

LEGALITY AND MORALITY IN INTERNATIONAL LAW: THE SYRIA AIR STRIKES

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I. INTRODUCTION

On April 6, 2017, the United States carried out a missile strike against the Al Shayrat airfield in Syria in response to the Syrian government's use of chemical weapons two days earlier on civilians in the northern Idlib province.1 On April 14, 2018, the United States, the United Kingdom, and France car-

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1. Michael R. Gordon, Helene Cooper & Michael D. Shear, Dozens of U.S. Missiles Hit Air Base in Syria, N.Y.TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html.

ried out strikes on three Syrian government sites in response to a suspected chemical attack on the town of Douma.<sup>2</sup> International legal scholars widely understood these attacks to be unlawful given that they are inconsistent with Article 2(4)<sup>3</sup> of the United Nations Charter, were carried out without the consent of President Assad, lacked Security Council authorization, and were not conducted in self-defense.<sup>4</sup> Nevertheless, many states condoned the Syria operations as normatively legitimate notwithstanding the fact that they were technically unlawful.<sup>5</sup> The reactions of states to these strikes thus raise interesting questions as to whether there exists a space in the international legal order where actions of sovereigns in exceptional cases may be technically unlawful, but nonetheless legitimate in the eyes of the international community.

The role of the sovereign in states of emergency begins to answer some of these questions. The extent to which the sovereign may act within the confines of the legal system, or outside of it, reveals much about the reach of law in times of crisis and the nature of the sovereign as a political or juridical entity. Central to this inquiry is an issue related to the rule of law: whether it is better to let the law be stretched and bruised in

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2. James Griffiths & Laura Smith-Spark, *What We Know About the Syria Strikes*, CNN (Apr. 14, 2018), <https://www.cnn.com/2018/04/14/middle-east/syria-strikes-what-we-know-intl/index.html>.

3. Article 2(4) of the U.N. Charter provides that “[a]ll 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.” U.N. Charter art. 2, ¶ 4.

4. See, e.g., Marty Lederman, *Why the Strikes Against Syria Probably Violate the U.N. Charter and (Therefore) the U.S. Constitution*, JUST SECURITY (Apr. 6, 2017), <https://www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution/>; Marko Milanovic, *The Clearly Illegal US Missile Strike in Syria*, EJIL: TALK! (Apr. 7, 2017), <https://www.ejiltalk.org/the-clearly-illegal-us-missile-strike-in-syria/> [hereinafter Milanovic, *Clearly Illegal*]; Marko Milanovic, *The Syria Strikes: Still Clearly Illegal*, EJIL: TALK! (Apr. 15, 2018), <https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/> [hereinafter Milanovic, *Syria Strikes*]; Julian Ku, *Trump’s Syria Strike Clearly Broke International Law—and No One Seems to Care*, VOX (Apr. 19, 2017), <https://www.vox.com/the-big-idea/2017/4/19/15345686/syria-un-strike-illegal-un-humanitarian-law>.

5. Alonso Gurmendi Dunkelberg et al., *Mapping States’ Reactions to the Syria Strikes of April 2018—A Comprehensive Guide*, JUST SECURITY (May 7, 2018), <https://www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/>.

order to account for all sovereign responses to emergency situations, or, if it is better to admit that a sovereign's emergency action is unlawful so as not to "muddy the issue"<sup>6</sup> of the rule of law's reach.

Oren Gross' Extra-Legal Measures Model attempts to reconcile this tension of "tragic dimensions" between democratic rule of law values and the sovereign's ability to act swiftly, secretly, and decisively against an emergency threat.<sup>7</sup> This comment applies Gross' model<sup>8</sup> to the international legal context and posits that this model provides the most appropriate theoretical explanation as to why, in certain exceptional situations, states condone otherwise unlawful acts as being nonetheless legitimate. Gross' model consists of two steps, ordinarily applied in a domestic context. First, the sovereign may act unlawfully where doing so will promote the greatest good for the greatest number of people. Second, the citizens of that sovereign must decide, either directly or indirectly, how to respond to such actions.<sup>9</sup>

This comment argues that, in applying Gross' model to the international legal context, a state may legitimately commit and admit an unlawful act, and that it is up to other states—synonymous with the *people* in Gross' model—to approve or disapprove of it. The application of the model is weakened by slippery slope concerns, in that there is a risk of a sovereign's power going unchecked in states of emergency. Nevertheless, this comment contends that in order to preserve respect for the rule of international law, it is preferable to admit the unlawfulness of an emergency action while confining its justification to the unique circumstances that led to it, rather than attempt to stretch and alter existing legal principles to accommodate it.

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6. See David Dyzenhaus, *Intimations of Legality Amid the Clash of Arms*, 2 INT'L J. CONST. L. 244, 269 (2004).

7. See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, 112 YALE L.J. 1011, 1028–29 (2003).

8. For a discussion of the elements of Gross' model, please see *infra* Part II.

9. Gross, *supra* note 7, at 1023.

## II. THE SYRIA AIR STRIKES AS EXCEPTIONAL ACTS

### A. *Legality of the Strikes Under International Law*

At the time they occurred, most international legal scholars considered the strikes to be unlawful on two bases.<sup>10</sup> First, they were not a lawful humanitarian intervention. While there is an ongoing debate as to whether the doctrine of *jus ad bellum*<sup>11</sup> contains an exception for humanitarian interventions, the dominant view is that it does not.<sup>12</sup> A humanitarian intervention by military means is permissible only if the U.N. Security Council determines that the human rights violations constitute a threat to peace and calls for an enforcement action,<sup>13</sup> or if the intervention was carried out in individual or collective self-defense.<sup>14</sup> However, the Syrian operations were not carried out with Security Council authorization and were not conducted on the basis of self-defense. Second, the strikes were not a legitimate countermeasure, given that they involved the use of force.<sup>15</sup> In the event of breaches of obligations *erga omnes*,<sup>16</sup> every state may resort to countermeasures against the

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10. See, e.g., Lederman, *supra* note 4; Milanovic, *Clearly Illegal*, *supra* note 4; Harold Hongju Koh, *The Real "Red Line" Behind Trump's April 2018 Syria Strikes*, JUST SECURITY (Apr. 16, 2018), <https://www.justsecurity.org/54952/real-red-line-behind-trumps-april-2018-syria-strikes/>; Milanovic, *Syria Strikes*, *supra* note 4; Dunkelberg et al., *supra* note 5; Ryan Goodman, *What Do Top Legal Experts Say About the Syria Strikes?* JUST SECURITY (Apr. 7, 2017), <https://www.justsecurity.org/39712/top-legal-experts-syria-strikes/>; Ku, *supra* note 4.

11. *Jus ad bellum* refers to the conditions under which states may resort to war or to the use of armed force.

12. See, e.g., Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 1012 (2016); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 5 (1999); Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y.B. INT'L L. 141 (1999); Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT'L L. 107 (2006).

13. Simma, *supra* note 12, at 5.

14. Pursuant to Article 51 of the U.N. Charter, such self-defense is only permissible in the case of an armed attack. U.N. Charter art. 51.

15. G.A. Res. 2625 (XXV), art. 1 (Oct. 24, 1970).

16. An obligation *erga omnes* is an obligation that a state owes to the international community, such that a breach of that obligation authorizes all states to take action. See *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

responsible state.<sup>17</sup> However, countermeasures must not involve the threat or use of armed force.<sup>18</sup> Accordingly, and even assuming that the obligation not to use chemical weapons was of an *erga omnes* nature, the Syria strikes still would not constitute a lawful countermeasure because they involved a use of force.

### B. *Reactions of the International Community*

States broadly condoned the 2017 operation in Syria. In fact, ten states expressly endorsed it at the U.N. Security Council the day after it occurred, even though the operation did not receive previous authorization.<sup>19</sup> A different group of states neither supported nor criticized the U.S. operation, and only Iran, Syria and Russia expressly condemned the operation as unlawful.<sup>20</sup> As regards the 2018 strikes, only the United Kingdom expressly asserted that the strikes were lawful.<sup>21</sup> However, a large number of states<sup>22</sup> expressed explicit political support while another large group<sup>23</sup> neither supported nor condemned the strikes. A smaller group<sup>24</sup> expressly asserted that the strikes were unlawful.

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17. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. OF INT'L L. COMMISSION art. 22, ¶ 3, U.N. Doc. A/56/10.

18. *Id.* art. 50; G.A. Res. 2625 (XXV), *supra* note 5, art. 1.

19. These states were Australia, France, Germany, Italy, the Netherlands, New Zealand, Saudi Arabia, Turkey, the United Kingdom, and Ukraine.

20. See Madison Park, *Who's With the US on Syria Strike and Who Isn't*, CNN (Apr. 8, 2017), <https://www.cnn.com/2017/04/07/world/syria-us-strike-world-reaction/index.html>.

21. Dunkelberg et al., *supra* note 5.

22. This group includes France, the United States, Colombia, Germany, Norway, Georgia, the United Arab Emirates, Saint Lucia, Greece, Spain, Lithuania, Japan, Australia, Ireland, Turkey, Macedonia, Jordan, Belgium, Israel, Albania, Poland, South Korea, Canada, Italy, Bulgaria, Ukraine, Saudi Arabia, Denmark, New Zealand, Croatia, Oman, NATO, Finland, the Netherlands, the Czech Republic, and Qatar. *Id.*

23. This group includes Egypt, Chile, Panama, India, Iraq, Philippines, Ethiopia, Guatemala, Sweden, Thailand, Ivory Coast, Mexico, Indonesia, Vietnam, Namibia, Peru, Kuwait, the African Union, Argentina, Uruguay, Malaysia, Brazil, Austria, and Pakistan. *Id.*

24. This group includes Equatorial Guinea, Cuba, Iran, South Africa, Venezuela, Kazakhstan, Bolivia, Russia, Lebanon, Costa Rica, China, and Syria. *Id.*

The reactions of states expressing purely political support, without mention of legality, are particularly interesting. For example, on April 13, 2018 Canadian Prime Minister Justin Trudeau stated: “Canada supports the decision by the United States, the United Kingdom, and France to take action to degrade the Assad regime’s ability to launch chemical weapons attacks against its own people.”<sup>25</sup>

Similarly, the official statement from the German Chancellor expressed:

[S]upport [for] the fact that our US, UK and French allies took on responsibility in this way as permanent members of the UN Security Council. The military strike was necessary and appropriate in order to preserve the effectiveness of the international ban on the use of chemical weapons and to warn the Syrian regime against further violations.<sup>26</sup>

### C. *What the Reactions Were Not*

#### 1. *An Expansion of Customary International Law*

Few scholars consider the reactions of states to the strikes as evidence of *jus ad bellum* developing a formal exception to Article 2(4) for cases like the Syria strikes. Harold Koh suggests that there might be an exception to the prohibition against the use of force for such humanitarian interventions.<sup>27</sup> However, this suggestion does not accurately reflect the circumstances surrounding the Syria air strikes because the reac-

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25. Justin Trudeau, Prime Minister, Can., Statement on Airstrikes in Syria (Apr. 13, 2018), <https://pm.gc.ca/eng/news/2018/04/13/statement-prime-minister-airstrikes-syria>.

26. Angela Merkel, Chancellor, Ger., Statement on the Military Strikes by the United States, United Kingdom and France in Syria (Apr. 14, 2018), <https://twitter.com/RegSprecher/status/985124181141610496>.

27. Koh suggests that this carve out could, in short, take the form of the following test: (1) if a humanitarian crisis creates consequences significantly disruptive of international order that would likely soon create an imminent threat to the acting nations, and (2) a Security Council resolution were not available because of a persistent veto and the group of nations that persistently sought Security Council action had exhausted all other remedies, then (3) that same group of nations could use limited force for genuinely humanitarian purposes as necessary and proportionate. The force should address the imminent threat, demonstrably improve the humanitarian situation, and terminate as soon as the threat is abated. Koh, *supra* note 12, at 1011.

tions of states were mostly made on the basis of non-legal arguments. For a customary international law rule to exist, there must be widespread and consistent state practice performed *in the belief the practice is required by law (opinio juris)*.<sup>28</sup> In both 2017 and 2018, states grounded their support for the operations in the particular circumstances of the chemical weapons attacks preceding the strikes. The support condoned singular operations, without purporting to establish a standard of general applicability.<sup>29</sup> The fact that the vast majority of states supporting the operations did not reference Article 2(4) of the U.N. Charter lends credence to the position that the supporting states did not want to create an exception to Article 2(4). In these circumstances, it is difficult to claim that states supported the operations based on a belief that law required their support.

## 2. *A Purely Political Decision*

In a similar vein, the reactions of states to the air strikes were not of a purely political nature given in ignorance of the law. These were not situations in which states merely looked the other way.<sup>30</sup> Rather, in both instances, the Security Council met to discuss the operations, accepting that the strikes involved issues of international law. In so doing, states publicly defended their views at the very institution legally charged with assessing the legal validity of the operations.<sup>31</sup>

### III. SIGNIFICANCE OF THE STRIKES FOR THE GROSS' MODEL

#### A. *Humanitarian Crises as an Exception*

As a preliminary matter, the use of chemical weapons by the Assad regime must constitute an *exception* or *emergency* before Gross' model can apply to the Syria strikes. Gross supports a wide concept of "emergency," referring to it as a "crisis" that is inherently linked to, and that operates as an excep-

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28. Statute of the International Court of Justice art. 38(1)(b); North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 44 (Feb. 20).

29. Monica Hakimi, *The Attack on Syria and the Contemporary Jus ad Bellum*, EJIL: TALK! (Apr. 15, 2018), <https://www.ejiltalk.org/the-attack-on-syria-and-the-contemporary-jus-ad-bellum/>.

30. *Id.*

31. *Id.*

tion to, the concept of “normalcy.”<sup>32</sup> Thus, it is possible that the use of chemical weapons by a state against its people might constitute an emergency or exceptional situation.

### B. *An Overview of The Extra-Legal Measures Model*

Gross’ Extra-Legal Measures Model assumes that admitting the unlawfulness of certain sovereign actions is the best way to preserve respect for the rule of law. The model consists of two parts. First, the sovereign may take an unlawful action where it promotes the greatest good for the greatest number of people. Encompassed in this factor is the sovereign’s admission that its behavior is unlawful.<sup>33</sup> This step is the “obvious question.” Second, the sovereign’s citizens must decide how to respond to such actions, either directly—for example, through the passing of legislation designed to immunize public officials from liability, or indirectly—for example, through the re-election of public officials.<sup>34</sup> This is called the “tragic question,” which considers whether any alternative open to the sovereign is free from serious moral wrongdoing.<sup>35</sup> Therefore, the people may conclude in particular instances that acting in a certain way is the right thing to do to promote the greatest good for the greatest number of people, but in other situations may decline to approve such action from legal, political, social, or moral standpoints.<sup>36</sup>

### C. *Suitability of the Model in Explaining States’ Reactions*

#### 1. *The Tragic Question*

Perhaps the most convincing way in which the Extra-Legal Measures Model explains states’ reactions to the Syria strikes is in its inclusion of *the tragic question*. The benefit of including this question is that it adds an element of uncertainty to the decision-making process of public officials, thus raising the costs of pursuing an unlawful course of action and thereby providing a check on power in the state of emergency.<sup>37</sup> In the

32. Gross, *supra* note 7, at 1070.

33. *Id.* at 1100.

34. *Id.*

35. See, e.g., Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1005 (2000).

36. Gross, *supra* note 7, at 1023.

37. *Id.* at 1101.



case of the Syria strikes, the United States, the United Kingdom, and France could reasonably have expected that the Security Council would meet to discuss their actions, and that states would be forced to comment on the legality of the operations. Therefore, it is this expectation of scrutiny from the international community that appropriately raised the cost of pursuing an unlawful course of action.

This comment posits that, in applying the Extra-Legal Measures Model to the international legal context, the governments of other sovereign states can reasonably take the position of the people deciding the tragic question. As Gross envisions the *people* retroactively deciding on the legitimacy of the sovereign's unlawful acts, likewise the international community is expected to retroactively comment on the legality or legitimacy of another state's actions. Assuming the states acquiesce, both aspects of Gross' model are satisfied. The obvious question is satisfied in that, when faced with the emergency of the chemical weapons attacks, the United States, the United Kingdom, and France chose to act in a way that they considered would promote the greatest good for the greatest number of people. However, and crucially, it is in the tragic question that the model best explains states' reactions. A significant number of the reacting states were not trying to make a pronouncement as to the legality of the strikes. Rather, they were attempting to communicate that, while those strikes were technically unlawful, in light of the use of chemical weapons, they were also a legitimate response. It was not a case of ignoring Article 2(4) but, instead, arguing that the legal prohibition against the use of chemical weapons is so sacrosanct that it can, in certain circumstances, justify an unlawful forcible response on purely normative grounds.<sup>38</sup>

## 2. *Increased Respect for the Rule of Law*

Fundamentally, Gross' model provides a compelling explanation for the reactions of states to the strikes in that it promotes respect for the rule of law, while also allowing for highly circumscribed, but effective, escape mechanisms.<sup>39</sup> As expressed by Bruno Simma, the rationale for this approach is that one should not change existing legal rules simply to fol-

38. Hakimi, *supra* note 29.

39. Gross, *supra* note 7, at 1097.

low momentary humanitarian impulses, and should not set new legal standards only to do the right thing in a single case.<sup>40</sup> Doing so may only lead to a battering of the existing legal system and increase the potential for states to abuse such expanded emergency legal powers. In this regard, it is relevant that for the operations in Syria, the acting states apparently respected the importance of *jus ad bellum* principles despite acting contrary to them. In fact, the United States, the United Kingdom, and France expended considerable energy in the Security Council building a case for the legitimacy of their actions in Syria.<sup>41</sup> It appears that the Syria strikes did not expose the fragility of *jus ad bellum*. Rather, they demonstrated that there are some situations so exceptional, such as the use of chemical weapons, that to attempt to regulate them using the doctrine of *jus ad bellum* would only obfuscate its reach in emergency situations.<sup>42</sup>

#### D. *Slippery Slope Concerns*

Opposition to the Extra-Legal Measures Model is rooted in fear of totalitarianism. While the inclusion of the tragic question raises the cost of pursuing an unlawful course of action, the fact that the process of public ratification occurs retroactively gives rise to a concern that the model does not impose any meaningful legal restraints on public officials.<sup>43</sup> If the model permits stepping outside of the legal system in times of emergency, then one must question how to limit such deviation.<sup>44</sup> However, in applying this model to the international legal context, it is important to recall that *jus ad bellum* has never completely worked as it was intended to, and states already resort to unlawful acts when deemed necessary. Thus, perhaps the more realistic challenge is finding a workable solution in an imperfect world taking into account actual state behavior.<sup>45</sup> The Extra-Legal Measures Model responds to this critique by imposing responsibility on the public to morally assess the government's actions. In so doing, it requires the sov-

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40. Simma, *supra* note 12, at 14.

41. Hakimi, *supra* note 29.

42. Dyzenhaus, *supra* note 6, at 269.

43. Gross, *supra* note 7, at 1122.

44. *Id.* at 1123.

45. Hakimi, *supra* note 29.

ereign to give reasons for its unlawful actions, which not only reduces the likelihood of a government rush to use emergency powers, but also facilitates accountability of government actors.<sup>46</sup> Thus, separating “exceptional” measures from the ordinary legal system may in fact do more to maintain the integrity of that same legal system.<sup>47</sup>

#### IV. CONCLUSION

In times of true emergency, involving terrible dilemmas of political and moral significance, the sovereign will often have no choice but to act outside the law.<sup>48</sup> This comment contends that this lack of choice is an unavoidable reality of the international legal system. The 2017 and 2018 Syrian air strikes in response to the Assad regime’s use of chemical weapons against its own people is a timely example of such a crisis. However, acknowledging the specific circumstances that justified a particular action in a particular case can reduce the danger posed by allowing such occurrences.<sup>49</sup> This is what the majority of states apparently did in their reactions to the strikes. Rather than only admit their unlawfulness, a large number of states supported the measures as being understandable or in some way normatively justified.

To this end, this comment asserts that Oren Gross’ Extra-Legal Measures Model is best placed to explain the phenomenon whereby states that are ordinarily respectful of longstanding principles of international law, feel comfortable departing from them in circumscribed times of crisis. It rests on the conclusion that Gross’ model not only allows for necessary flexibility in the way that the sovereign responds to a crisis, but also ensures that its actions in times of emergency are still subject to normative approval by the people. This not only provides a natural check and balance on the sovereign’s power in the state of exception, but also strengthens respect for the rule of law in that it avoids the bending and bruising of existing legal principles to accommodate hard cases.

However, there are drawbacks in applying Gross’ model. In particular, there is the risk of a sovereign’s power going un-

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46. Gross, *supra* note 7, at 1123.

47. *Id.* at 1132.

48. Simma, *supra* note 12, at 1.

49. *Id.*

checked when subject only to ex-post ratification rather than contemporaneous legal constraints. Ultimately, however, one must accept the unfortunate reality that difficult cases will occur in which states will act outside the law, and other states will legitimize their conduct. Therefore, this comment rests on the assertion that, in the absence of a perfect system to explain this reality, it is better to admit that an action is unlawful in the state of exception and subject it to ex-post normative assessment, rather than expect the existing legal order to accommodate such exigencies or to allow the sovereign's power in an emergency to remain wholly unchecked.