOR, 5th Session, Res. & Dec., UN Doc. S/INF/5/Rev.1, 1950, p. 4; SC Res. 83 (June 27, 1950), *op. cit.*, p. 5; view online: <http://unscr.com/en/resolutions/doc/82>

⁴² It was cited again by the Clinton administration in 1994; this potentially means that the UN collective security system is a substitute to congressional action and therefore Congress's constitutional role in questions of war would become virtually irrelevant.

⁴³ Law adopted by the United States Congress establishing the process of joining the United Nations; *in*. Pub. L., No. 79-264, ch. 583, 59 Stat. 619 (1945), 22 U.S.C. §§287-287e (1988); L. FISHER, *Presidential War Power*, University Press of Kansas, 2013, p. 90

⁴⁴ L. FISHER, *Op. cit.*, p. 96-97

⁴⁵ D. ACHESON, *Present at the creation: My years in the State Department*, W. W. Norton & Company, 1987, p. 408

⁴⁶ D.J. BARRON, *Waging War: The Clash between Presidents and Congress 1776 to ISIS*, Simon & Schuster, New York, 2016, p. 296

⁴⁷ The resolution was passed over the veto of President Nixon on November 7, 1973.

Congress⁴⁸. The purpose of the resolution is to “insure that the collective judgement of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”⁴⁹ This resolution sets a framework for the division of war powers between Congress and the President.

Nevertheless, the WPR gave rise to differing interpretations. In its section 2(C) it recognizes the constitutional powers of the President as Commander-in-chief to introduce forces into hostilities or imminent hostilities as “exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possession, or its armed forces.”⁵⁰ This led some Presidents and supporters of broad presidential war making capabilities to believe that he can act without congressional approval or without respecting the limits imposed by the WPR⁵¹. The effectiveness of the WPR depends on the extent to which the Executive voluntarily decides to comply to it or if Congress induces it to do so. Concerning the 60-day provision, that limits the use of force to 60 days unless Congress authorizes otherwise⁵², the executive has generally viewed it as unconstitutional because it checked the Presidential powers without affirmative congressional action. Furthermore, the Office of Legal Counsel in its legal opinion regarding the *Haiti deployment* in 1994 stated that the Resolutions “structure... recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces” into hostilities or circumstances presenting an imminent risk of hostilities⁵³.

⁴⁸ R. F. GRIMETT, ‘Instances of Use of United States Armed Forces Abroad, 1798-2010’, *Congressional Research Service*, 2011, p. 12

⁴⁹ G. M. PERKINS, *The War Powers Resolution after 30 years*, Novinka, New York, 2005, p. 4; The concept of *hostilities* is not defined in the resolution. The only relevant definition is found in the House of Representatives report suggesting that “the word ‘hostilities’ was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope...”, in H.R. REP. NO. 93-287, at 7 (1973). This would suggest turning to practice and precedent in order to understand the meaning of ‘hostilities’;

⁵⁰ G. M. PERKINS, *The War Powers Resolution after 30 years*, *op. cit.*, p. 11

⁵¹ For example you have the 60-day provision which provides that if a President has introduced U.S. forces into hostilities, he must cease the use of these forces within 60 days unless Congress authorizes the operation; for more information on the WPR see G. M. PERKINS, *The War Powers Resolution after 30 years*, *op. cit.*, 2005

⁵² *Ibid.*, p. 11

⁵³ W. DELLINGER, ‘Deployment of United States Armed Forces into Haiti’, 18 Op. O.L.C. 173, 1994, p. 175, online: <https://www.justice.gov/olc/opinion/deployment-united-states-armed-forces-haiti-0>

The main limit then imposed on Presidential war powers is the planned military engagement that amounts to a ‘war’ within the meaning of the Declaration of War Clause which would require prior congressional authorization⁵⁴. Therefore, Congress’s authority isn’t required in every military operation.

In our view, the relationship between Congress and President regarding war powers is more a question of practice rather than law. This requires more of a fact-specific assessment. Indeed, we shall see in the next sections the absence of an active Congress in limiting the Presidents war making capabilities. Instead, we see an increase since the post-cold war era of military action without congressional approval.

SECTION II: CHECKS AND BALANCES ON PRESIDENTIAL WAR POWERS

In practice, there aren’t many cases where Congress has effectively tried to resist presidential unilateralism. Indeed, if we look at the post-cold war era, a lot of the unilateral military operations involving the use of force were in most cases supported and/or authorized by the United Nations⁵⁵. Thus making it difficult for Congress to ensure effective oversight of presidential powers in the conduct of foreign affairs. The view is that once the President has engaged U.S. troops in ‘hostilities’ it’s politically more efficient for Congress to support the President or at least remain silent lest they be accused of weakness or lack of patriotism (unity)⁵⁶. Another obstacle to taking action against the President is due to the collective nature of Congress wherein the President’s political party might control one or both houses or even when partisan conflict may simply create a stalemate.

The judiciary on the other hand could intervene and sanction executive unitary decisions under constitutional law or the War Powers Resolution. A landmark case came about before the adoption of the WPR during the Truman administration called the famous steel seizure case. Indeed, in *Youngstown Sheet & Tube Co. v. Sawyer*, the supreme court ascertained that shared powers is the

⁵⁴ U.S. CONST. art. I, §8

⁵⁵ J. LOBEL, “Benign Hegemony? Kosovo and Article 2(4) of the U. N. Charter”, *Chicago Journal of International Law*: Vol. 1: No. 1, p. 5, online at: <http://chicagounbound.uchicago.edu/cjil/vol1/iss1/5>

⁵⁶ M. A. GENOVVESE and D. G. ADLER, *The War Power in an Age of Terrorism*, Macmillan, 2017, p. 50

principle in foreign affairs⁵⁷. The case concerned an executive order issued by President Truman in 1952 wherein he directed the Secretary of Commerce to take possession and operate the plants and facilities of 87 major steel companies⁵⁸. He based his justification on the existence of a nationwide emergency and the presence of American troops in the Korean War⁵⁹. Steel was essential for the production of weapons and other war materials⁶⁰. The arguments in support of this action were mainly based on inherent executive power, especially in emergency conditions⁶¹. The facts concerned the threat of a strike during the Korean War which was entering its third year in 1952. The demands of the workers weren't for the administration the issue. In fact, President Truman stated that "the demands of the steelworkers weren't out of line" to him⁶². For the cabinet the strike would have a major impact on their war efforts. In order to prevent that the administration opted as a last resort the temporary seizure of the steel plants⁶³. Thus, relying on the Presidents 'inherent powers' wherein the executive has the authority under "the Constitution and laws of the United States, and as President of the United States and Commander-in-Chief of the armed forces of the United States."⁶⁴ The Court didn't follow this reasoning and instead said that the President lacked the statutory authority to take such action. Indeed, the Court considered that the lack of congressional approval and the fact that the emergency wasn't a situation in which the Executive was trying to repel a sudden attack made the seizure of the still mills, an extensive view of Presidential war powers which needed to be restricted⁶⁵.

The idea is that Courts can intervene in checking the President once he exceeds his powers but this is on a case by case basis. It also requires Congress to be active in the matter rather than complacent.

⁵⁷ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), online: <https://supreme.justia.com/cases/federal/us/343/579/#tab-opinion-1940407>

⁵⁸ L. FISHER, *Presidential War Power*, University Press of Kansas, 2013, p. 114

⁵⁹ *Ibid.*, p. 114

⁶⁰ Look a 17. Fed. Reg. 3139 (1952); L. FISHER, *Presidential War Power*, *op. cit.*, p. 114

⁶¹ *Ibid.*; D.J. BARRON, *Waging War: The Clash between Presidents and Congress 1776 to ISIS*, Simon & Schuster, New York, 2016, p. 306

⁶² H. S. TRUMAN, *Memoirs*, vol. 2, *Years of Trial and Hope*, Garden City, NY: Doubleday and Co., 1956, p. 465

⁶³ Other methods were envisaged before invoking the President's authority under his powers as Commander-in-Chief. For more information, see A. F. WESTIN, *Anatomy of a Constitutional Law Case: Youngstown Sheet & Tube v. Sawyer*, New York, Macmillan, 1958; M. MARCUS, *Truman and the Steel Seizure Case: The Limits of Presidential Power*, Durham, NC: Duke University Press, 1994

⁶⁴ L. FISHER, *Presidential War Power*, *op. cit.*, p. 114

⁶⁵ D.J. BARRON, *Waging War: The Clash between Presidents and Congress 1776 to ISIS*, Simon & Schuster, New York, 2016, p. 307-308

In the words of Justice Robert Jackson its “[...] inertia, indifference or quiescence might enable if not invite, independent presidential action [...] Congress must invoke its institutional tools at its command rather than expect assistance from the federal judiciary”⁶⁶. In the case of Syria, Congress hasn’t objected to the cruise missile strikes. It only refused to support military intervention when the Obama administration in 2013 attempted to seek congressional approval when it threatened to use force against Syria⁶⁷.

Despite this decision in the steel seizure case, since the adoption of the WPR, we haven’t seen an active judiciary in checking the President’s authority in war related matters. The general view is that questions related to the distribution of war powers is rather a ‘political question’ than a judicial matter.

In light of the lack of judicial review, some legal scholars have suggested that Presidents have *de facto* authority to initiate small-scale military operations that they deem to be in the national interest⁶⁸. We shall elaborate on the difference between ‘small wars’ that don’t at first hand require congressional authorization and ‘big wars’ that require congressional authorization in the next section.

SECTION III: THE CRUISE MISSILE STRIKE, EXCESSIVE OR PERMISSIBLE?

After our brief contextual analysis of the scope of Presidential war powers we can firmly state that in the conduct of foreign policy and specifically war or ‘hostilities’ the Executive branch has broad powers in its initiation and execution. An unwilling Congress and a reluctant Judiciary leaves the President with the responsibility to consider abiding or not to the doctrine of shared powers regarding international relations. With regards to Syria we shall examine two approaches. First, we will briefly look into the Obama administration and its strategy towards Syria. Second we shall dive into the approach taken by the Trump administration.

⁶⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), at. 637

⁶⁷ C. SAVAGE, ‘Obama Tests Limits of Power in Syrian Conflict’, *N.Y. TIMES* (Sept. 8, 2013), online: <http://nyti.ms/1aX80Jq>.

⁶⁸ P. J. SPIRO, War Powers and the Sirens of Formalism, 68 *N.Y.U.L. REV.* 1338, 1993, p. 1348

Regarding the Syrian strike, domestically the question remains ‘is this war’? As stated before, there are situations which are considered less than war, thus, not requiring congressional approval. If on the other hand the President wants to initiate a large scale operation, then this would require Congress’s acquiescence. A more recent case of a military operation conducted without congressional approval is the Libyan intervention in 2011. Let us examine this case for more practical purposes since the Syrian war began at around the same period and is also considered as being part of the ‘Arab Spring’⁶⁹.

Accompanied by a UNSCR⁷⁰, the Obama administration, applying the Dellinger test stated above⁷¹, citing a compelling national interest but also through a written opinion by the then-acting Assistant Attorney General for the Office of Legal Counsel Caroline Krass, supported militarily the Libyan operation without congressional approval. The reasoning was that the use of force was limited in nature, scope, and duration, it did not constitute a ‘war’ in the constitutional sense, that requires prior congressional approval⁷². President Obama gave a statement identifying several national interests supporting United States involvement in the military operation: “Now, here is why this matters to us. Left unchecked, we have every reason to believe that Qaddafi would commit atrocities against his people. Many thousands could die. A humanitarian crisis would ensue. The entire region could be destabilized, endangering many of our allies and partners. The calls of the Libyan people for help would go unanswered. The democratic values that we stand for would be overrun. Moreover, the words of the international community would be rendered hollow.”⁷³ He invoked his ‘constitutional authority to conduct U.S. foreign relations and his authority as Commander-in-Chief and Chief Executive.’⁷⁴

⁶⁹ See C. GLASS, *Syria burning: ISIS and the Death of the Arab Spring*, OR Books, New York, 2015

⁷⁰ S/Res/1973 (2011), United Nations Security Council Resolution, 7 March 2011

⁷¹ W. DELLINGER, ‘Deployment of United States Armed Forces into Haiti’, 18 Op. O.L.C. 173, 1994, online: <https://www.justice.gov/olc/opinion/deployment-united-states-armed-forces-haiti-0>

⁷² C. KRASS, ‘Authority to Use Military Force in Libya’, 35 Op. O.L.C. 1, 2011, p. 1; online: <https://www.justice.gov/olc/opinion/authority-use-military-force-libya>

⁷³ *Ibid.*, p. 3

⁷⁴ *Ibid.*, p. 4; These are similar justifications given by past Presidents in their military operations absent congressional approval. We stated above, the Truman administration but we can also cite, the Bush administration in the Kuwaiti operation of 1991, the Clinton administration in the Kosovo operation of 1999; See also Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 9 (1992); See Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 n.4, 178 (1994);

The reasoning developed in the section related to the scope of Presidential war powers is that in foreign and military affairs the President has ‘independent authority’. This means that in the absence of explicit restrictions imposed by Congress, the President can conduct foreign policy rather broadly but which must always be in the national interest of the nation. The Office of Legal Counsel relies on many precedents involving military operations without congressional approval to justify Presidential authority in the Libyan intervention. Indeed, they make reference to the Haiti deployment of 1994 and the Kosovo operation in 1999⁷⁵. The two stage test involves verifying the legitimacy of the national interests invoked and assessing the scale of the military operation in order to determine whether it falls short of “war” requiring prior congressional approval. Concerning national interests, the Office of Legal Counsel identified two that were at stake in Libya which were ‘preserving regional stability’ and ‘supporting the United Nations Security Council’s effectiveness’⁷⁶. Regarding regional stability, the idea is that the U.S. government had an interest in preventing a Libyan humanitarian disaster because of the potential consequences on civilian displacement and outflows to neighboring countries. Nevertheless, what limits are there to the national interest argument then? This raises a more political question rather than a legal one. Indeed, does a U.S. national really have an interest in the stability of the middle-eastern region? Or is it that some nations because of the scope of their power and reach have an interest in the political situation of foreign nations.

In addition to national interests, the effort was supported by the United Nations Security Council wherein they identified the conflict as a ‘threat to international peace and security’⁷⁷. In this, the United States has committed to supporting the UNSC in its actions to promote international peace and security⁷⁸. We saw that in the Korean War that was one of the main justifications used for U.S. intervention⁷⁹.

⁷⁵ See Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 n.4, 178 (1994)

⁷⁶ C. KRASS, ‘Authority to Use Military Force in Libya’, 35 Op. O.L.C. 1, 2011, p. 10, online: <https://www.justice.gov/olc/opinion/authority-use-military-force-libya>

⁷⁷ S/Res/1973 (2011), United Nations Security Council Resolution, 7 March 2011, p.

⁷⁸ C. KRASS., *Op. Cit.*, p. 11

⁷⁹ Authority of the President to Repel the Attack in Korea, 23 Dep’t St. Bull. 173, 177 (1950)

Regarding the second stage of the test, involving the scale of the military operation, the Office of Legal Counsel refers to a fact-specific assessment as mentioned above in order to determine whether the operations fall short of ‘war’ in the constitutional sense. The conclusion was that since the operation didn’t involve sending ground troops and was limited mainly to air strikes and associated support missions this reflected a minor risk of continued military conflict and escalation⁸⁰. Furthermore, prior military operations without congressional approval were more important in scope, duration and nature⁸¹. We can see the heavy reliance on prior operations to justify the use of force without congressional approval.

Finally, no objection was made by Congress concerning this legal reasoning. In fact, the main congressional leaders agreed that the operation wasn’t in violation of the War Powers Resolution nor Constitutional law⁸².

In light of these elements we shall now examine the Syrian cruise missile strikes and whether the justification provided in passed legal opinions and the present legal opinion coincide. We shall also briefly take a look at former President Obama’s approach to Syria. The idea is to see whether the justification given by the Trump administration reflects prior administrations practices and views, thus making the cruise missile strike permissible or excessive.

§1 – The Obama Approach to Syria

In 2009, during his Nobel Peace Prize acceptance speech, President Obama clearly made a reference to humanitarian intervention by stating “I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war.”⁸³

It is true that the Syrian war in its entirety presents a humanitarian concern. Indeed, the amount of civilian casualties and internal displacement as well as refugee outflows is considerable and

⁸⁰ C. KRASS., *Op. Cit.*, p. 13

⁸¹ *Ibid.*

⁸² H.H. KOH, ‘The War Powers and Humanitarian Intervention’, *HOUS. L. REV.*, vol. 53, 2016, p. 995

⁸³ B. OBAMA, Remarks on Accepting the Nobel Peace Prize in Oslo, 2 PUB. PAPERS 1799, 1801 (Dec. 10, 2009), <https://www.gpo.gov/fdsys/pkg/PPP-2009-book2/pdf/PPP-2009-book2-Doc -pg1799.pdf>.

alarming. The United States policy in the matter and under the Obama administration was a comprehensive diplomatic effort which had multiple objectives such as the agreement of a ceasefire, ousting Assad, eliminating chemical weapons and providing humanitarian aid⁸⁴. In order to do so this would require international support and especially some form of a United Security Council Resolution allowing the use of force if necessary. The urgency of an intervention came to be in 2013 when proof was given to the United States that the Syrian regime had allegedly launched a chemical weapons attack on its civilians⁸⁵. Absent a security council resolution, the Obama administration attempted to seek prior congressional approval for the intervention. This position wasn't consistent with its actions namely the Libyan operation in 2011. Indeed, the Executive provided a legal reasoning as examined above stating that no prior congressional approval was needed (*see supra.*). Therefore, if need be he could have acted in accordance with the Libyan precedent. The position of the Obama administration appears to be a cautious one since in addition to a divided Congress, there wasn't any UNSCR that could support the use of force in Syria. The idea was to increase the legitimacy of the operation and portray a united front on the matter⁸⁶.

Nevertheless, this move was a political failure and no military operation was initiated against the Syrian regime for its alleged use of chemical weapons. On the other hand, the threat to use force by the Obama administration resulted in a diplomatic process involving Russia and Syria that led to the supervised removal of chemical weapons from Syria by the Organization for the Prohibition of Chemical Weapons (*see supra.*). Let us at present examine the Trump administration's approach to the Syrian conflict and the use of chemical weapons.

§2 – Trump's 'shift' in foreign policy

One of President Trump's foreign policy campaign pledges was to focus more on domestic affairs rather than foreign affairs. Indeed, his view is that the U.S. has spent a lot of resources on military

⁸⁴ H.H. KOH, 'The War Powers and Humanitarian Intervention', *op. cit.*, p. 998

⁸⁵ United Nations, 'United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic' Final Report (December 2013), *Op. Cit.*, p. 2-6

⁸⁶ C. SAVAGE, 'Obama Tests Limits of Power in Syrian Conflict', *N.Y. TIMES* (Sept. 8, 2013), online: <http://nyti.ms/1aX80Jq.g>

campaigns abroad that don't necessarily benefit the American people⁸⁷. Conversely, once in office, his commitment to less intervention wasn't upheld. Instead, he continued the American approach to international relations⁸⁸.

Regarding Syria, the main policy objective was to defeat ISIS⁸⁹. Nonetheless, as examined above in chapter I, following the alleged use of chemical weapons by the Assad regime on its own population, the Trump administration ordered a cruise missile strike on a Syrian air base first on April 7, 2017 and second on April 13, 2018 but this time in coalition with the United Kingdom and France (*see supra.*). Both attacks were taken without congressional approval nor a United Nations Security Council Resolution.

Concerning the first missile strike in 2017, no official legal reasoning was given by the Trump administration justifying the attack under international or domestic law. This makes the case for the legality of the strikes quiet challenging. Indeed, previous administrations attempted to provide a sound legal reasoning at least under domestic or international law for the use of force abroad. Here both are lacking. Nonetheless, in his letter to Congressional leaders, President Trump identified the U.S. interest in preventing the use and proliferation of chemical weapons⁹⁰. In our view, the lack of a sound legal justification similar to the ones given by prior administrations presents a major shift in the Executive's way of using his war making capabilities. Indeed, absent a legal reasoning one could consider the Trump administration as being in complete disregard of the U.S. constitution and his role as Commander-in-Chief. A mere statement doesn't amount to a justification. The Obama administration provided a basis for intervention prior to engaging in a military operation (even though it didn't) in Syria. Furthermore, as examined above it provided one

⁸⁷ Viewed online: <https://www.nytimes.com/2016/04/28/us/politics/donald-trump-foreign-policy-speech.html>

⁸⁸ For more on the American approach to international relations, see H. H. KOH. *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, New Haven, Yale University Press, 1990.

⁸⁹ The civil war in Syria directly empowered the growth of the Islamic State of Iraq and Syria ("ISIS"), a terrorist threat that has required the deployment of over 2,000 U.S. troops. See Jim Garmone, DoD News, Defense Media Activity, Pentagon Announces Troop Levels in Iraq, Syria (Dec. 6, 2017), <https://www.defense.gov/News/Article/Article/1390079/pentagon-announces-troop-levels-in-iraqsyria/>.

⁹⁰ Letter from President D.J. TRUMP to the House of Representatives, 8th of April 2017, in. <https://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate/>; see also M. LEDERMAN, '(Apparent) Administration Justifications for Legality of Strikes Against Syria', 8 April 2017, online: <https://www.justsecurity.org/39803/apparent-administration-justifications-legality-strikes-syria/>

for its military operation in Libya. In our view, this makes the case for the lawfulness of the operation very shaky.

On the other hand, in the aftermath of the cruise missile strikes of 2018, the Trump administration gave an official legal opinion justifying the attack under domestic law⁹¹. The reasoning was mostly based on precedents. The opinion starts by mentioning the justification for the attack, stating that “The President could lawfully direct airstrikes on facilities associated with Syria’s chemical weapons capability because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense⁹²”. Indeed, this statement resembles that of the Obama administration for the Libyan operation (*see supra.*).

Part of the Office of Legal Counsel’s reasoning is to refer to historical practice in matters related to war powers. They refer to the Presidents constitutional authority to initiate military operations without seeking congressional approval if it advances national interests⁹³. Indeed, they make reference to prior military operations absent prior congressional acquiescence that were approved in prior opinions of the Office of Legal Counsel⁹⁴. In our view, the opinion makes a relatively compelling case for Presidential unilateral action. The extensive list of precedents can lead one to believe in an inherent Presidential authority regarding war making capabilities with a singular constitutional limitation which is not to engage in continued hostilities that would amount to war in the sense of the Declaration of War Clause.

⁹¹ S. A. ENGEL, ‘April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities’, Opinion of Assistant Attorney-General, in *Opinions of the Office of Legal Counsel*, Vol. 42, May 31, 2018, online: <https://www.justice.gov/olc/opinion/file/1067551/download>

⁹² *Ibid.*, p. 1

⁹³ Citing that his authority derives from Article II ‘Commander-in-Chief’ of the Constitution and also making reference to his ‘independent authority’ in the conduct of foreign relations (cfr. *Curtiss-Wright case*); see S. A. ENGEL, ‘April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities’, Opinion of Assistant Attorney-General, in *Opinions of the Office of Legal Counsel*, Vol. 42, May 31, 2018, p. 4 online: <https://www.justice.gov/olc/opinion/file/1067551/download>

⁹⁴ “These past deployments have included President Truman’s defense of South Korea; President Kennedy’s introduction of U.S. forces into Vietnam; President Reagan’s retaliatory strikes on Libya following the Beirut bombing; President George H.W. Bush’s introduction of U.S. troops into Somalia; President Clinton’s actions in Bosnia, Haiti, Kosovo, Sudan, and Afghanistan; President George W. Bush’s intervention in Haiti; and President Obama’s airstrikes in Libya and in Houthi-controlled territory in Yemen.” – *Ibid.*, p. 6

Concerning the Syrian airstrikes of 2018, the Office of legal counsel applied the Dellinger Test to the military operation. Indeed, as stated in the Libyan intervention it consists in a two stage approach. The first relates to the national interests at stake and the second to examining whether the ‘scale, duration and nature’ of the military operation might rise to the level of war in the constitutional sense⁹⁵.

In assessing the national interests at stake, the Office of Legal Counsel made an important remark, saying that “the aim of this inquiry is not to evaluate the worth of the interests at stake—a question more of policy than of law—but rather, to set forth the justifications for the President’s use of military force and to situate those interests within a framework of prior precedents”⁹⁶. Indeed, the legitimacy of the national interests invoked by the Trump administration is another debatable question which would require an extensive analysis on the role of the United States in international relations. Here we attempt to look at the justification given and whether it follows historical practice and constitutional law.

The national interests at stake were threefold. Firstly, the promotion of regional stability which has previously been used as a basis for military intervention⁹⁷. Secondly, the prevention of a worsening of the region’s humanitarian catastrophe, and thirdly, the deterrence of the use and proliferation of chemical weapons⁹⁸. One of their main concerns is the use of chemical weapons, indeed, the Trump administration views the continued use of these weapons might insight others to gain access to them. This could further spread conflict and disorder in the region.

This argument leads us to the question of preventing a humanitarian disaster. This is to say that the conflict as a whole represents a humanitarian catastrophe in light of the number of displaced citizens and refugee outflows⁹⁹. Nevertheless, they refer to the chemical weapons attack as

⁹⁵ S. A. ENGEL, ‘April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities’, *Op. Cit.*, 2018, p. 9-10

⁹⁶ *Ibid.*, p. 10

⁹⁷ In the Haiti and Libyan deployment, promoting regional stability was mentioned as being of national interest to the United States; See Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 n.4, 178 (1994); See C. KRASS, ‘Authority to Use Military Force in Libya’, 35 Op. O.L.C. 1, 2011, p. 10, online: <https://www.justice.gov/olc/opinion/authority-use-military-force-libya>

⁹⁸ S. A. ENGEL, ‘April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities’, *Op. Cit.*, 2018, p. 11

⁹⁹ See U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. doc. A/HRC/37/72, 23 March 2018

contributing to the humanitarian crisis in Syria saying that “civilians fleeing from the strikes become refugees needing assistance”¹⁰⁰. If we look at past military operations involving the prevention of a humanitarian catastrophe, the aim was to put an end to the disaster as a whole. Indeed, in Libya the operation ended with the removal of General Kaddafi and his regime. In Kosovo, the intervention ended with the deposition of President Milosevic. On the other hand, if we look at Syria, the intervention was aimed solely towards Syrian chemical weapons facilities. Following the alleged chemical weapons attack, the amount of deaths was approximatively in the hundreds¹⁰¹, which in comparison to the total civilian death toll as well as civilian internal displacements and refugee outflows numbered in the millions is quite minor. This is to say that, the main concern we believe is the use and proliferation of chemical weapons which the Trump administration views as presenting a humanitarian issue and not the civilian casualties and/or those fleeing the strikes. Therefore, this presents a new basis for military intervention that from our point of view hasn’t been invoked by prior administrations in their justifications for the use of force without congressional approval¹⁰². This leaves us to question the legality of the intervention and also whether any country that has or uses chemical weapons is then subject to potential unilateral action by the United States and its allies. In the legal opinion they mention the Russian government stating that “Russia recently used a nerve agent in an attempted assassination in the United Kingdom”¹⁰³.

Nonetheless, these interests stated by the Trump administration were also supported by the Office of Legal Counsel in its written opinion of May 31 2018.

Let us turn to stage two of the Dellinger Test and examine the case for potential escalation that could rise to the level of ‘war’ in the Constitutional sense. The legal opinion refers to the same fact-specific assessment used in the Haiti and Libyan deployment to determine whether the scale of the military operation could amount to ‘war’ requiring congressional authorization¹⁰⁴. Indeed, they came to the conclusion that “the proposed Syrian operation, in its nature, scope, and duration, fell

¹⁰⁰ S. A. ENGEL, ‘April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities’, *Op. Cit.*, 2018, p. 15

¹⁰¹ OPCW, ‘Interim Report on the Progress of the Fact-Finding Mission Regarding an Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syrian Arab Republic’, on April 7 2018, S/1645/2018, July 6 2018, p. 3 online: https://www.opcw.org/fileadmin/OPCW/S_series/2018/en/s-1645-2018_e_.pdf

¹⁰² S. A. ENGEL, ‘April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities’, *Op. Cit.*, 2018, p. 16

¹⁰³ *Ibid.*, p.18

¹⁰⁴ *Ibid.*, p. 18-19

far short of the kinds of engagements approved by prior Presidents under Article II. First, in contrast with some prior deployments, the United States did not plan to employ any U.S. ground troops, and in fact, no U.S. airplanes crossed into Syrian airspace. Whereas here, the operation would proceed without the introduction of U.S. troops into harm's way [...]"¹⁰⁵. Second, the mission was solely to target the identified chemical-weapons facilities.

Despite all this, we believe that a potential escalation may still arise and lead to the possibility of a conflict between Syria and/or its allies like Russia and Iran. According to the Trump administrations intelligence agencies this wasn't likely since the aim of the operation wasn't regime change but merely to reduce Syria's chemical weapons capabilities¹⁰⁶. However, it still amounts to a use of force against a sovereign state, therefore retaliation couldn't be totally avoided.

The office of legal counsel still came to the conclusion that the President had constitutional authority to carry out the strikes under domestic law and historical practice.

Congress for the most part made no objection to the strikes but nonetheless some considered it as being out of line. Indeed, Sen. Tim Kaine stated the "the ludicrous claim that this President can magically assert 'national interest' and redefine war to exclude missile attacks and thereby bypass Congress should alarm us all [...], this is further proof that Congress must finally take back its authority when it comes to war"¹⁰⁷.

In our opinion the justification lacks some form of legitimacy and this for multiple reasons. Firstly, the argument based on the use and proliferation chemical weapons is a new justification since there is no apparent prior administration that used this argument as a basis for military intervention. Secondly, there wasn't any United Nations Security Council Resolution supporting the operation, in contrast to the Libyan intervention of 2011. Thirdly and finally, the legal opinion doesn't refer to the legality of the intervention under international law and *ius ad bellum*.

¹⁰⁵ *Ibid.*, p. 20

¹⁰⁶ *Ibid.*, p. 21-22

¹⁰⁷ Statement made by Sen. Tim Kaine, online: https://www.washingtonpost.com/world/national-security/justice-advised-trumps-order-for-syria-airstrikes-in-the-national-interest/2018/06/01/9126f3d6-65c9-11e8-a69c-b944de66d9e7_story.html?noredirect=on&utm_term=.175bd9ed3623

In so doing, the act may seem lawful in light of the amount of precedents of Presidential unilateral military action at hand accompanied by the rather extensive legal opinion of the Office of Legal Counsel. Nonetheless, under U.S. domestic law there is a duty for the Executive to respect its obligations under international law¹⁰⁸. This seems to be lacking. We shall consider the cruise missile strike under international law in the next chapter.

CHAPTER III: OPEN DISREGARD OF *IUS AD BELLUM* AND THE PROHIBITION OF THE USE OF FORCE?

In the previous chapter we examined the domestic legal challenges regarding Presidential war powers in the missile strike context. Indeed, we saw that historical practice in the United States indicates that the President has some capabilities in initiating the use of force against another State. These war powers (see *supra.*) were invoked by the Trump administration in its cruise missile strike to justify the Executive's actions under domestic law. Nevertheless, the separation of war making powers between Congress and the President is undeniably a delicate subject wherein there still remains a lack of clarity on the matter.

Our aim, in this chapter, is to determine whether the Trump Administration in its cruise missile strike on Syrian territory against the Syrian government (its different facilities) can be justified under *Ius ad Bellum*. To do so, we shall examine the scope of the prohibition of the use of force (section I). That will help us determine whether we can consider if the strike is in apparent breach of the prohibition (section II) or if there are legal and/or legitimate justifications given by the US government (section III) combined with the position of other sovereign nations (section IV). we shall also examine the potential impact of this strike on article 2(4) (section V).

At this stage of our study we're examining the strike under the laws that govern international armed conflicts. Indeed, a conflict can be both national and international. For the conflict to be of an

¹⁰⁸ U.S. CONST., Art. VI

international nature, states must use force against each other¹⁰⁹. Once we enter the field of an international armed conflict, states should abide to *Ius ad Bellum* and *Ius in Bello*¹¹⁰. The former covers the legality of any-use of inter-State force, the latter governs the conduct of inter-State hostilities¹¹¹.

SECTION I- SCOPE OF ARTICLE 2(4) OF THE UN CHARTER

Needless to say that ‘9/11’ and subsequent events have fuelled the reconsideration of the rules concerning international armed conflict. Indeed, the fundamental principle of the prohibition of the use of force contained in article 2(4) of the UN charter is not static. Exceptions to this principle are being invoked and debated. In this present case, many questions arise. Firstly, does the cruise missile strike fall within the scope of article 2(4)? Secondly, if so, has it been violated? Thirdly, can an exception be invoked?

§ 1 – THE PROHIBITION OF THE USE OF FORCE

In order to determine whether the cruise missile strike constitutes a use of force, we must dive into the meaning of Article 2(4) of the UN charter. Indeed, article 2(4) states ‘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’. The intention was to prohibit almost every use of inter-State armed violence¹¹². Although, some make the argument that the article only restricts the use of force against the ‘territorial integrity’ or ‘political independence’ of a State therefore, the use of force for other

¹⁰⁹ Prosecutor v. Tadic (Decision on Jurisdiction), ICTY Appeals Chamber, 1995, 35 *ILM* 35, 54 (1996)

¹¹⁰ Y. DINSTEIN, *War, Aggression, and Self-Defence*, (6th ed.), 2017, Cambridge, p. 5

¹¹¹ *Ibid.*

¹¹² United Nations Information Organization, *Documents of the United Nations Conference on International Organization*, vol. 6, 1945, p. 334-335, online: <http://digitallibrary.un.org/record/1300969/files/UNIO-Volume-6-E-F.pdf>

purposes doesn't fall within the scope of article 2(4)¹¹³. This isn't the position of the authors of the original text who drafted the article in the broadest terms possible for an all-inclusive prohibition¹¹⁴. Furthermore, some consider that the prohibition is also *ius cogens*. This means that it is a 'norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules'¹¹⁵. This subject is addressed in the Vienna Convention on the Law of Treaties at its article 53 wherein it states '[...] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'¹¹⁶. Applying this notion to the prohibition of the use of force means it doesn't change through the processes of customary international law or treaty law creation and extinction¹¹⁷. In the *Nicaragua* judgement of the International Court of Justice, the Court concluded that Article 2(4) concurred with customary international law in terms of both *opinio juris* and state practice¹¹⁸. Furthermore, the International Law Commission in its commentary state that the 'the law of Charter concerning the prohibition to use force constitutes a conspicuous example of a rule of international law having the character of *ius cogens*'¹¹⁹. This reinforces its non-derogatory nature. The exceptions to the prohibition provided for by the Charter frame the scope of application of article 2(4) and should not be confused with derogations¹²⁰.

The question that follows is whether the cruise missile strike amounts to a use of force. Indeed, if the attack reaches the threshold of force within the meaning of the UN charter, then we can examine the legality of the attack. If not, article 2(4) does not apply thus falling possibly under another rule

¹¹³ M. E. O'CONNELL, 'The Prohibition of the use of force', in N.D. WHITE and others, *Research Handbook on International Conflict and Security law*, Edward Elgar, 2013, p. 100

¹¹⁴ United Nations Information Organization, *Documents of the United Nations Conference on International Organization*, *Op. cit.*, p. 334

¹¹⁵ Prosecutor v. Furundzija, ICTY, Trial Chamber, 1998, *ILM* 317, 1999, p. 349

¹¹⁶ Article 53 of the Vienna Convention on the Law of Treaties, 1969

¹¹⁷ M. E. O'CONNELL (Others?), 'The Prohibition of the use of force', in *Research Handbook on International Conflict and Security law*, Edward Elgar, 2013, p. 113

¹¹⁸ *Nicaragua v. United States*, Military and Paramilitary Activities in and Against Nicaragua, 1986 ICJ, par. 189-90

¹¹⁹ Report of the International Law Commission, 18th Session, *ILC Ybk* 172, vol. II, 1966, p. 247

¹²⁰ Y. DINSTEIN, *War, Aggression, and Self-Defence*, (6th ed.), 2017, Cambridge, p. 111

of international law¹²¹. Article 2(4) prohibits two-levels of force: aggression and all other force in violation of the prohibition.

Some scholars consider that the use of force falls within the scope of article 2(4) when the attack of one state against another state is more than *de minimis*¹²². Whether an attack falls below the threshold of article 2(4) or not is based on state practice. The ICJ pointed out in the *Nicaragua case* the importance of differentiating ‘the most grave forms of the use of force from other less grave forms’¹²³. Nevertheless, we stated that the intention of the authors was to prohibit any use of force¹²⁴. This means that any type of force, unless explicitly allowed by the UN Charter, is banned.

Going back to the facts of the US use of force against the Syrian government, we know that the first military operation on the 7th of April 2017 involved the launching of fifty-eight Tomahawk cruise missiles from the Mediterranean Sea targeting the Shayrat Airfield in Homs governate where the U.S. intelligence community assessed the origin of the chemical weapons attack¹²⁵. These missiles are used for deep land attack warfare; they have been used by the U.S. government in multiple conflicts such as Operation Desert Storm in 1991, Operation Infinite Reach in 1998,

¹²¹ For example, the principle of non-intervention which includes article 2(4) but is not limited to it; See L. F. DAMROSCH, “Politics across Borders: Non-Intervention and Nonforcible Influence over Domestic Affairs” 83 *American Journal of International Law* (1989) pp. 1-50.

¹²² M. E. O’CONNELL, ‘The Prohibition of the use of force’, *Op. cit.*, p. 102; Another aspect that we can briefly dwell on is whether the attack falls within one of the four limits to article 2(4). Indeed, (i) force other than armed force, (ii) minimal uses of force, (ii) use of force on the territory of another state by invitation and (iv) force against non-state actor groups will not violate article 2(4). In the present case, the use of force by the US government doesn’t fall within one of the limits cited above therefore we shall not examine this question further; See M. E. O’CONNELL, ‘The Prohibition of the use of force’, in N.D. WHITE and others, *Research Handbook on International Conflict and Security law*, Edward Elgar, 2013, p. 101-109

¹²³ *Nicaragua v. United States, Military and Paramilitary Activities in and Against Nicaragua*, 1986 ICJ, par. 101-103

¹²⁴ See also T. RUYS, ‘The Meaning of ‘Force’ and the Boundaries of the *Ius ad Bellum*: Are ‘Minimal’ Uses of Force excluded from the UN Charter article 2(4)?’, *AJIL* 159, 2014, pp. 171-88

¹²⁵ J. MATTIS, “Remarks on Syria Operations”; Statement by Secretary of Defense Jim Mattis on the U.S. Military Response to the Syrian Government’s Use of Chemical Weapons (Apr. 10, 2017), <https://www.defense.gov/News/News-Releases/NewsRelease-View/Article/1146758/statement-by-secretary-of-defense-jimmattis-on-the-us-military-response-to-the-source/GovDelivery/>; See also S. A. ENGEL, ‘April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities’, Opinion of Assistant Attorney-General, in *Opinions of the Office of Legal Counsel*, Vol. 42, May 31, 2018, p. 2, online: <https://www.justice.gov/olc/opinion/file/1067551/download>

Operation Allied Force in 1999 and in Operation Iraqi Freedom in 2003¹²⁶. One can reasonably say that these are indeed weapons used in international armed conflicts. In the second military operation on the 13th of April 2018, this was a collective effort between France, the United Kingdom and the United States where they targeted Syrian chemical weapons infrastructure. The same weapons were used but this time one-hundred missiles were sent targeting facilities in Damascus¹²⁷.

With regards to these facts, one must determine whether the attack can be considered an act of aggression or whether it amounts to another form of force but still constitutes a violation of article 2(4). Indeed, an act of aggression is considered to be a serious violation of the prohibition of the use of force. The United Nations adopted a resolution in 1974 defining aggression which was supposed to be included in the Rome Statute in 2010 after the first review conference of the International Criminal Court but wasn't in the end¹²⁸. The resolution defines aggression as being 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'¹²⁹. In light of this information, one can reasonably say that these attacks on the Syrian government fall within the scope of article 2(4). They can sensibly be considered as an act of

¹²⁶ Accessed online: http://www.navy.mil/navydata/fact_display.asp?cid=2200&tid=1300&ct=2;https://www.globalsecurity.org/military/systems/munitions/bgm-109-operation.htm

¹²⁷ S. A. ENGEL, 'April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities', Opinion of Assistant Attorney-General, *Op. Cit.*, p. 2-3

¹²⁸ Article 1-3, GA Res. 3314 (XXIX), 1974; See also Annex I, Resolution RC/Res. 6, 11 June 2010 which inserts an article 8bis defining aggression in the Rome Statute;

¹²⁹ Article 1, GA Res. 3314 (XXIX), 1974; Article 3, GA Res. 3314 gives a list of attacks that qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State *or the use of any weapons by a State against the territory of another State*; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) 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 the acts listed above, or its substantial involvement therein.

aggression by the U.S. against the sovereignty of the Syrian government¹³⁰. Therefore, in breach of the prohibition of the use of force.

Nevertheless, there might be an exception to this violation of article 2(4) of the UN Charter and in order to determine the possible legality of the attack we shall look, in the next sections, at the justifications given by the Trump Administration as well as the position of international law and legal scholars.

SECTION II: LEGALITY OR ILLEGALITY OF THE CRUISE MISSILE STRIKES UNDER *IUS AD BELLUM*

In the previous section we established that the cruise missile strikes are at first hand in breach with article 2(4) of the UN Charter. We will now attempt to examine if an exception to the violation of the prohibition of the use of force exists in this present case. Indeed, the strike came to be following the alleged chemical weapons attack perpetrated by the Syrian Government on their population. As stated in Chapter I, the use of chemical weapons is illegal under international law (see *supra*). Indeed, Syria acceded to the Chemical Weapons Convention and is therefore bound by its obligations which includes the elimination of its chemical weapons stockpile as well as the prohibition to use them. Nonetheless, they allegedly continued to use the banned weapons. Let us at present dive into the potential legal justifications if there are any for the use of force.

The UN Charter permits the use of inter-State force in two cases: (i) when collective security measures are taken by the Security Council under Chapter VII of the Charter or (ii) in Self-Defence under article 51 of the UN Charter. In addition to these exceptions, some consider that there are some forms of force that are in a grey area. They argue that ‘implicit Charter’ exceptions and ‘extra-Charter exceptions’ exist¹³¹. The idea is that certain conduct can be justified and isn’t bound by the prohibition of the use of force like ‘anticipatory self-defence, forcible reactions to a ‘minor use of force’ of another State, armed interventions to rescue nationals, the extraterritorial use of force

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¹³¹ N. SCHRIJVER, ‘Challenges to the Prohibition to Use Force: Does the Straitjacket of Article 2(4) UN Charter Begin to Gall too Much?’, in N. BLOKKER and others, *The Security Council and the Use of Force: Theory and Reality – A need for Change?*, Brill, Leiden, 2005, p.35

against a massive non-state armed attack and genuine humanitarian intervention'¹³². We shall examine if one of these exceptions is applicable to the present case.

§1 – ABSENCE OF A UNITED NATIONS SECURITY COUNCIL RESOLUTION

Under the UN Charter, the Security Council has the power to adopt collective security measures in order to ensure international peace and security. This is mainly contained in Chapter VII of the Charter in articles 39 and 42¹³³. A recent example of a resolution allowing the use of force adopted by the UNSC is resolution 1973. This concerned the Libyan operation which aimed to end the violence perpetrated by the Libyan government against its civilians and to restore peace in the region. The UNSCR stated that it allowed member states to take all necessary measures to achieve this aim¹³⁴. This might or might not include the use of force but it's for the member states to notify the Secretary-General of the measures taken to pursue the aim of the Resolution¹³⁵.

Concerning Syria, the UNSC has failed on multiple occasions to adopt a resolution allowing the use of force in order to restore peace and security. A draft resolution authorizing the use of force in response to the use of chemical weapons was vetoed by Russia and China on the 28th of February 2017¹³⁶. Indeed, one of the main reasons behind this deadlock is political. First, Russia is an ally to Syria, thus making it difficult to come to an agreement for the use of force against Syria¹³⁷.

¹³² E. WILMSHURST, 'Aggression', in R. CRYER and others., *An Introduction to Criminal Law and Procedure*, Cambridge, Cambridge University Press, 2007, p. 262

¹³³ Article 39 of the UN Charter states 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'; Article 42 states 'Should the Security Council consider that measures provided for in Article 41 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.'

¹³⁴ S/Res/1973 (2011), United Nations Security Council Resolution, 7 March 2011, p. 3

¹³⁵ *Ibid.*, p. 3

¹³⁶ Viewed online at: <https://www.theguardian.com/world/2017/mar/01/russia-and-china-veto-un-resolution-to-impose-sanctions-on-syria>

¹³⁷ E. STERNER, 'Dictators and Deterrence: Syria's Assad, Chemical Weapons, and the Threat of U.S. Military Action', *Comparative Strategy*, Taylor & Francis Group, 2014, p. 413

Second, Russia stated that there had been an overuse of force in Libya¹³⁸. This made the adoption of UNSCR authorizing the use of force quite unlikely.

However, as stated before, there is a UNSCR that endorsed the Framework for the Elimination of Syrian Chemical Weapons supervised by the Organization for the Prohibition of Chemical Weapons (see. *Supra*)¹³⁹. The resolution did not envision the use of force by States in case of a breach by the Syrian government of its obligations.

In the absence of a UNSCR one must therefore look at another potential charter exception which is self-defence.

§2 – ARTICLE 51 OF THE UN CHARTER

The UN Charter codified an ‘inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations’¹⁴⁰. Nonetheless, this right still requires immediate reporting to the UNSC. Indeed, in the present case needless to say that Syria didn’t attack the United States nor France nor the United Kingdom. The reason for the cruise missile strikes on both occasions (7th of April 2017 and 13th of April 2018) as stated above is the alleged use of chemical weapons by the Syrian government on its population. Therefore, we can judiciously state that the U.S. nor its allies can invoke article 51 of the UN charter as a justification for their use of force against Syria. However, it is true that collective self-defence of Iraq is the justification used to fight ISIS on the Syrian territory¹⁴¹. Since Syria allegedly attacked its own population no other State was targeted.

In light of the information at hand, relying on individual and/or collective self-defence seems farfetched and unlawful. We shall now proceed to examine the possibility of extra-Charter related exceptions.

¹³⁸ H.H. KOH, ‘The War Powers and Humanitarian Intervention’, *HOUS. L. REV.*, vol. 53, 2016, p. 998

¹³⁹ S/RES/2118 (2013), United Nations Security Council Resolution, 27 September 2013

¹⁴⁰ UN Charter, Art. 51

¹⁴¹ U.N. Doc. S/2014/695, Permanent Rep. of the United States of America to the U.N., Letter date Sept. 23 2014, from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General.

We may refer to the ‘Uniting for Peace’ procedure which is a way for the UNGA to make recommendations to the United Nations Security Council in case it doesn’t reach an agreement concerning military action once a breach of peace or an act of aggression has occurred¹⁴². This procedure lacks practice but may not lack relevance in the present case. Indeed, it might be useful when justifying humanitarian intervention. This would certainly help legitimize the US and its allies attack on the 14th of April if the General Assembly would support their claim by recommending to the UNSC to use force in Syria after their alleged chemical weapons attack¹⁴³. Concerning the attack on the 7th of April since it was unilateral use of force by the US and not a collective effort, the ‘uniting for peace’ procedure wouldn’t be appropriate.

However, let’s keep in mind that a General Assembly resolution falls short of a UNSCR which can authorize the use of force. Indeed, a GA resolution to use force will be considered as a recommendation to Member States to take joint action through collective self-defence¹⁴⁴. Which means that the GA may recommend a use of force only in cases of a breach of peace or of aggression, therefore in response of an armed attack¹⁴⁵. In the case of Syria, one could argue a breach of peace because of the alleged chemical weapons attack accompanied by its non-compliance with UNSCR 2118 and the CWC.

Let us turn to another exception that requires our attention, humanitarian intervention. Indeed, this exception is relevant in the present case since it has been invoked as a justification by the US and its allies (voy. *Infra.*). We shall unravel and examine their position further down in this paper. At present we will limit ourselves to a brief presentation of the principle and its application to different situations.

¹⁴² GA Res. 377-A, UN Doc. A/1481 (1950), United Nations General Assembly Resolution, 3 Nov. 1950

¹⁴³ H.H. KOH, ‘The Real “Red Line” Behind Trump’s April 2018 Syria Strikes’, 16 April 2018, online: <https://www.justsecurity.org/54952/real-red-linebehind-trumps-april-2018-syria-strikes/>

¹⁴⁴ A.V.W. THOMAS and A.J. THOMAS, *Non-Intervention: The Law and its Import in the Americas*, Southern Methodist University Press, Dallas, 1956, p. 175-176

¹⁴⁵ Y. DINSTEIN, *War, Aggression, and Self-Defence*, (6th ed.), 2017, Cambridge, p. 367

This principle is an unsettled matter among States and legal scholars. Some consider the emergence of a customary international law norm. If so, it would require rather conclusive State practice and *opinio juris* (*see infra*).

Indeed, humanitarian intervention is the unilateral use of force against another State for humanitarian purposes. This reasoning is found in the interpretation of article 2(4) of the Charter which for those who back the principle means that the use of force to further the purposes of the Charter isn't prohibited¹⁴⁶. As stated above (*see section I*), some legal scholars view the prohibition not as absolute therefore in cases of humanitarian intervention, because it doesn't harm the territorial integrity and political independence of a Nation, it can be permitted. One of the reasons for the emergence of this type of interpretation of article 2(4) (furthering the purposes of the UN) is due to the standstill in the UNSC during the Cold War. The collective security system derived from Chapter VII of the Charter wasn't working so member states reinterpreted article 2(4) to enable the use of force¹⁴⁷.

However, today one could use this argument in light of the number of resolutions that didn't pass concerning Syria due to the vetoes of some permanent Security Council members (mainly Russia and China) but the claim is essentially the protection of human rights which is considered to be more and more of an international matter rather than merely domestic¹⁴⁸. Humanitarian intervention can therefore override the prohibition of the use of force to further the protection of human rights.

Those who oppose this doctrine view the prohibition contained in article 2(4) of the Charter as absolute and all-inclusive. Furthermore, there are claims that the prohibition of the use of force is also *ius cogens* (*voy. Supra*). Even though we can consider that a very large majority of States accept and recognize the prohibition of the use of force as having a peremptory nature, the practice of States shows us otherwise. Indeed, the amount of violation, the presence of expansive

¹⁴⁶ F.R. TESON, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd edn, Dobbs Ferry, NY: Transnational Publishers, 1997, p. 151;

¹⁴⁷ M. REISMAN, 'Coercion and Self-Determination', *AJIL*, vol. 78, 1984, p. 642

¹⁴⁸ C. GREENWOOD, *Essays on War in International Law*, Cameron May, London, 2006, p. 593

interpretations of article 2(4) and the exceptions to the prohibition can lead us to believe how long can article 2(4) still be viewed as *ius cogens*.

Going back to humanitarian intervention, for it to be an exception to article 2(4), it would require universal support in order to override the prohibition in cases where the conditions for humanitarian intervention exist. This would require an analysis of State practice and *opinio juris* in the matter. We shall not dive into an extensive examination of the doctrine but we will take an example of when the principle has been used as a justification to use force against a sovereign State. This will help in our analysis of whether the cruise missile strikes are justified under international law or not.

In 1999, Serbia's President, Slobodan Milošević, ordered his forces to attack the citizens of the republic of Kosovo. There was an increasing repression and ethnic cleansing of the Kosovo Albanians¹⁴⁹. The collective security system contained in the UN Charter failed because of the Russian veto which made a UNSCR unobtainable¹⁵⁰. This led nineteen NATO countries to use force without a UNSCR for humanitarian purposes to prevent those abuses from occurring (the intervention lasted approximatively seventy-eight days)¹⁵¹. The operation was a success and the President was later deposed¹⁵². Some States that participated in the operation accepted a justification based on an implicit right to humanitarian intervention. The UK publicly declared the legality of the intervention stating that it was "necessary and proportionate to the [humanitarian] aim" and "is strictly limited in time and scope to this aim"¹⁵³. Belgium also gave a legal justification for its participation in the military campaign. It relied on implied Security Council authorization and invoked humanitarian intervention¹⁵⁴.

¹⁴⁹ G.P. FLETCHER and J.D. OHLIN, *Defending Humanity, when force is justified and why*, Oxford univ. Press, 2008, p. 152

¹⁵⁰ C. GRAY, 'The use of force for humanitarian purposes', in N.D. WHITE and others, *Research Handbook on International Conflict and Security law*, Edward Elgar, 2013, p. 233-234

¹⁵¹ G.P. FLETCHER and J.D. OHLIN, *Defending Humanity, when force is justified and why*, *op. cit.*, p. 152

¹⁵² H.H. KOH, 'The War Powers and Humanitarian Intervention', *HOUS. L. REV.*, vol. 53, 2016, p. 976

¹⁵³ UK Foreign & Commonwealth Office, *fry/Kosovo: the way ahead*; UK view on the legal base for use of force (1998), quoted in A. ROBERTS, NATO's 'Humanitarian War' over Kosovo, *Survival*, Autumn 1999, p. 106.

¹⁵⁴ *Serbia and Montenegro v. Belgium*, Preliminary objections, *Legality of Use of Force*, 1999, ICJ; C. GRAY, 'The use of force for humanitarian purposes', *op. cit.*, p. 236

The US on the other hand failed to provide a sound legal reasoning for their participation in the collective military operation. They merely listed different factors that put together reflected more a policy strategy rather than a legal rationale. The lack of justification will undermine the lawfulness of the operation and therefore its precedential value. Nevertheless, this case is a rather compelling precedent for humanitarian intervention in light of the facts at hand. Indeed, the actions of the government led hundreds of thousands of Kosovars to flee the country, tens of thousands were estimated dead and it seemed that the President wasn't prepared to back down¹⁵⁵.

UNSCR 1244 was adopted and aimed to find a political solution to the conflict. It didn't, on the other hand, approve the military campaign conducted by the NATO. Russia and China continued to speak of a serious violation of the UN Charter. Their opinion was that the Security Council was the authority competent to authorize such a campaign and that the principle of sovereignty and non-intervention are part of the basic principles of the UN Charter¹⁵⁶.

This operation has been cited on multiple occasions to justify the use of force on humanitarian grounds¹⁵⁷.

Assuming that there is a universal support for humanitarian intervention in case of a considerable humanitarian crisis, many important questions arise such as the threshold for intervention, the scope, the role of the UN bodies in this regard and the determination of the States that have the right to act. It's a difficult concept to support since there are many cases of humanitarian crisis that are left unresolved. Who then decides where and when to intervene? The Member States, the Security Council? The framework for this principle is quiet inexistent¹⁵⁸. We shall examine the

¹⁵⁵ C. GRAY, 'The use of force for humanitarian purposes', *op. cit.*, p. 233

¹⁵⁶ C. GRAY, 'The use of force for humanitarian purposes', *op. cit.*, p. 235

¹⁵⁷ H.H. KOH, 'The War Powers and Humanitarian Intervention', *HOUS. L. REV.*, vol. 53, 2016, p. 980

¹⁵⁸ The UK in 2000 set out a framework consisting of six principles: (i) stronger culture for conflict prevention (ii) armed force should only be used as a last resort (iii) the immediate response for halting the violence is the with the territorial state (iv) when the government is not willing or able to prevent an overwhelming humanitarian catastrophe or is actively promoting it, the international community should intervene (v) the use of force should be proportionate to the humanitarian purpose and be carried out in accordance with international law (vi) any use of force should be collective. This framework didn't get the intended support; See UK Materials on International Law, *BYIL* 71, 2000, p. 646

case for humanitarian intervention in the case of the cruise missile strike in the next sections concerning US justifications and State *opinio juris*.

SECTION III: THE U.S. JUSTIFICATIONS

In this section we will attempt to dissect the US justifications concerning its cruise missile strikes on the 7th of April 2017 and the 14th of April 2018. Indeed, concerning Presidential War Powers our opinion was that some questions were left unanswered and that the extent of the Executive's war making capabilities aren't clearly defined but is rather based on historical practice. Especially, in the case of the cruise missile strike since there is a lack of precedents concerning military intervention for the elimination of chemical weapons. Regarding international law, the task to determine the lawfulness of the cruise missile strike is equally challenging because of the apparent absence of a legal justification under the UN Charter. Indeed, as stated above there is no UNSCR supporting the intervention, no charter exception can be invoked and the concept of humanitarian intervention doesn't have a clear and universally accepted framework¹⁵⁹.

Before diving into the legal rationale behind the attacks let us briefly explain why a legal justification is required. Indeed, a State can simply decide to take unilateral action without justifying its actions under *ius ad bellum* if the State knows that it won't be held accountable. Articulating the international legal rationales that support a State's action can serve multiple functions. One of the most important functions is to ascertain and help ensure the international lawfulness of a State's behaviour. UK legal adviser McLeod emphasises on the importance of

¹⁵⁹ Let us note that there is a shift from the concept of humanitarian intervention to the concept of Responsibility to Protect. This idea emerged through an independent panel set up by the Canadian government, the International Commission on Intervention and State Sovereignty. See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, online: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; The concept doesn't diverge that much from that of humanitarian intervention. It basically refers to a duty on states to act in cases of humanitarian crisis. This concept is referred to in the *World Summit Outcome Document* of the UN Millennium Summit in its section on 'Human Rights and the rule of Law'.; See UN Doc. A/60/L.1, 2005 *World Summit Outcome document*, 15 September 2005; The idea that this is a new legal concept is divided among States, however, some UNSCR mention R2P; See SC/Res/1674, SC/Res/1706 and especially SC/Res/1973 regarding Libya. There isn't much support for unilateral action based on R2P and since the United States didn't invoke it as a justification for military intervention we shall not elaborate further on the subject but limit ourselves to the concept of humanitarian intervention.

“engaging with the outside world to explain what the law is and why that is the case”¹⁶⁰. Moreover, public explanations can help increase the precedential value of the State’s actions. The idea is that legal diplomacy helps the understanding of international law. For example, in the case of the counter-ISIL military coalition, many letters were submitted to the U.N. Security Council by States invoking self-defence rationales for the use of force against ISIL on Syrian territory without Syria’s consent¹⁶¹. This reinforces the lawfulness of the State’s actions and more importantly helps guarantee that the actions are understood as lawful by others.

Justifying the use of force outside of the exceptions of self-defence and a UNSCR is a more delicate matter. Indeed, the State has three options it could (i) offer a legal rationale persuading audiences that its actions can be housed within existing rules or that the rules should be modified, (ii) offer a policy justification, or finally (iii) remain silent¹⁶². In the case of the Kosovo military operation, the United Kingdom for example chose the first option and justified its actions under humanitarian intervention. The US on the other hand used the second option in the sense that, in the words of the US State Department Legal Adviser Michael J. Matheson, “this process was not entirely satisfying to all legal scholars [...] but it did bring the Alliance to a position that met our common policy objectives without courting unnecessary trouble for the future”¹⁶³.

One of the main objections against the Trump administration is the lack of legal reasoning for both attacks. It is true that for the attack on April 13th it attempted to give an official legal justification but this is essentially a domestic legal reasoning. The arguments contained in the Office of Legal

¹⁶⁰ Remarks by I. MACLEOD (Apr. 23, 2015), at <http://www.thehagueinstituteforglobaljustice.org/latest-insights/latest-insights/news-brief/the-hagueconference-on-international-legal-diplomacy/>

¹⁶¹ See Statement by the U.S. State Department Legal Adviser Brian Egan (2016), “Public explanations of legal positions are an important part of legal diplomacy. The United States is not alone in providing such public explanations. Over the last eighteen months, for example, nine of our coalition partners have submitted public Article 51 notifications to the U.N. Security Council explaining and justifying their military actions in Syria against ISIL. Though the exact formulations vary from letter to letter, the consistent theme throughout these reports to the Security Council is that the right of self-defense extends to using force to respond to actual or imminent armed attacks by non-State armed groups like ISIL. Those States’ military actions against ISIL in Syria and their public notifications are perhaps the clearest evidence of this understanding of the international law of self-defense.”, in: B. EGAN, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 INT’L L. STUD. 235, 2016, p. 244

¹⁶² C. KEITNER, ‘Explaining international acts’, *Research Paper UC Hastings*, 285, p. 8

¹⁶³ M. J. MATHESON, ‘Justification for the NATO Air Campaign in Kosovo’, 94 *ASIL PROC.*, 2000, p. 301

Counsel are primarily to justify its actions under US domestic law and not international law (*see supra.*). Which is quite alarming since the intervention is a response to the Syrian government's disregard of its obligations under international law. Even more troubling is the complete absence of an official justification regarding its first cruise missile strike in 2017. Nevertheless, we shall look at different official statements to identify the US government's position with regards to international law.

Concerning the 7th of April 2017 cruise missile strike, we shall not go back to the facts of the attacks and the reprisals undertaken by the Trump Administration (*voy. Supra*). Instead, we shall dive directly into the legal reasoning of the US government in this matter. Indeed, the US and the international community as a whole view the use of chemical weapons by the Syrian government as unlawful and in violation of the chemical weapons convention. Nevertheless, the United States failed to provide an official justification regarding the legality of the cruise missile strike. As stated above, the lack of legal justification weakens rather than strengthens the legality of the action. This makes the case for a precedent less credible. Indeed, “what gives an incident precedential value is that it happened and that the state (here the United States) maintained that it was acting lawfully, thus making it a matter of state practice for international law and a matter of executive practice for domestic law”¹⁶⁴.

It seems as though the act in itself was more of a one-off reprisal strike rather than a long-term solution to the problem (the use of chemical weapons). This would suggest that the US Government clearly violated article 2(4) of the UN Charter by which they are also bound in their own Constitution under article VI. Indeed, we explained above that a State can in general lawfully violate the prohibition of the use of force in two circumstances: self-defence or a United Security Council Resolution. However, let us examine some of the White House's statements regarding the legality of the attack.

For example, if we look at the White House's press releases we find once again listed factors justifying their cruise missile strike. The administration states for example the severe humanitarian distress caused by the chemical weapons attack, the violations of international law particularly the

¹⁶⁴ H.H. KOH, ‘The War Powers and Humanitarian Intervention’, *HLR* 53, 2016, p. 980

violations of its obligations under the Chemical Weapons Convention as well as UNSCR 2118, the threat to international security...¹⁶⁵. The US government argues that the use of force is necessary and proportionate to the aim of deterring and preventing the future use of chemical weapons by the Syrian Government. In the absence of a clear legal reasoning one could argue that the case for the legality of the intervention is weak and therefore rather unlawful.

The attacks on the 13th of April 2018 were different in scale and in nature. Indeed, the attacks were taken collectively between the United States, the United Kingdom and France (voy. *Supra*). Even though the action was taken collectively there was no collective legal justification for the missile strike. The UK is the only State out of the three that gave a reasoned legal rationale based on the humanitarian intervention principle. We shall analyse their position further down in this paper. The Trump administration gave an official reasoning wherein it justifies its actions under the US Constitution and not under *ius ad bellum*. Nevertheless, we can cite different statements made by government officials such as U.S. Ambassador to the United Nations Nikki Haley who indicated that the strikes were “justified, legitimate, and proportionate,” and that the U.S. action was “part of a new course charted last year to deter future use of chemical weapons.”¹⁶⁶ Furthermore, U.S. Secretary of Defense Jim Mattis explained the strikes as defending “an important national interest in averting a worsening catastrophe in Syria, and specifically deterring the use and proliferation of chemical weapons”¹⁶⁷.

§1 – The case for humanitarian intervention

Even though this principle wasn’t directly invoked by the Trump administration we can attempt to identify a possible exception based on a set of standards developed by legal scholars¹⁶⁸. Indeed,

¹⁶⁵ Letter from President D.J. TRUMP to the House of Representatives, 8th of April 2017, in. <https://www.whitehouse.gov/briefings-statements/letter-president-speaker-house-representatives-president-pro-tempore-senate/>; see also M. LEDERMAN, ‘(Apparent) Administration Justifications for Legality of Strikes Against Syria’, 8 April 2017, online: <https://www.justsecurity.org/39803/apparent-administration-justifications-legality-strikes-syria/>

¹⁶⁶ Ambassador N. HALEY, *Remarks at an Emergency UN Security Council Meeting on Syria* (Apr. 14, 2018), at <https://usun.state.gov/remarks/8389>.

¹⁶⁷ Statement by Secretary J. N. MATTIS on Syria (Apr. 13, 2018), at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1493610/statement-bysecretary-james-n-mattis-on-syria/>.

¹⁶⁸ H.H. KOH, ‘The War Powers and Humanitarian Intervention’, *HLR* 53, 2016, p. 1004

before the Syria strikes the US participated in a limited number of humanitarian interventions. We cited the Kosovo operation above as well as for example operation Provide Comfort in Iraq in 1991. However, the US government hasn't endorsed publicly this principle as an exception to the prohibition of the use of force. Nevertheless, a set of cumulative conditions are necessary and have been developed by legal scholars and government officials to justify military intervention in cases of humanitarian distress.

The question arises of whether one can consider international law as unyielding or as flexible enough to allow morally legitimate action to stop or prevent atrocities, in this case the deliberate use of chemical weapons. Most scholars once again tend to view article 2(4) as unyielding therefore absolute. Any use of force outside the exceptions posed by the UN Charter are per se illegal¹⁶⁹. On the other hand, you have for example former British Legal Adviser Sir Daniel Bethlehem who thinks that “in the case of the law on humanitarian intervention, an analysis that simply relies on the prohibition of the threat or use of force in Article 2(4) of the U.N. Charter, and its related principles of non-intervention and sovereignty, is overly simplistic.”¹⁷⁰

If we look at the Syrian situation, one could argue that the failure of the collective security system provided by the UN to find a solution to the crisis, namely due to the persistent veto of some UNSC permanent members, necessitates alternative solutions. Indeed, on one side you have the prohibition of the use of force on the other you have other pressing matters that are of great concern to international law: human rights, regional security, grave nature of already committed atrocities... If U.N. “procedural standards require the consensus of the five permanent members of the Security Council and at least four of the elected members[, t]his produces a significant danger of under intervention.”¹⁷¹ Considering this, maybe the prevention of atrocities in the name of furthering the purposes of the UN system might override the prohibition of the use of force.

¹⁶⁹ See for example Yale Legal Scholars O. A. HATHAWAY & S. J. SHAPIRO, Opinion, *On Syria, a U.N. Vote Isn't Optional*, N.Y. TIMES (Sept. 3, 2013), <http://nyti.ms/1DMbgki>

¹⁷⁰ Sir D. BETHLEHEM, ‘Stepping Back a Moment—The Legal Basis in Favor of a Principle of Humanitarian Intervention’, *EJIL: TALK!* (Sept. 12, 2013), <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>

¹⁷¹ M. W. DOYLE, *The question of intervention: John Stuart Mill and the Responsibility to Protect*, 2015, p. 204

The case for humanitarian intervention is relevant in light of the crisis at hand. Indeed, considering the lack of consensus on the matter this crisis could be an opportunity to crystallize the doctrine¹⁷². The idea is whether the Charter would permit another exception that allows the threat or use of force against another State when a persistent Security Council stalemate prevents the United Nations system to achieve its anti-war objectives. The immediate question that follows is in allowing such exception how can we guarantee no over-intervention?

While the U.N. Charter gives the UNSC the authority to act when a state uses chemical weapons to kill its own civilians, Article 2(4) nowhere makes that an exclusive responsibility. So if the UNSC recurrently failed to fill that void of protection by discharging that responsibility, could a group of states with sincerely humanitarian motives act jointly and legally for the sole purpose of protecting civilians? The International Commission on Intervention and State Sovereignty argued: “If the Security Council fails to discharge its responsibility in conscience-shocking situations crying out for action, then it is unrealistic to expect that concerned states will rule out other means and forms of action to meet the gravity and urgency of these situations.”¹⁷³

Let us now turn to the potential framework that would allow such intervention in the case of Syria based on the opinion of supporters for humanitarian intervention¹⁷⁴:

- (a) The crisis disrupts the international order that would potentially create and imminent threat to the acting nations. The Trump administration claimed that the cruise missile strike was in the vital interests of the United States in both cases¹⁷⁵.

¹⁷² Indeed, in order for a norm to be considered as having a customary nature in international law, two elements are to be considered. First, State practice and second *opinio juris*. State practice is the objective consideration and aims to see whether the conduct is general but not necessarily universal. Concerning *opinio juris*, the subjective element, we look at whether there is a belief that this practice is obligatory and constitutes law. The crystallization of a conduct means that we're at the formation of an international law norm of a customary nature; See Y. DINSTEIN, *War, Aggression, and Self-Defence*, (6th ed.), 2017, Cambridge, p. 99

¹⁷³ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, p. 55, online: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>;

¹⁷⁴ A. DEEKS, ‘Multi-Part Tests in the Jus Ad Bellum’, 53 *HOUS. L. REV.* 1035, 2016, p. 1060; H. KOH, ‘The War Powers and Humanitarian Intervention’, 53 *HOUS. L. REV.* 1035, 2016, p. 1011

¹⁷⁵ Statement by Secretary J. N. MATTIS on Syria (Apr. 13, 2018), at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1493610/statement-by-secretary-james-n-mattis-on-syria/>; See also S. A. ENGEL, ‘April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities’, Opinion of Assistant Attorney-General, in *Opinions of the Office of Legal Counsel*, Vol. 42, May 31, 2018, p. 9-10, online: <https://www.justice.gov/olc/opinion/file/1067551/download>

- (b) The nations acting collectively sought UNSC resolutions wherein the UNSC failed repeatedly to come to a solution. This is the case here, Russia and China vetoed a UNSCR that would authorize the use of force¹⁷⁶.
- (c) Limited force for genuinely humanitarian purposes that is necessary and proportionate to the aim. Here the aim is to deter the use and proliferation of chemical weapons. The Trump administration stated for their first strike that their use of force targeted the airfield from which the chemical weapons were launched. For the second strike it targeted different Syrian chemical weapons facilities¹⁷⁷.
- (d) The action was collective. Concerning the first cruise missile attack in 2017 the attack was unilaterally and individually steered by the United States. The second strike was taken jointly with the UK and France.
- (e) The collective action would prevent the use of illegal means by the territorial state. This still has to be examined, we cannot state that the Syrian government doesn't have any more chemical weapons and won't use them again in the future.
- (f) It would help to avoid an illegal end, the continued use of chemical weapons causing civilian casualties.

Even when applying this framework to Syria, some questions still remain unanswered. Indeed, the Syrian conflict as a whole presents a humanitarian disaster and a threat to international order. The aim to alleviate the use of chemical weapons can be considered as praiseworthy but will it be obtained? Indeed, in the case of the Kosovo or the Libyan operations the aims were obtained, therefore the use of force in violation of article 2(4) was per se *legitimate*. Furthermore, they were accompanied by *ex post* (Kosovo) and *ex ante* (Libya) Security Council resolutions. This is not the case for Syria. If we look at the conflict as a whole, one can't argue the need for some form of intervention nonetheless the missile strikes aren't a response to the overall crisis but merely to Syria's use of chemical weapons. The use of chemical weapons compared to the conflict is significantly less (hundreds of civilian casualties resulting from the chemical weapons attack compared to the hundreds of thousands of deaths, the millions of refugees and displaced Syrians

¹⁷⁶Viewed online at: <https://www.theguardian.com/world/2017/mar/01/russia-and-china-veto-un-resolution-to-impose-sanctions-on-syria>

¹⁷⁷ S. A. ENGEL, 'April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities', *Op. Cit.*, 2018, p. 2

resulting from the overall conflict)¹⁷⁸. This leads us to believe that the nature of the harm is another factor which may determine the case for humanitarian intervention and not merely that the crisis had reached a certain level of gravity. Would the use of other weapons that are outlawed and considered horrendous justify the threat or use of force in violation of article 2(4)?¹⁷⁹

Nevertheless, the need for a strong legal rationale and explicit expressions of *opinio juris* are required in order to legitimize such intervention which is somewhat considerably lacking in this case. Let us observe the position of other States on the lawfulness or not of these strikes.

SECTION IV: STATE *OPINIO JURIS*

It is not without note that a considerable amount of States publically expressed their support for the missile strikes. Nevertheless, some states also stated that the attacks were clearly illegal. The question is what weight is given to state *opinio juris*. In this section we shall examine both sides by first looking at the states that support the attacks then by unravelling the UK justification and finally by looking at the states that were against them.

§1 – STATES SUPPORTING THE CRUISE MISSILE STRIKES

¹⁷⁸U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. doc. A/HRC/37/72, 23 March 2018, https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-72_EN.pdf; Human rights watch, https://www.hrw.org/sites/default/files/syria_2.pdf

¹⁷⁹ We are thinking about biological, radiological or poisonous weapons for example.

Since the amount of states that publicly supported the strikes isn't that long we can attempt to list them¹⁸⁰: Australia¹⁸¹, Bahrein¹⁸², Canada¹⁸³, France¹⁸⁴, Germany¹⁸⁵, Japan¹⁸⁶, Jourdan¹⁸⁷, Italy¹⁸⁸, Israel¹⁸⁹, Kuwait¹⁹⁰, The Netherlands¹⁹¹, Poland¹⁹², Qatar¹⁹³, South Korea¹⁹⁴, Turkey¹⁹⁵, Ukraine¹⁹⁶,

¹⁸⁰ This list mainly concerns the strikes on the 7th of April 2017

¹⁸¹ "Press conference with the minister for defense and chief of the defense force", Prime minister of Australia website, Sidney, NSW, 7 April 2017, online: <https://www.pm.gov.au/media/2017-04-07/press-conferenceminister-defence-and-chief-defence-force>.

¹⁸² "Ministry of Foreign affairs supports US military operations against chemical attack sites in Syria" Ministry of Foreign Affairs, Kingdom of Bahrain, online: <http://www.mofa.gov.bh/Default.aspx?tabid=7824&language=en-US&ItemId=7286>.

¹⁸³ "Statement by the Prime Minister of Canada on US. Strikes in Syria", Justin Trudeau, Prime minister of Canada, Ottawa, Ontario, 7 April 2017, online: <http://www.pm.gc.ca/eng/news>.

¹⁸⁴ « Syrie communiqué conjoint de François Hollande et d'Angela Merkel », Représentation permanente de la France auprès de l'Union européenne, Ministère de l'Europe et des affaires étrangères, 7 avril 2017, en ligne : <https://ue.delegfrance.org/syrie-communique-conjoint-de> ;

¹⁸⁵ *Ibid.*;

¹⁸⁶ "Press occasion on the Situation in Syria", The Prime Minister in Action, 7 April 2017, online: 7 April 2017, http://japan.kantei.go.jp/97_abe/actions/201704/07article2.html.

¹⁸⁷ "A necessary and appropriate response", Government spokesman Mohammad Momani, 7 April 2017, online: <http://edition.cnn.com/2017/04/07/world/syria-us-strike-world-reaction/index.html>.

¹⁸⁸ "Syria", Ministry of foreign affairs and international cooperation, Press contact, 7 April 2017, online: http://www.esteri.it/mae/en/sala_stampa/archivionotizie/comunicati/2017/04/siria_0.html.

¹⁸⁹ "Israeli leaders offer wall-to-wall praise for US strike on Syria", The Times of Israel, 7 April 2017, online: <http://www.timesofisrael.com/netanyahu-praises-message-of-resolve-in-us-strike-on-syria/>.

¹⁹⁰ "Kuwait support US strike on Syrian bases", Saudi press agency, 1438/7/10, 7 April 2017, online: <http://www.spa.gov.sa/viewstory.php?lang=en&newsid=1612784>.

¹⁹¹ "Government response to US actions in Syria", Governments of the Netherlands, 7 April 2017, online: <https://www.government.nl/ministries/ministry-of-foreign-affairs/news/2017/04/07/government-response-to-usaction-in-syria>.

¹⁹² "Poland supports U.S. actions on Syria, Government spokesman says", Reuters, Warsaw, 7 April 2017, online: <http://www.reuters.com/article/mideast-crisis-syria-poland-idUSW8N1G5024>.

¹⁹³ "Qatar calls for End to Syrian people's tragedy", Information Office, Doha, 7 April 2017, online: <https://www.mofa.gov.qa/en/all-mofa-news/details/2017/04/07/qatar-calls-for-end-to-syrian-people's-tragedy>.

¹⁹⁴ "MOFA spokesperson's commentary on US response to use of chemical weapon in Syria", Ministry of Foreign affairs of Korean Republic website, 7 April 2017, http://www.mofat.go.kr/webmodule/htsboard/template/read/engreadboard.jsp?typeID=12&boardid=302&seqno=318320&c=TITLE&t=&pagenum=24&tableName=TYPE_ENGLISH&pc=&dc=&wc=&lu=&vu=&iu=&du=.

¹⁹⁵ "Press release regarding the US's military operation targeting the Syrian regime's Shayrat airbase in Homs", N°107, 7 April 2017, online: http://www.mfa.gov.tr/no_107_-7-april-2017_-press-release-regarding-the-us_military-operation-targeting-the-syrian-regime_s-shayrat-airbase-in-homs.en.mfa.

¹⁹⁶ "Statement by the Ministry of foreign affairs of Ukraine in Syria", Ministry of foreign affairs, Ukraine, 7 April 2017, online: <http://mfa.gov.ua/en/press-center/news/56242-statement-by-the-ministry-of-foreign-affairsof-ukraine-on-syria>.

United Arab Emirates¹⁹⁷ and The United Kingdom¹⁹⁸. These states supported the cruise missiles strikes spearheaded by the Trump administration in 2017.

Nevertheless, different justifications for their support was given. For example, Australia, Italy and Canada consider the attack as proportionate and limited¹⁹⁹. Other States like France for example gave their support based on, we may say, implicit humanitarian intervention. In 2013 they had already argued for military intervention without a UNSCR²⁰⁰.

Furthermore, we can cite the position of different representatives of international and regional organizations such as the position of Donald Tusk, President of the Council of Europe, who tweeted: “US [United States] strikes show needed resolve against barbaric chemical attacks. EU [European Union] will work with the US to end brutality in Syria²⁰¹”. This doesn’t reflect the position of all member States but nonetheless if no other State refutes this position then one can view it as favouring the attacks. Silence can be considered as tacit acceptance.

The question remains as to whether any reference to international law was made. The idea is to distinguish between a mere ‘understanding’ that the attack was per se acceptable to considering that the attacks were indeed lawful. Looking at their statements, we cannot clearly see legal arguments. Instead the words that were used such as ‘*fully support; strongly support; limited, measured, proportionate action*’ which leaves us to believe that States are unwilling to provide a sound legal basis. The only State that gave a legal opinion is the United Kingdom, which we shall

¹⁹⁷ “UAE backs U.S. strikes against Syrian regime”, Saudi press agency, 1438/7/10, 7 April 2017, online: <http://www.spa.gov.sa/viewstory.php?lang=en&newsid=1612782>.

¹⁹⁸ “The United Kingdom support the U.S. air strike on the Al Shayrat airfield because war crimes have consequences”, Foreign & Commonwealth Office, Matthew Rycroft, 7 April 2017, online: <https://www.gov.uk/government/speeches/the-united-kingdom-supports-the-us-air-strike-on-the-al-shayratairfield-because-war-crimes-have-consequences>.

¹⁹⁹ See note n°62 for Australia, n° 64 for Canada, n°69 for Italy

²⁰⁰ A/68/PV.5, United Nations General Assembly, 24 septembre 2013, p.36 ; A. BOUILHET, « Syrie : Hollande assure qu’il n’est pas isolé », Le Figaro, 6 septembre 2013 ; « Syrie – Déclaration du gouvernement et débat à l’Assemblée nationale et au Sénat – Intervention de Laurent Fabius au Sénat », Ministère de l’Europe et des affaires étrangères, 4 septembre 2013, en ligne : <https://id.ambafrance.org/SyrieDeclaration-du-gouvernement>.

²⁰¹ Donald Tusk Twitter account, President of the Council of Europe, consulted on the 12th of July 2017, see: https://twitter.com/eucopresident/status/850276318914560002?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.telegraph.co.uk%2Fnews%2F2017%2F04%2F07%2Fus-air-strike-syria-world-reacted-donald-trumpsdecision-intervene%2F

examine further down. One could consider the position of the States that supported the attacks as merely political and moral.

§2 – UNRAVELLING THE UK JUSTIFICATION

Indeed, the United Kingdom gave a legal rationale for their intervention in Syria based on the humanitarian principle. They have already stated their position of the lawfulness of such intervention even in breach of the prohibition of the use of force. The UK Government set out a framework that it applies to assess the need for humanitarian intervention.

“The UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force is humanitarian intervention, which requires three conditions to be met:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).”²⁰²

We see here a similar framework to the one proposed above which also requires a few comments. Indeed, once again the case for humanitarian distress is debatable. If the aim is to deter the use of chemical weapons, then this should be the basis of the argument. Indeed, as stated above, the whole conflict is a humanitarian disaster but the strikes aren’t aimed to address the conflict but are merely aimed to deter the future use of chemical weapons. They state that lives are to be saved but once again the proportion of casualties that resulted from the alleged chemical weapons attack are significantly less compared to the overall conflict. Our point is, should States that claim to abide to international law breach international law in the name of a right that isn’t universally supported?

²⁰²Viewed online: <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>

Especially if, in this case, the aim isn't necessarily obtained. Indeed, we cannot be sure that the strikes will deter the Syrian government in its use and possession of chemical weapons.

§3 – Clearly Illegal Strikes for some States

In South America a group of States composed of Argentina, Chili, Mexico, Paraguay, Peru and Uruguay made a joint declaration. They stated that « *El uso de armas químicas es un crimen de lesa humanidad y un crimen de guerra, proscrito por los tratados internacionales, entre ellos la Convención de las Naciones Unidas sobre la Prohibición del Desarrollo, la Producción, el Almacenamiento y el Empleo de Armas Químicas y sobre su destrucción, por lo que las acciones para prevenir esta clase de atrocidades deben ser respaldadas por toda la comunidad internacional de conformidad con las normas del derecho internacional y los principios de la Carta de las Naciones Unidas. Hacemos un llamado a todas las partes involucradas, incluyendo a los actores con influencia en la región, a ejercer la mayor prudencia para evitar una escalada de las tensiones y para encontrar una solución política a la muy compleja y dramática situación en Siria, bajo los auspicios de las Naciones Unidas*²⁰³ ». The government of Brazil also made a similar declaration in which they were in favor of dialogue and the respect of international law²⁰⁴.

These positions don't clearly state the illegality of the attacks perpetrated by the Trump administration nevertheless they illustrate a clear opinion that territorial integrity and political independence cannot be breached except under the rules confined by international law and the UN Charter. The President of Bolivia accompanied by his representative at the UN seem somewhat

²⁰³ [Translation in french] « *Prévenir ce genre d'atrocité doit être pris en charge par toute la communauté internationale en conformité avec les normes de droit international et les principes de la Charte des Nations Unies. Nous appelons toutes les parties concernées, y compris les parties ayant une influence dans la région, à agir dans la plus grande prudence pour éviter une escalade des tensions et de trouver une solution politique à la situation compliquée et dramatique en Syrie, sous l'égide des Nations* »; « Communiqué conjoint des gouvernements d'Argentine, Chili, Mexique, Paraguay, Pérou et Uruguay », Ministère des affaires étrangères de la Colombie, 7 April 2017, online : <http://www.cancilleria.gov.co/newsroom/publicques/comunicado-conjuntogobiernos-argentina-brasil-chile-colombia-paraguay-uruguay-0>; See also: « Gobiernos de Latinoamérica tienen 'profunda preocupacion' por la situación en Siria », El Herald, 7 avril 2017.

²⁰⁴ « Conflicto en Siria », Oficina de Prensa del Ministerio de Relaciones exteriores, note n°113, 7 April 2017.

more explicit in their opinion of the strikes, they clearly see the cruise missile strikes of the 7th of April 2017 as illegal²⁰⁵. China as well consider the use of force as illegal as well as North Korea²⁰⁶.

The Government of Syria and their allies condemned the strikes and deem them as a clear violation of the UN Charter and state sovereignty²⁰⁷. Russia and Iran together view unilateral use of force without UNSCR as illegal and in breach of international law and the UN Charter²⁰⁸. They view the attack as an act of aggression. Indeed, the Russian government proposed a resolution to hold the US accountable of aggression but this resolution was set aside by the UNSC²⁰⁹.

Considering the amount of States that condemn the strikes it would be difficult to establish a legal justification based on humanitarian intervention since this would mean invoking that it exists as customary international law and therefore requiring State practice and *opinio juris*²¹⁰. When we can confidently state that the subjective element is lacking and that states still don't fully consider it as law.

²⁰⁵ See Président Evo Morales Ayma twitter account, consulted on the 25 July 2017, online: <https://twitter.com/evoespueblo>;

²⁰⁶ “Foreign Ministry Spokesman Hua Chunying’s Remarks on military US military strike against targets in Syria”, Ministry of foreign affairs of the People’s Republic of China, 8 April 2017, online: http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1452276.shtml. ; “La Corée du Nord condamne la frappe américaine en Syrie”, Le Vif, 8 avril 2017, en ligne : <http://www.levif.be/actualite/international/la-coree-du-nord-condamne-la-frappe-americaine-en-syrie/articlenormal-643245.html>.

²⁰⁷ “We describe that attack as a flagrant violation of international law and act of aggression. We strongly condemn the illegitimate actions by the u.s. the consequences of this for regional and international stability could be extremely serious.”; Statement by Russian Ambassador Safronkov to the UN, in Transcripts from UN Security Council meetings on Syria, April 7 2017; “The syrian-arab republic strongly condemns the act of aggression by the united states of america, which is counter to the principles of the charter of the united nations.”; Statement by Syrian Ambassador to the UN al Ja' Afari, in Transcripts from UN Security Council meetings on Syria, April 7 2017; online at: <https://www.c-span.org/video/?c4665703/security-council-russian-response-us-airstrikes-syria>

²⁰⁸ “Iran strongly condemns US missile attack on Syria”, Foreign ministry spokesman, Bahram Ghasemi, 7 April 2017, online: <http://www.mfa.gov.ir/index.aspx?fkeyid=&siteid=3&pageid=22945&newsview=448615>; “Foreign ministry statement of US military action in Syria on April 7 2017 », The Ministry of Foreign Affairs of the Russian Federation, 692-04-2017, 7 April 2017, online: http://www.mid.ru/en/press_service/spokesman/official_statement/asset_publisher/t2GCdmD8RNIr/content/id/2717798

²⁰⁹ Viewed online at: <https://www.rt.com/news/424171-uns-c-russia-resolution-syria/>

²¹⁰ G. CAHIN, *La coutume internationale et les organisations internationales, l'incidence de la dimension institutionnelle sur le processus coutumier*, Edition Pedone, Paris, 2001, p. 408.

Even though many Governments viewed the cruise missile strikes as unlawful and in breach of international law, the United States nor its allies won't be held accountable, which leaves us with another question, that of the impact of the strikes on article 2(4).

SECTION V: IMPACT ON ARTICLE 2(4)

Looking at State practice one could wonder whether the prohibition set out in article 2(4) against the use of force outside the exceptions provided for by the Charter isn't absolute and hasn't remained unchanged since its adoption in 1945. Indeed, it seems as though more limits to article 2(4) are emerging; the use of force for the protection of human rights, ensuring arms control or promoting democracy. There exists pressing matters that are of international concern and may present a threat to international peace and security; international terrorism, the proliferation of weapons of mass destruction, rising conflicts within states... Furthermore, warfare has also evolved, the advanced techniques and weaponry used in military operations don't necessarily cause total war. In the case of the cruise missile strike, we saw that the targets were chemical weapons facilities and the operation was very limited in time, lasting a few hours. Considering all this, some might for a re-interpretation of article 2(4) in order to address problems of peace and security that have failed to be addressed by the UNSC. To consider this chain of thought, it still would require some form of measures by the UNSC and GA. Indeed, the UNSC is the supranational authority that has the power to settle international disputes through the mechanisms provided by the UN Charter which might or might not include the use of force. If we leave this task to the states, then we risk seeing the use of force as a means to pursue national or regional policy strategy. Secretary-General Kofi Annan put stated in his *Larger Freedom* report 'The task is not to find alternatives to the Security Council as a source of authority but to make it work better'²¹¹. For the international community as a whole and with respect to the objectives of the UN Charter, it is much better to uphold rather than restrict the prohibition of the use of force.

²¹¹ UN Doc. A/59/2005 (2005), *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, par. 126

CHAPTER IV: ILLEGAL BUT LEGITIMATE

In our view, there lacks a relevant international legal basis to justify the cruise missile strikes against the Syrian government. Indeed, we saw that no charter related exception can be invoked and that referring to humanitarian intervention seems farfetched in light of the lack of consensus on the matter. This leads us to another possible justification, which implies the admission that the cruise missile strikes are illegal under international law but that they are legitimate in light of the issue at hand, which is mainly the use and proliferation of chemical weapons.

This position was held in the Kosovo operation, indeed, in light of the failure to obtain a UNSCR and because all other diplomatic avenues had been exhausted there wasn't any solution available to prevent and end the atrocities committed in Kosovo²¹². Therefore, the last resort would be to conduct a military campaign without a UNSCR which would achieve the aim of preventing the atrocities from occurring. It is true that this is what happened.

Let us make a brief comparison with the laws of a State and the obligation for its subjects to abide by them. Indeed, some laws might be considered as unjust by its subjects and thus may need to be revised. The revision of 'unjust' laws should be done through the proper procedural channels available under the State's legislative and judicial tools. Nonetheless, it is possible that even by going through the adequate channels no remedy or revision of the said 'unjust' law can be obtained. This is where the case for civil disobedience comes to light. Indeed, history shows us that many activists have resorted to this type of practice in order to ascertain their claim that in disobeying the law they are committed to 'higher-values'²¹³. What we would like to point out is the importance in accepting the consequences of violating an established rule of law. This is crucial in the activists aim.

²¹² C. GRAY, 'The use of force for humanitarian purposes', in N.D. WHITE and others, *Research Handbook on International Conflict and Security law*, Edward Elgar, 2013, p. 234

²¹³ Examples include: the civil rights movement during the 1960's, the road to Indian independence led by Gandhi; today we can cite the action of whistleblowers who provide classified or secret information to the public even though they risk prosecution (Luxleaks, Edward Snowden...); For more information on civil disobedience see P-A. PERROUTY, *Obéir et désobéir : Le citoyen face à la loi*, Université Libre de Bruxelles, Bruxelles, 2000 ; B. PAREKH, *Gandhi's political philosophy : A critical examination*, Macmillan, London, 1991 ; C. UDEH, « Rights, Responsibility, Law and Order in 21st Century's Civil Disobedience », *Journal of Politics and Law*, Canadian Center of Science and Education, Vol. 7, No. 2, 2014

Going back to the case of military intervention in Syria, the comparison is indeed relevant. The claim by the United States to alleviate a humanitarian catastrophe and the continued use of chemical weapons seems to be a ‘just’ cause. Since the mechanisms provided for under the UN Charter failed, the last resort was to violate article 2(4) and its prohibition of the use of force in order to achieve the desired humanitarian aim. This reasoning might seem legitimate at first hand but it still requires more comments.

Indeed, firstly the law contained in article 2(4), namely, the prohibition of the use of force, that is violated is not an unjust law. It is a fundamental principle inscribed in the collective security system developed after World War II. In the principles and purposes of the UN Charter we see under Article 1 that they are “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; of the United Nations Charter states”²¹⁴. Considering this, the United States in choosing to violate article 2(4) should have taken into account the impact the strike would have on the principle of the prohibition of the use of force.

Second, one must look at the facts of the case at hand. In deciding to breach article 2(4) there should be some sort of guarantee or at least sufficient evidence that the objective will be obtained. In claiming that the strike will deter the future use of chemical weapons by the Syrian government one could argue that this lacks argumentative weight. Indeed, the first strike in 2017 didn’t deter the Syrian government in allegedly using chemical weapons again. Which is why another strike was initiated in 2018, this time more considerable and in coalition with the UK and France (*See supra.*). Who is to say that the Syrian government will stop the use of chemical weapons? If it doesn’t, will there be another strike?

²¹⁴ UN Charter, Art. 1

Nonetheless, what brings weight to counter the argument that the cruise missile strikes were unlawful is the reaction by the international community²¹⁵. Indeed, the fact that many states supported the strikes (*see supra.*) makes it somewhat challenging to directly label the strikes as illegal. International law rests fundamentally on State practice which is very much influenced by those with sufficient political and military power²¹⁶.

Another interesting view, is the idea that our international order rests on ‘universally’ held values that were mainly set by the victors of the Cold war which is the West. Considering this, the shapers of our current global structure are the ones who engage in unilateral military intervention to preserve the ideological realms of our society. This doesn’t contribute to the legitimacy of the operation since this depends on who bears the responsibility in the shaping of international law. We only argue that in light of these elements, it seems that the United States, considering its weight in the global structure doesn’t have the same obligations towards the compliance or non-compliance of international law than other states. This makes their obligation to justify the cruise missile strikes even less relevant.

The illegal but legitimate argument is a dangerous one because it can potentially lead to over-intervention or even more concerning might lead to some military campaigns which at face value present humanitarian concerns but once depicted serve the intervening states self-interests.

²¹⁵ H.H. KOH, ‘The War Powers and Humanitarian Intervention’, *HLR* 53, 2016, p. 1015

²¹⁶ J. LOBEL, “Benign Hegemony? Kosovo and Article 2(4) of the U. N. Charter”, *Chicago Journal of International Law*: Vol. 1: No. 1, p. 5, online at: <http://chicagounbound.uchicago.edu/cjil/vol1/iss1/5>

CONCLUSION

The Syrian cruise missile strikes presents an important case study for US domestic war making powers and for the respect of the laws contained under the collective security system established by the UN. Indeed, with regards to Presidential war powers, in the continuation of the assertion that the Commander-in-Chief has extensive war making capabilities, it is crucial to further examine the extent of how the Executive defines national interests. As we've seen in our analysis on the justifications given by the Trump administration regarding the strikes often refer to a national interest in alleviating the humanitarian disaster and the continued use of chemical weapons. The idea that the President can initiate small scale military operations without congressional approval if there are sufficient national interests is quite vague. In policy-making there should be some sort of cooperation between Congress and the President in matters of foreign affairs. In Harold Koh's book *'The National Security Constitution'* he suggests a 'balanced institutional participation in national security decision making'²¹⁷. Indeed, we agree that a passive Congress in foreign policy can lead to arbitrary decisions made by the Executive in which he'll justify them using the 'national interest' argument. This can have potentially dangerous effects. Historical practice shows that there are cases where the President has engaged in large military operations which at first might have appeared in the legitimate interest of the United States but where finally completely unjustified²¹⁸.

With regards to international law, the Syrian Cruise missile strike can have opposing views. It can potentially be regarded as a 'lawmaking' moment for the supporters of humanitarian intervention or it can be viewed as an open disregard of the prohibition of the use of force set in article 2(4) of the UN Charter. Our view is that one has to look at the purpose of international law and most importantly why nations should obey it. Indeed, in our analysis on the legal justification under international law we came to the conclusion that there wasn't a sound justification available or at least one that could be supported by the UN Charter system. Even when looking at the legitimacy of the strikes, there still remained some space for contradiction. There are traditional competing views on the compliance to international law. There is the realist approach which consists in

²¹⁷ H. H. KOH. *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, New Haven, Yale University Press, 1990, p. 5

²¹⁸ We are thinking of the Iraqi War in 2003, the Vietnam war in the 60's and 70's and the Korean War in 1953

claiming that international law isn't really law because it cannot be enforced²¹⁹ and there is the rationalistic claim that nations will obey international law only if it serves national self-interest²²⁰. Indeed, both statements are relevant in the present case. The United States in the violation of the prohibition of the use of force should be held accountable but in light of lack of consensus on the legality or illegality of the strikes it won't. Even so, the weight of the United States in foreign policy really leaves them with a sort of blank check in its compliance or non-compliance. Moreover, we saw that the Obama administration in seeking congressional approval wanted to reinforce its legitimacy for the use of force against Syria but failed to do so. Instead of carrying out the attack anyway, which it could have based on historical practice it chose to comply with national and international law. This can be viewed as an approach that reflects the rationalistic theory.

We only aim here to point out that the collective security system is failing when it comes to Syria and the promotion of peace in the region. Indeed, the case for intervention in Syria is a delicate one and as stated in our study the humanitarian concern is of much importance. Nonetheless, military intervention doesn't seem like the long-term solution. Firstly, the ideal situation would be intervention based on a UNSCR to achieve a ceasefire and regional stability. This we saw is unlikely and would require a considerable military effort. Second, violating international law by using force on a sovereign territory claiming the respect of arms control seems like a new justification which has no precedent. Therefore, it might be more legitimate and strategically efficient to abide to the UN collective security system and more importantly to the authority of the UNSC in the promotion of peace and stability.

As observers, we can only wait and see how the cruise missile strikes will affect the conflict as a whole and whether the desired objective of alleviating the humanitarian disaster and the use of chemical weapons will be obtained.

²¹⁹ G. F. KENNAN, *American Diplomacy 1900-1950*, Penguin, 1984, p. 95-103

²²⁰ L. HENKIN, *How Nations Behave*, Columbia University Press, 1979, p. 47

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