

2012

Humanitarian Intervention and Syria

Eric Engle

Follow this and additional works at: <https://lawpublications.barry.edu/barryrev>

 Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Eric Engle (2012) "Humanitarian Intervention and Syria," *Barry Law Review*: Vol. 18 : Iss. 1 , Article 5.
Available at: <https://lawpublications.barry.edu/barryrev/vol18/iss1/5>

This Article is brought to you for free and open access by Digital Commons @ Barry Law. It has been accepted for inclusion in Barry Law Review by an authorized editor of Digital Commons @ Barry Law.

HUMANITARIAN INTERVENTION AND SYRIA

*Dr. Jur. Eric Engle, LL.M **

“Nations, being obliged by nature reciprocally to cultivate human society (Prelim. § 11), are bound to observe towards each other all the duties which the safety and advantage of that society require.”

—Emmerich de Vattel¹

INTRODUCTION

Syria is currently undergoing deep civil turmoil; indeed, some would say a revolution. This crisis, a real turning point² in Syria and world affairs, may well turn into a defining moment for relations between Russia and the United States. The Syrian government is, at the very least, a de facto ally³ of the Russian Federation (R.F.).⁴ However, the United States regards Syria’s head of state, Bashar al-Assad, as a violator of fundamental human rights and wishes to see him removed from power.⁵ Syria reiterates, twenty-five years later, much of the Cold War logic.⁶

* Dr. Engle teaches law at Humboldt University, Berlin. He has taught law in France, Germany, Estonia, and Russia. He has studied law in the U.S. (JD), France (DEA, DEA) and Germany (L.L.M., Dr. Jur.). Я—часть той силы, что вечно хочет зла и вечно совершает благо—Bulgakov (“I am part of that power which ever wills to do ill and ever works to do well”—Bulgakov, *Master and Margarita* (author’s translation)). I wish to thank my editors at the *Barry Law Review* for their pains-taking work.

1. THE LAW OF NATIONS: BOOK II, § 1 para. 4 (1883).

2. See *Crisis*, ONLINE ETYMOLOGY DICTIONARY, available at <http://www.etymonline.com/index.php?term=crisis> (last visited Jan. 13, 2013) The ancient Greek word crisis (κρίσις) means “turning point” and was used by Hippocrates to refer to disease—either the patient dies or gets well.

3. GEORGE GINSBURGS & ROBERT SLUSSER, A CALENDAR OF SOVIET TREATIES 1958–1973 at 674 (1981) (noting the agreement on Soviet use of naval facilities in exchange for delivery of advanced air defense missiles and jet fighter planes).

4. The Russian led Eurasian Economic Community (EurAsEC) had been considering entering into a free trade agreement with Syria. Таможенный союз и Сирия могут подписать договор о создании зоны свободной торговли [*Customs Union and Syria Can Sign an Agreement on Free Trade Zone*], 10 TELEVISION RUSSIA (May 28, 2012), <http://www.tv100.ru/news/tamojenny-soyuz-i-siriya-mogut-podpisat-dogovor-o-sozdanii-zony-svobodnyy-torgovli-56782/>. However, that is probably no longer the case. Although Russia had been regularly selling arms to Syria that is no longer the case. *La Russie vend 36 Yak-130 à la Syrie* [*Russia Sells 36 Yak-130 to Syria*], INFO-AVIATION (Jan. 27, 2012), <http://info-aviation.com/?p=12954> 27 janvier 2012; *La Russie Ne Conclura Pas De Nouveaux Contrats De Vente D’armes Avec La Syrie* [*Russia Will Not Enter into New Contracts for Arms Sales to Syria*], AMNESTY INTERNATIONAL (July 9, 2012), <http://www.amnesty.ch/fr/pays/moyen-orient-afrique-du-nord/syrie/docs/2012/russie-stop-armes-syrie>; *Russland stellt Lieferung von Kampfflugzeugen an Assad ein* [*Russia Represents a Supply of Fighter Aircraft to Assad*], SUEDEDEUTSCHE ZEITUNG (July 9, 2012), <http://www.sueddeutsche.de/politik/gewalt-in-syrien-russland-stellt-lieferung-von-kampfflugzeugen-an-assad-ein-1.1406550>.

Putin states his strategy is to try to force both sides to the negotiating table. *Russland liefert Syrien keine Waffen mehr* [*Russia Supplies Syria Any Weapons*], 20 MINUTEN ONLINE (July 9, 2012, 2:38 PM), <http://www.20min.ch/ausland/news/story/26129790>.

5. See, e.g., Hillary Rodham Clinton, *Remarks at the Friends of the Syrian People Ministerial Meeting*, DEPT. OF STATE (July 6, 2012), available at <http://www.state.gov/secretary/rm/2012/07/194628.htm> (“We are

Syria's case presents a possibility for further elaboration of the international rule of law. Instead, for political reasons, it is more likely that it will represent a downward spiral into violent lawlessness, a failure of the post cold-war international system.⁷ Syria may even be the unfortunate harbinger of a "cold peace". It does not need to be so.

This article first examines the political situation regarding Syria so that the legal commentary that follows will be understood in context of its practical real-world connection. Part I will examine the actors, their interests, and possible outcomes.⁸ Part II will explore the relevant international law.⁹

I. INTERNATIONAL RELATIONS

A. The Strategic Stakes

1. Russia

"[T]he West, in painting [the Free Syrian Army] as freedom fighters, doesn't understand that these guys, are blood-sucking vampires and if they come to power there will be hell to pay, and for the Americans, too."

—Maxim Yusin¹⁰

During the Cold War, the USSR was a global power, claiming the capacity to lead a global struggle of the impoverished "East" (the second world) and "South" (the third world) against the industrialized, imperialist, and developed "North" (the first world). The USSR presented an alternative model to liberalism: a socialist people's dictatorship, led by an intellectual vanguard party implementing a planned economy claiming to act on behalf of ordinary workers to protect them from exploitation by capitalists. The defeat of the USSR in the Cold War resulted from the successful U.S. policy of seeking to bankrupt the USSR by way of an arms race, which turned U.S. technological superiority to a strategic advantage, punctuated by bullet-points, such as the funding of anti-Soviet insurgencies in Afghanistan, Nicaragua¹¹ and probably Eritrea (inter alia). The Strategic Defense

united in support of the Syrian people and in our absolute resolve to see the end of the Assad regime and a transition to a democratically-elected, representative government.").

6. *Russia's Cold-War Strategy for Syria*, LE FIGARO (Feb. 5, 2012), available at <http://www.eurotopics.net/en/home/presseschau/archiv/article/ARTICLE100165-Russia-s-Cold-War-strategy-for-Syria>; see also Peter McKay, *Syria's Dead are Victims of the New Cold War*, MAILONLINE (June 10, 2012), available at <http://www.dailymail.co.uk/debate/article-2157318/Syrias-dead-victims-new-Cold-War.html>.

7. "The reported mass killings are likely to ignite more anger nearly two weeks after the massacre of more than 100 people elsewhere in Syria as an international peace plan unravels and the country spirals toward civil war." Associated Press, *Syrian Activists Say Dozens Killed in Hama Province*, CBCNEWS (June 6, 2012 6:36 PM), <http://www.cbc.ca/news/world/story/2012/06/06/syria-hama-violence.html>.

8. See *infra* Part I.

9. See *infra* Part II.

10. Julia Ioffe, *In Russia, Even Putin's Critics Are OK with His Syria Policy*, THE NEW REPUBLIC (July 23, 2012, 7:20 PM), <http://www.tnr.com/blog/plank/105281/in-russia-even-putins-critics-are-ok-his-syria-policy>. Maxim Yemin is the Deputy Editor of the foreign affairs section of the daily newspaper Kommersant. *Id.*

11. WOLFF HEINTSCHEL VON HEINEGG, CASEBOOK VÖLKERRECHT § 399, at 179 (Beck, 2005).

Initiative (SDI or “Star Wars”) sought to create a missile shield against the USSR.¹² The SDI certainly violated the spirit of the since abrogated Anti-Ballistic Missile (ABM) Treaty and probably the letter of the treaty as well.¹³ The SDI—much like the secret wars—was a “black” project. It is impossible to say for certain whether, and to what extent, it in fact violated the ABM Treaty at least until documents become de-classified.

The stick of Reagan’s arms race was matched with a carrot: a promise of economic restructuring and development of the USSR should they bring down the Berlin Wall.¹⁴ However, despite implied promises, there was no “Marshall Plan”¹⁵ or “bank for reconstruction and development” of the post-Soviet space.¹⁶ Rather than restructure and rebuild the post-Soviet economy, the U.S. instead sought to dismember the USSR into its constituent republics to permanently remove the threat of nuclear war and global revolution the USSR presented. The U.S. at least tolerated criminal tendencies of certain Russian classes¹⁷ because much legitimate economic activity was defined as economic crime by Soviet standards.¹⁸ All Russian economic actors in the early 1990s were “criminals,” at least according to Soviet law and the *nomenklatura*. If the United States succeeded at permanently removing the threat of a Soviet strategic nuclear strike and global third-world revolutions by way of disaggregation of the post-Soviet Republics, whether through ethnic nationalism, privatization, asset-stripping, or criminality (fractionating and diffusing), the U.S. did not succeed at instilling the rule of law, human rights, and democracy—not even in the core Slav republics (Russia, Belarus, and the Ukraine). This is to say nothing of the even poorer post-Soviet peripheral republics such as Georgia. The U.S. defeated its enemy, but has yet to build an ally therefrom. It can and should but lacks vision and expertise thereto due to linguistic and cultural isolation.

Against this background, the conflict in Syria is a reiteration of dysfunctional Cold War interactions, which are suboptimal for the U.S. and the Russian Federation—to say nothing of the Syrian people and their terrible fate, which is currently in the balance.

12. CATHAL J. NOLAN, *THE GREENWOOD ENCYCLOPEDIA OF INTERNATIONAL RELATIONS: S-Z* 1600 (2002).

13. See generally Donald G. Gross, *Negotiated Treaty Amendment: The Solution to the SDI-ABM Treaty Conflict*, 28 HARV. INT’L L.J. 31 (1987).

14. Peter Robinson, “*Tear Down This Wall*”: *How Top Advisers Opposed Reagan’s Challenge to Gorbachev—But Lost*, 39 PROLOGUE MAG., no. 2, Summer 2007, at 2, available at <http://www.archives.gov/publications/prologue/2007/summer/berlin.html>. Ronald Reagan famously said at the Brandenburger Tor, Berlin: “General Secretary Gorbachev, if you seek peace, if you seek prosperity for the Soviet Union and Eastern Europe, if you seek liberalization, come here to this gate. Mr. Gorbachev, open this gate! Mr. Gorbachev, tear down this wall!” *Id.*

15. *No Marshall Plan for the Soviets Yet*, CHI. TRIB. (May 26, 1991), available at http://articles.chicagotribune.com/1991-05-26/news/9102160972_1_shatalin-soviet-economy-soviets-hope.

16. See Craig R. Whitney, *Gorbachev’s Pleas for Aid Not Expected to Bear Fruit*, N.Y. TIMES (May 24, 1991), available at <http://www.nytimes.com/1991/05/24/world/gorbachev-s-pleas-for-aid-not-expected-to-bear-fruit.html>.

17. See TRANSNATIONAL TERRORISM IN THE WORLD SYSTEM PERSPECTIVE 85 (Ryszard Stemplowski ed. 2002); Alfred McCoy, *THE POLITICS OF HEROIN: CIA COMPLICITY IN THE GLOBAL DRUG TRADE* 385 (2003).

18. See generally WILLIAM A. CLARK, *CRIME AND PUNISHMENT IN THE SOVIET OFFICIALDOM: COMBATING CORRUPTION IN THE POLITICAL ELITE, 1965–1990* (1993).

Russia's strategic interests in Syria, broadly speaking, are as follows:

- 1) Syria, i.e., Assad's government, has been a Russian ally since at least the 1960s.
- 2) Russia's only overseas naval base is at the port of Tartus in Syria.
- 3) Syria is a Russian market for arms exports.
- 4) Russia exports nuclear technology to Iran, a profitable enterprise. However, Russia keeps tight control over the technical experts needed to actually use such technology. That is, when Russia withdraws Russian technical experts from Iran, Iran cannot then use or further its nuclear program. This Russian policy of inculcating technical dependence is deliberate.¹⁹ Russia seeks to control Iran thereby, to guarantee the security of Russia from potential nuclear terrorism, and as a method for obtaining further construction and sales contracts.
- 5) Regarding the suppression of extremist Islamic terrorism, Russia has a substantial Muslim minority. Some of them are violent extremists, who are willing to undertake "martyrdom operations" in Russia (suicide bombings). Iran is known as a sponsor of state terrorism. If Iran is playing with nuclear fire Russia is also playing with fire. Whether Russia truly can or believes it can moderate Iranian anti-semitic extremism and state-sponsored terrorism is questionable.
- 6) The Russian Federation specifically condemns abuses of human rights in Syria by any actor and especially the use of civilians as human shields.²⁰
- 7) The Russian Federation, in my eyes unrealistically, seeks to reclaim its role as a global power. Lacking an ideology to do so, and with a much diminished population base due to the independence of its former Central Asian Republics, Russia does not have the population base or productivity to rival countries like the People's Republic of China or the United States or the E.U. Russia can justifiably claim a proper role in Central Asia, but its limited cold war era global alliance network has two decades later been essentially disrupted.

Russia's desire to maintain a base in Syria is pragmatic rather than ideological. The Montreux Convention strictly governs the transit of military vessels through the Bosphorous Straits—a waterway located entirely within Turkey's territory.²¹ Russia cannot rapidly deploy ships from its Black Sea fleet to the Mediterranean because of that treaty. Moreover, Russia and Turkey have not historically been

19. Clément Therme, *L'Entente stratégique russo-iranienne: une menace pour la sécurité?* [*The Russian-Iranian Strategic Agreement: A Threat to Security?*], IFRI.ORG, at 1, 8–9 (May 2006), available at http://www.ifri.org/files/P_MOM_2.pdf.

20. Press Release, Situation with Evacuation of the Inhabitants of the Blockaded Quarters of the Syrian City of Homs, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (July 4, 2012), available at http://www.mid.ru/bdcomp/Brp_4.nsf/arh/E243A5221AAF87EA44257A36002D0643?OpenDocument.

21. Montreux Convention, July 20, 1936, 173 L.N.T.S. 213. The official text of the treaty is French. An unauthoritative English translation is available at http://sam.baskent.edu.tr/belge/Montreux_ENG.pdf.

allies—just the opposite.²² This author posits that the Russian government is unwilling to withdraw from their Tartus base in Syria under any circumstances; I expect that is a non-negotiable point to the Russian leadership. Thereto, it should be mentioned, that Russia does have technicians and personnel stationed at the Tartus base and elsewhere in Syria.²³ While the base itself is small, it is also necessary, at least in the eyes of the Russian military. In theory, the base could be expanded.

Discussions regarding the Middle East naturally revolve around energy policy and politics. Regarding energy, Russia is a powerhouse—roughly eighty percent of all known deposits of natural gas on earth are found on Russian territory.²⁴ To complicate matters, much of that is found in regions with significant minority Muslim populations (local majorities, but nationally minorities, for the next two decades given population trends).²⁵ Consequent to the separatist war in Chechnya, led by Muslim separatists and fought over oil,²⁶ Russia and the U.S. have had a common interest in the suppression of terrorism, specifically Jihadist terrorism.²⁷ Russia is a major producer of oil and petroleum products, and an exporter of nuclear power plant technology.²⁸ Russia is resource rich, although the Russian people are generally somewhat impoverished.²⁹ Like the other BRIC (Brazil, Russia, India and China) countries, Russia is a powerful economy on the threshold of becoming part of the first world. In fact, Moscow, a city of 20 million, is first world—but Russia’s rural hinterland is essentially a subsistence economy and even a barter economy in some places. This poverty in its own periphery makes the Russian struggle against terrorism all the more bitter. As Marx said, the people with “nothing to lose but their chains” can dare anything—including suicide bombings, from which Russia has also suffered.³⁰

22. Dmitri Trenin, *Russia and Turkey: Enemies in the Past, Conscious Partners in the Future*, EUINSIDE (Aug. 27, 2012), <http://www.euinside.eu/en/analyses/russia-and-turkey-enemies-in-the-past-partners-in-the-future>.

23. Frank Gardner, *How Vital is Syria's Tartus Port to Russia?*, BBC NEWS (June 27, 2012, 1:23 PM), <http://www.bbc.co.uk/news/world-middle-east-18616191>.

24. *Russia: Country Analysis Brief*, U.S. ENERGY INFORMATION ADMINISTRATION (EIA), <http://www.eia.gov/countries/country-data.cfm?fips=RS> (last updated Sept. 18, 2012) (“Russia holds the world’s largest natural gas reserves, the second largest coal reserves, and the eighth largest crude oil reserves. Russia was the largest producer of crude oil in 2009, surpassing Saudi Arabia. Russia has the largest natural gas reserves in the world and it is the second-largest producer of natural gas. Russia is one of the top producers and consumers of electric power in the world, with more than 220 million kilowatts of installed generation capacity.”).

25. See, e.g., Dipak Basu, *The Conflict of Chechnya: The Cause*, IVARTA.COM (Sept. 13, 2004), http://www.ivarta.com/columns/ol_040913.htm.

26. E.g., Craig Pirrong, *Russia's Chechen War: It All Comes Down to Energy Rents*, SEEKING ALPHA (Apr. 4, 2010), available at <http://seekingalpha.com/article/196964-russia-s-chechen-war-it-all-comes-down-to-energy-rents>.

27. E.g., Simon Shuster, *How the War on Terrorism Did Russia a Favor*, TIME (Sept. 19, 2011), available at <http://www.time.com/time/world/article/0,8599,2093529,00.html>.

28. See UAE, *Russia Sign Nuclear Deal*, FOX BUSINESS (Dec. 17, 2012), <http://www.foxbusiness.com/news/2012/12/17/uae-russia-sign-nuclear-deal/>; see *Russia: Country Analysis Brief*, supra note 24.

29. See generally Lincolin C. Chen, Friederike Wittgenstein, & Elizabeth McKeon, *The Upsurge of Mortality of in Russia: Causes and Policy Implications*, 22 POPULATION & DEV. REV., Sept. 1996, available at <http://www.jstor.org/discover/10.2307/2137719?uid=3739600&uid=2&uid=4&uid=3739256&sid=2110155163710>.

30. KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* (Samuel Moore trans., Penguin Books 1967) (1848).

Trade and investment between Russia and the U.S. is virtually non-existent.³¹ In contrast, Russia trades intensively with the European Union (EU).³² Russia is relatively autarchic, but not absolutely. Happily, Russia has finally been admitted to the World Trade Organization (WTO).³³ The free movement of goods, capital, workers, and services fosters peace by building mutual dependence and prosperity. Russian accession to the WTO represents hope for a better future.

The 1990s were a decade of poverty and lawless criminality in Russia. Obviously the Russian Federation wishes to grow into the first world and even to reclaim its status as a leading light of the third world. Russian ambition to be a global power, although currently unrealistic, is also understandable, given Russia's history. By cooperating with China, it could indeed return to global power. Moreover, if Russia and/or China can actualize a workable plan for the peaceful and sustainable development of the impoverished third world then we should thank them heartily for making our world a more peaceful and prosperous place. Currently, however, neither Russia nor China has elaborated an ideology to legitimize any claim they may wish to make as leaders of the global south. Nor have they crafted a model for stable and sustainable third world economic development. So, we are not facing neo-communism or anything like it. Indeed, the Russian inability to extend the rule of law and human rights to its allies reflects a certain rigidity and weakness of the concept of vertical powers and authoritarian democracy as methods for the implementation or even formation of an ideology to represent the claims of the global south.

Caesar Chavez or the Castro brothers possibly could, but have not, developed an ideology of third world resistance to global capitalism. In that sense, the global ideology of liberalism—market capitalism with individual rights³⁴—will likely continue to prevail globally, but only by default because liberalism has not fashioned a workable universal model for sustainable development and peace in the third world periphery.³⁵ However, presently there is no alternative ideology to market liberalism presented by, or available to, the global south. Argentinean President Cristina Kirchner's Peronism³⁶ is the only real alternative option to

31. In 2011 U.S. exports to Russia were under ten billion dollars (8,286.1) and imports were just over 34 billion (34,619.0). *Trade in Goods with Russia*, U.S. CENSUS BUREAU (2011), <http://www.census.gov/foreign-trade/balance/c4621.html>.

32. In 2010 the EU exported €86.1 billion to Russia and imported €158.6 billion from Russia. *Russia Trade Picture*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/russia/> (last updated Feb. 8, 2013).

33. ERIC ENGLE, RUSSIA, THE EUROPEAN UNION AND THE CIS 39–49 (2012).

34. Anne-Marie Slaughter-Burley, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 514 (1995) (imagining a world of peace democracy and human rights; hypothesizing a world of liberal states).

35. Duncan Kennedy, *African Poverty*, 87 WASH. L. REV. 205, 233 (2012), available at <http://duncankennedy.net/documents/New/African%20Poverty.pdf>; see also Duncan Kennedy, *The Political Aspect of Development Theory*, VIMEO, available at <http://vimeo.com/21727630> (last visited Oct. 21, 2012).

36. *La Presidenta pidió 'unidad, organización y solidaridad' a todos los argentinos* [*The President Called for 'Unity, Organization and solidarity' to all the Argentines*], CASA ROSADA (July 9, 2012), <http://www.caserosada.gov.ar/informacion/actividad-oficial/25972-cristina-fernandez-pidio-unidad-organizacion-y-solidaridad-a-todos-los-argentinos>.

liberal individualist free market capitalism.³⁷ Even this option is of little effect. Peronism is adapted to the pre-globalization world of autarchic national economies and is thereby involuted: no matter how much justice it may seek regarding the cancellation of usurious International Monetary Fund (IMF) debts³⁸ and labor organization,³⁹ an involuted return to a pre-war world of isolated national economies and protectionism cannot meet the challenges or seize the opportunities of globalization. One may compare the economic performance of free-trading Chile with protectionist Argentina to see which policy mix is better: advantage—Chile.

Although the Russian Federation—to present—has not brought a better, or even any, alternative Resolution to the U.N. Security Council, the Russian Federation has obstructed Western efforts to solve the problem of Syria at the U.N. by consistently vetoing Western efforts to invoke the Security Council in the struggle to remove Assad from power.⁴⁰ I do not expect Russian intransigence to change, nor do I expect the Russian Federation to propose any coherent alternative Resolution. Syria represents an inexcusable bankruptcy of Russian foreign policy. Russia deserves better, Russia's ally Syria certainly deserves better and indeed the world deserves better than an intransigent blind Russian foreign policy. All Russia sees is the threat of Islamism: it does not provide or see the possibility of hope for a better future to the Syrian people—e.g., the protection of human rights under the rule of law leading to economic prosperity resulting in a flourishing of culture and, finally, democracy among Russia's allies and friends. Those who love Russia and her people have every right to be disappointed by the failure of the Russian foreign ministry to see a way out of the problem.

2. Strategic Goals and Constraints of the U.S. and NATO

For simplicity's sake I equate the interests of the U.S. and the North Atlantic Treaty Organization (NATO). Although that is a simplification, the various NATO countries' interests in Syria are at least roughly aligned.

First, and most obviously, the U.S. and its NATO allies are dependent on imported petroleum products.⁴¹ Petroleum products are available in abundance in countries with which the U.S. does not have the best relations, or even any relations at all. Energy dependence is such a constraint on U.S. national security that the

37. *Cristina Kirchner: Argentina's New Eva Peron*, THE TELEGRAPH (Feb. 8, 2012, 8:31 AM), <http://www.telegraph.co.uk/news/worldnews/southamerica/argentina/8845537/Cristina-Kirchner-Argentinas-new-Eva-Peron.html>.

38. *Economía [Economy]*, CASA ROSADA (2012), <http://www.presidencia.gob.ar/component/content/article/102-obra-de-gobierno/1162-obra-de-gobierno-gestion-publica>.

39. *Trabajo y Seguridad Social [Labor and Social Security]*, CASA ROSADA (2012), <http://www.presidencia.gob.ar/component/content/article/102-obra-de-gobierno/1251-trabajo-y-seguridad-social->.

40. See Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES (June 19, 2012), http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html?_r=0.

41. *How Dependent Are We on Foreign Oil?*, ENERGY INFORMATION AGENCY, available at http://www.eia.gov/energy_in_brief/foreign_oil_dependence.cfm (last updated July 13, 2012) ("The United States relied on net imports (imports minus exports) for about 45% of the petroleum (crude oil and petroleum products) that we consumed in 2011.")

U.S. is literally running its Navy using recycled vegetable oil.⁴² The U.S. also has a strong interest in the struggle against terrorism. Russia shares that interest,⁴³ though I would prefer to see the world united by Hope rather than fear.

Ideologically, the U.S. attempts to export the ideas of human rights and even the rule of law but has not been particularly successful in either endeavor because of a lack of cultural and linguistic expertise, a lack of a model of effective multilateral cooperation under international law, and a lack of a working theory for sustainable development of the third world.⁴⁴ The U.S. has not effectively nor successfully deployed or extended human rights and the rule of law as policies. Due to historical, linguistic, and cultural ignorance U.S. ideology tends to a simplistic black-and-white all-or-nothing individualistic view that which is then implemented incoherently due to the limitations of those perspectives. For example, the person Assad, an individual, is not the sole source of all that ails Syria. Removing him from power would not instantly and perfectly solve the problems facing Syria. Financing his opponents might indeed, as the Russians warn, result in “blowback.” Yet, although U.S. foreign policy adventurism in Hungary (1956), Cuba (Bay of Pigs), Vietnam (1975), Lebanon (1982), and most recently in Iraq and Afghanistan has consistently failed to attain good results for the U.S., the U.S. never really questions its simplistic good-versus-evil individualist free market ideology or the ways that ideology tries to implement foreign policy: it only stares incomprehensibly at the smoking ruins without asking the hard questions. Thus, in 2013 impoverished tribal, religious maniacs have bankrupted the world’s most powerful country. States unfriendly to the U.S. would be the last to point any of this out. U.S. efforts to propagate the rule of law and human rights largely fail.⁴⁵ This is partly because the type of people most likely to be effective human rights advocates are least likely to have a very favorable opinion of the U.S. government and vice-versa. Diplomats and military

42. Noah Shachtman, *Navy’s Big Biofuel Bet: 450,000 Gallons at 4 Times the Price of Oil*, WIRED (Dec. 5, 2011, 8:51 PM), available at <http://www.wired.com/dangerroom/2011/12/navy-biofuels/>.

43. Andrei Nesterenko, *Statement by Russian MFA Spokesman Andrei Nesterenko Regarding the Large-scale Terrorist Acts in Baghdad*, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (Oct. 26, 2009), http://www.mid.ru/bdomp/Brp_4.nsf/arh/A642CE28FBB285A3C325765B005A9BDC?OpenDocument. More recently, in the Syrian context, see also Комментарий официального представителя МИД России А.К.Лукашевича в связи с террористическим актом против военно-политического руководства Сирии [*Comment by Russian MFA Spokesman A.K. Lukashevicha in Connection with the Terrorist Attack Against the Military-political Leadership of Syria*], MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (July 18, 2012), available at http://www.mid.ru/bdomp/Brp_4.nsf/arh/F7D0E91169A8A0BA44257A3F004F5BC9?OpenDocument.

44. See PAUL CAMMACK, *CAPITALISM AND DEMOCRACY IN THE THIRD WORLD: THE DOCTRINE FOR POLITICAL DEVELOPMENT* (1998). If I have understood him correctly, the Marxist Professor Paul Cammack argues that the western development models are not coherent in application but are directed toward the suppression of alternative models of development. I try not to ascribe collective motives to capitalists, not due to fear of class analysis but because much of the logic of the capitalist class is compelled not by agreement or cooperation among capitalists but results from their shared beliefs and goals.

45. Christina M. Cerna recognizes that an effective rule of law is needed to secure human rights. Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West*, 27 N.Y.U. J. INT’L L. & POL. 289, 295 (1994–1995) (citing Karel Vasak, *La réalité juridique des droits de l’homme* [*The Legal Reality of Human Rights*], in 4 LES DIMENSIONS INTERNATIONALES DES DROITS DE L’HOMME (U.N. Educational, Scientific & Cultural Organization 1978)).

professionals tend to view human rights and the rule of law with a certain skepticism, even cynicism. Moreover, U.S. expertise in foreign cultures, histories, and especially languages is deficient. Even when the U.S. finds a dedicated expert linguist, such as Ambassador McFaul, that often comes with an entire baggage of capitalist ideology and insensitivity, which results in treating potential partners as problems. I am hardly diplomatic, but then again, I also do not clothe myself as such. Nonetheless, former Secretary of State Hillary Clinton has vigorously—and with remarkable success—prosecuted U.S. Foreign policy, advancing human rights consistently and coherently despite institutional and cultural limitations; she was on her very own rainbow tour of world diplomacy.⁴⁶ The U.S. Marines have a saying: “We can be your best friends or your worst enemies and it is your choice.”⁴⁷ Clinton is not leaving you the choice—she wants to be friends. One can only hope that current Secretary of State John Kerry will be as effective but that is not realistic: to my eyes the United States has never had a better Secretary of State, the Chief.

The U.S., like its Israeli ally, obviously wishes to prevent any acquisition of an atomic weapon by the government of Iran.⁴⁸ Similarly, it is fairly clear that the U.S. thinks it is time for Assad to go: the U.S. goal is a regime change in Syria.⁴⁹

Thus, the U.S. and Russia are facing a zero-sum conflict. Above all, the U.S. wants to get rid of Assad and Russia wants to maintain its base. While those two goals can theoretically cohere, it is likely the ouster of Assad would entail a government possibly unwilling to continue to grant Russia basing rights in Syria. I do not regard the ouster of Russia’s base as a U.S. objective.

3. Other Interested States

Other interested states are Syria itself: Assad wishes to remain in power, and other people wish to see him ousted.⁵⁰ Israel, as already mentioned, wishes to see Iran kept out of the nuclear club.⁵¹ But Iran, a Syrian ally,⁵² wishes to acquire nuclear technology.⁵³ Moreover, Iran is currently under a U.S. led boycott. The

46. Bradley Klapper & Matthew Lee, *Globe-Hopping Hillary Clinton Breaks Travel Record*, ABC NEWS (July 17, 2012), available at <http://abcnews.go.com/Politics/wireStory/jet-setting-hillary-clinton-breaks-travel-record-16792071>.

47. Marine General Jim Mattis stated in 2003 before the invasion of Iraq, “We can be your best friend, or your worst enemy.” Steve Cheney, Editorial, WASH. MONTHLY (2008), <http://www.washingtonmonthly.com/features/2008/0801.cheney.html>.

48. See Mary Bruce, *Obama: U.S. Will do ‘What we Must’ to Block Iran Nukes*, ABC NEWS (Sept. 25, 2012), <http://abcnews.go.com/blogs/politics/2012/09/obama-u-s-will-do-what-it-must-to-block-iran-nukes/>

49. See Elliot Abrams, *American Options in Syria*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/syria/american-options-syria/p26226> (last visited Jan. 19, 2012).

50. *World Briefs: Assad Reasserts Wish to Remain*, PITTSBURGH POST GAZETTE (Nov. 9, 2012), <http://www.post-gazette.com/stories/news/world/world-briefs-assad-reasserts-wish-to-remain-661307/>.

51. Andrea Mitchell, *Israel’s Netanyahu: Draw ‘Clear Red Line’ to Stop Iran from Getting Nuclear Weapons*, NBCNEWS.COM (Sept. 27, 2012), http://worldnews.nbcnews.com/_news/2012/09/27/14126478-israels-netanyahu-draw-clear-red-line-to-stop-iran-from-getting-nuclear-weapons?lite.

52. Ewen MacAskill & Duncan Campbell, *Iran and Syria Confront US with Defence Pact*, THE GUARDIAN (Feb. 16, 2005, 8:57 PM), <http://www.guardian.co.uk/world/2005/feb/17/usa.syria>.

53. See Bruce, *supra* note 48.

U.S. and E.U.⁵⁴ are currently not buying Iranian petroleum and have successfully persuaded China and Singapore to reduce their consumption of Iranian petroleum.⁵⁵

B. Possible Outcomes (and likely consequences)

Mainly, there are two possible outcomes to the crisis—either Assad will be ousted or he will somehow maintain his position. Likewise, this entails two possibilities—either Russia will maintain their naval base at Tartus or will be expelled therefrom. Less predictable possible entailed consequences from those four possibilities include an Iranian oil embargo (refusal to sell),⁵⁶ a stepped up Iranian nuclear program (which is unlikely, as the Russians really try to inculcate the nuclear dependence of their atomic clients), and Iranian sponsored terrorist attacks and a higher price of petroleum. Meanwhile, Saudi Arabia has been arming the rebels⁵⁷ and apparently so has Turkey.⁵⁸

The outcomes, whether Assad is ousted or not, include increased likelihoods of expensive oil, fundamentalist terrorism, and nuclearization, and this at a time when heavy debt already weighs on the U.S. due to ten years of failed wars in Southwest Asia and the Horn of Africa consequent to the lawless blind unilateralism of the Bush administration. Whatever the outcome, the resolution of the Syrian crisis will be costly for the U.S. in economic or political terms and possibly both. However, the U.S. President⁵⁹ cannot walk away from Syria: the U.S. is committed to a Syrian future without Assad, and if it were to walk away U.S. foreign policy would seem irresolute and irresponsible. So, the U.S. is constrained to a policy of ouster.

54. Harald Wiederschein, *Öl-Embargo gibt Vorgeschmack auf eine Zukunft ohne Öl* [Oil Embargo Gives a Foretaste of a Future Without Oil], FOCUS (Jan. 23, 2012), http://www.focus.de/wissen/klima/tid-24849/eu-staaten-beschliessen-boycott-gegen-iran-oel-embargo-gibt-vorgeschmack-auf-eine-zukunft-ohne-oel_aid_705777.html.

55. “Secretary of State Hillary Clinton announced the exemptions for China and Singapore on Washington’s embargos on Iran crude, citing their ‘significantly’ reduced oil purchases from the Islamic Republic.” *US Exempts China, Singapore from Iran Oil Embargo*, PRESSTV (June 29, 2012), <http://www.presstv.ir/detail/2012/06/29/248512/us-spares-china-singapore-on-iran-oil/>.

56. On the legality of a past Arab oil embargo, see Ibrahim F. I. Shihata, *Destination Embargo of Arab Oil: Its Legality under International Law*, 68 AM. J. INT’L L. 591 (1974).

57. *Diplomat Says Saudis are Arming Syrian Rebels*, JERUSALEM POST (Mar. 17, 2012, 6:22 PM), <http://www.jpost.com/MiddleEast/Article.aspx?id=262224>.

58. Justin Vela, *Arab States Arm Rebels as UN Talks of Syrian Civil War*, THE INDEPENDENT (June 13, 2012), available at <http://www.independent.co.uk/news/world/middle-east/exclusive-arab-states-arm-rebels-as-un-talks-of-syrian-civil-war-7845026.html>; see also Michael Weiss, *Syrian Rebels Say Turkey is Arming and Training Them*, THE TELEGRAPH (May 22, 2012), <http://blogs.telegraph.co.uk/news/michaelweiss/100159613/syrian-rebels-say-turkey-is-arming-and-training-them/>.

59. Hereto I should note, the President’s foreign policy powers are plenary and absolute. The President’s foreign policy, especially his war powers, shall not be controlled by courts or congress because of the separation of powers and the need for the United States to speak with one voice internationally. The foreign policy power is of necessity authoritarian, absolute and unreviewable. It is the power of war and peace and thus of life and death. It is a terrible power but can only be restricted by refusing to fund the executive, the power of the purse. Thus, for example, President Obama deployed U.S. military forces to Libya without receiving congressional authorization under the 1973 War Powers Resolution. See Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), available at <http://www.nytimes.com/2011/06/16/us/politics/16powers.html> (stating that the U.S. President’s action was rightful, for the war powers *resolution* (not act!) is non-binding and not unconstitutional as any other *resolution*).

Syria is however an Iranian ally. The United States maintains no diplomatic relations with Iran and is opposed to the Iranian government and the nuclear power program of Iran. The U.S. policies in Syria are likely extensions of U.S. policies toward Iran. It seems that the U.S. is shadow-boxing over Syria as a part of its struggle against Iran.

Although U.S. foreign policy is constrained and has little to gain from regime change in Syria, Russia is in a can't-lose position. Even if there was a civil war in Syria and Russia was then expelled from its base, that outcome would lead to higher petroleum costs, which would redound to Russia's benefit: Russia exports petroleum. The worst-case scenario for Russia is still really good. The best case for Russia is even better: maintain its base, succeed at resisting U.S. unilateralism, and construct an alternative to U.S. hegemony. However, constructing an alternative ideology is not likely to be the goal or desire of Russia. Russia and Putin are likely not looking at Syria as a strategic case of elaborating a united front of the industrializing world against imperialist finance capital. If my estimate is correct, then Russian moves can be processed as pragmatic tactics intended to maximize the Russian economy: Russia wishes to keep the costs of oil high, and the Western embargo of Iran does that and also compels Iran to trade with Russia, one of Iran's few trading partners, on terms favorable to Russia. Whatever the outcome in Syria, Russia wins—whether through the sales of weapons and nuclear technology to the Middle East *or* via the sale of oil to the West at very high prices, and possibly both. However, those are not strategic efforts to forge a third-world united front against U.S. global hegemony.

Russia is in a can't-lose situation *but* is also in a position where outcomes can be constrained to predictability, presuming that Putin has not yet developed a coherent third-world/periphery-BRIC ideology of alternative development. Few people could develop such an ideology. This author is one such person, but I do not think such is desirable given current U.S. views that are favorable toward the triumvirate of rule of law, human rights, and multi-lateralism. If I thought Peronism and/or neo-communism would get us out of third world wars more rapidly I would push them. That is currently not the case in my estimate, and I think liberal capitalism can actually work through the process of history.

Then again, what if the ghost of Eva Peron whispers quietly into Putin's ear at night? Putin is very intelligent and is entirely capable of understanding and implementing an alternative ideology to U.S. styled individualism and free-market democracy. He might be clever enough to craft one. If Peron's shade talks to Putin during the long wintry nights of Russia, let us just hope she is saying something beautiful about law and justice—the topic to which we now turn.

II. INTERNATIONAL LAW

The hard and painful question for international lawyers (jurists) is whether, and to what extent, international law could help structure and avert the needless human

suffering in Syria. Russia has repeatedly vetoed U.N. Security Council Resolutions⁶⁰ and has had every opportunity to suggest alternative resolutions. It has not, despite having had plenty of time and opportunity to do so. Thereby Russia has given up the initiative. Russian allies and potential Russian allies should note Russia's inability to manage Syria's downward spiral, let alone avert it—to say nothing of concluding it favorably due to intransigence and blindness. Russia had no goal or plans for the U.N. to help build a better future for Syrians. Russia lost the strategic initiative in abandoning its pretence of championing the world's poor; it lost the tactical initiative in Syria due to its inability to propose a U.N. Security Council Resolution which would solve the problem. Economic and political pressure from the U.S. and its allies may help to convince the Russian Federation to take responsible action to protect Russia's immediate and long term interests. As well as the stick of sanctions there is the carrot of rewards. Politics of suasion must attract compliance by showing the noncompliant why compliance would be in their own best interests. A win-win solution in Syria is possible: it requires hope for change, pragmatic optimism, hard work, and give-and-take negotiations. That is politics—the art of the possible. Russia has not provided any of that to present. The loss of strategic and even tactical initiative explains why the Syrian crisis is local, not global.

This section examines the *legal*, not the *political*, solutions to the problem. The transformation of international law and the concept of sovereignty⁶¹ in the post-war era have been consistently marked by juridification: the creation of international courts and court-like bodies for the adjudication of rights to replace negative sum political conflict with zero sum legal resolution, aiming toward the formation of positive sum economic solutions.⁶² As well as creating individual human rights, some of which are directly enforceable, the post-war world formed an integrated global liberal economic order based on the free movement of goods through the General Agreement on Tariffs and Trade (GATT) then its successor the WTO. The free movement of goods, capital, enterprises, and of workers-migration rights are global norms in the post war world. These four freedoms arose to build prosperity through interdependence and thereby avert war and the negative effects of war—death, wasted wealth, and lost productive potential.

Which international laws are relevant to the Syrian struggle?

Even though most of international law is black-letter *lex lata* and unambiguous, some parts of international law are unclear. One source of international legal uncertainty is the fact that public international law features some contradictory legal principles. Furthermore, some international law principles do not always accurately reflect reality. These facts fuel erroneous critiques of international law⁶³

60. See Gladstone, *supra* note 40.

61. MATTHIAS HERDEGEN, VÖLKERRECHT § 28(3), at 197 (Beck 7th ed. 2008).

62. Lars Blichner & Anders Molander, *What is Juridification?*, CENTRE FOR EUROPEAN STUDIES (Mar. 2005), https://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/workingpapers2005/wp05_14.pdf.

63. The best antinomian critique of international law I have seen so far is JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 35 (Oxford U. Press 2005). While I don't agree with their view of

as somehow “not really law”⁶⁴ when in fact states invoke their self-help remedies in logical methods following basic rules.⁶⁵

A. Contradictory Principles Disconnected from Reality: International Antinomies

At times, international law *appears* self-contradictory, ambiguous and/or out of touch with reality. These problematic points of international law are most evident in the most conflicted and agonistic fields, namely, the rights in the law of war—*jus in bello* and *jus ad bellum*.⁶⁶

One example of the apparent ambiguity of international law I wish to expose and extirpate here is this: for any given internationally recognized general principle of law⁶⁷ we can often find a contradicting, or at least apparently contradicting, general principle of law which is also internationally recognized. We now look briefly at apparent contradictions of international law in order to understand them. Thereby we are able to reconcile apparent conflict into overall harmony.

1. The General Principle of Non-Intervention versus Humanitarian Intervention

The principle of non-intervention⁶⁸ holds that no state will interfere in the domestic, i.e., internal affairs, of any other state.⁶⁹ However, we can qualify and contrast that concept with its contraries: the right to humanitarian intervention⁷⁰ and the concept of human rights.⁷¹ We can also point out how unrealistic the

customary international law as “illusory,” their presentation of the positive law of nations so far as I have seen is accurate.

64. For a good refutation of the idea that customary international law is not really positive and thus has no effect in the domestic U.S. legal order, see Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1997–1998).

65. MANFRED KÜNG & MARTIN ECKERT, REPETITORIUM ZUM VÖLKERRECHT § 11, at 27 (1993).

66. “International humanitarian law, or *jus in bello*, is the law that governs the way in which warfare is conducted. . . . The *jus ad bellum* (law on the use of force) or *jus contra bellum* (law on the prevention of war) seeks to limit resort to force between States.” *IHL and Other Legal Regimes—Jus ad Bellum and Jus in Bello*, ICRC.ORG (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm>.

67. General principles of international law are a source of international law. HEINTSCHEL VON HEINEGG, *supra* note 11, § 277, at 127.

68. See KÜNG & ECKERT, *supra* note 65, § 424, at 249 (containing a brief overview of the principle of non-intervention).

69. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 205 (June 27); EDITH OESER & WALTER POEGGEL VÖLKERRECHT: GRUNDRISS 59 (1983).

70. Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT’L AFF. 293, 311 (2011). “Contemporary international law can be read as either allowing or forbidding international humanitarian intervention, and the legal uncertainty around humanitarian intervention is fundamental and irresolvable. Contradictory and plausible interpretations about the legality of any act of intervention exist simultaneously, and neither can be eliminated.” *Id.* I agree that there is ambiguity, but argue that the ambiguity is resolvable through structured coherent logic.

71. “*On ne peut en aucun cas prétendre qu’il serait ‘licite’ pour un Etat de massacrer sa population sous le prétexte que tout ce qui se passe à l’intérieur des frontières relève de ses ‘affaires intérieures.’*” (“We cannot in any way claim it is ‘legal’ for a state to massacre its population under the pretext that everything happening inside the country is its ‘internal affairs.’”) Anne-Cécile Robert, *Origines et vicissitudes du ‘droit d’ingérence’* [Origins

principle of non-interference has become. In a world of deep international economic integration, it is neither desirable nor possible for states to respect the principle of non-interference. However, as we shall see, the principle of humanitarian intervention is itself problematic⁷² because of the ambiguity as to when it is justified.⁷³

The international system has yet to complete its elaboration of functionalist institutions⁷⁴ to develop neutral expertise for rule-making and adjudication to replace military interactions with political, legal, and economic ones. Nor has international law completely escaped the failed logic of autarchic isolated states which doomed the world to wars for markets and resources. Autarchy and isolation caused wars because the only way to expand market share or obtain access to resources was to expand a state's territory—at the expense of other states. Autarchic isolation is the principle from which the rules of non-intervention and non-interference sprang forth. These rules are the incoherent and disempowering orphans of a failed and dead idea—peace through “splendid isolation.” International law is at times deficient, but not as a result of internal contradictions. Rather, it is because of our own failure to elaborate something better. It is insufficient to merely complain. One must also propose a better alternative. If the principle of non-intervention is to be replaced then whoever wishes to replace it must propose a cogent and attractive alternative.

2. Sovereignty and Immunity versus Human Rights

Another evident contradiction in international law is human rights *versus* sovereign immunity.⁷⁵ Today, human rights are internationally recognized.⁷⁶ Individuals can have rights under international law.⁷⁷ They may even at times directly enforce their rights themselves without intervention of the state acting on their behalf. However, even if a given human right is recognized as existing, inhering in the individual, and enforceable by the individual, such a right is then confronted by the contradictory idea of sovereignty⁷⁸ and its corollary immunity.⁷⁹ Sovereignty is the concept of the absolute and unlimited power of the state over the

and *Vicissitudes of the 'Right to Intervene'*], LE MONDE DIPLOMATIQUE (May 2011), <http://www.monde-diplomatique.fr/2011/05/ROBERT/20488>.

72. For an early effort in the U.N. era to grapple with the idea of whether and when humanitarian intervention might be lawful, see Jean-Pierre L. Fonteyne, *Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203 (1973–1974).

73. HEINTSCHEL VON HEINEGG, *supra* note 11, § 451, at 218.

74. See, e.g., Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940) (describing functionalism).

75. For a synopsis, see KÜNG & ECKERT, *supra* note 68, § 295, at 184; *id.* § 297, at 186.

76. This was even true during the Cold War. See OESER & POEGGEL, *supra* note 69, at 102–05.

77. See, e.g., KÜNG & ECKERT, *supra* note 65, § 293, at 183.

78. J. Shen argues that the principle of sovereignty and of non-intervention are non-derogable as *jus cogens*. Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions under International Law*, 7 INT'L LEGAL THEORY 1, 29 (2001). That view is illogical and wrong as a matter of positive international law. If sovereignty were non-derogable then there would be no other *jus cogens*.

79. HERDEGEN, *supra* note 61, § 37(1), at 253.

lives and property⁸⁰ of its subjects and all on its territory.⁸¹ Modern apologists argue that sovereignty entails responsibility⁸² but that is not the case historically; just the opposite in fact. Sovereignty—the absolute final and unreviewable authority of the state over the lives and property of all its subjects and all things or persons on its territory—entails a concept of the immunity of the state itself (sovereign immunity for *acto jure imperii*) and also the immunity of the head of state (head of state immunity)⁸³ and his or her ministers (ministerial and diplomatic immunity).⁸⁴ These contradictions can be resolved best by seeing sovereignty and immunity as general rules with the existence and enforceability of human rights as exceptions.

3. National Self-Determination versus Sovereignty and State Integrity

The principle of national self-determination⁸⁵ has been recognized by international law since the 1970s at the very latest. National self-determination arguably entails a corollary, the right to democracy,⁸⁶ an uncertain right—which if it exists, only currently exists as *de lege ferenda*.⁸⁷ It also implies the legal personality of peoples.⁸⁸ However, the rule that a people have a right to national self-determination⁸⁹ is ambiguous: what is a people, and over which territory⁹⁰ may the people exercise its right to national self-determination?⁹¹ Moreover, the principle of national self-determination at times clashes with the international rules

80. See, e.g., KÜNG & ECKERT, *supra* note 65, § 44, at 49.

81. See, e.g., HEINTSCHEL VON HEINEGG, *supra* note 11, § 394, at 174.

82. *Id.* § 384, at 165.

83. Herdegen, *supra* note 61, § 37(10), at 261.

84. *Id.* § 37(3), at 254.

85. The purposes of the U.N. are: “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace . . .” U.N. Charter art. 1, para. 2. Article 1 of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations provides: “Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.” G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/8082 (Oct. 24, 1970).

86. HERDEGEN, *supra* note 61, § 50(2), at 350 (noting democratic trend as reflected in treaty law, right to democracy not yet however a part of customary international law).

87. See BLACK’S LAW DICTIONARY 459 (8th ed. 2004) (defining “de lege ferenda,” a latin phrase meaning “from law to be passed” as “a proposed principle that might be applied to a given situation instead or in the absence of a legal principle that is in force”). De lege ferenda literally means “the law in the making”, i.e. the law which is coming into force rather than the law which is definitively existing positively speaking. *Id.*

88. OESER & POEGGEL, *supra* note 69, at 50.

89. *Id.* at 57, 97.

90. See, e.g., Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT’L L. 321, 321–36 (1972).

91. For a discussion of the “colonial”/“non-colonial” split in this law, see Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT’L L. & COM. 21, 29–30 (1992).

that states are sovereign, enjoy plenary powers, and that the integrity⁹² of each state and its borders shall be respected.⁹³

4. The Prohibition of the Use of Force versus Self Defense

These are not the only examples of conflicting, even contradictory, international laws. For example, Article 2(4) of the U.N. Charter⁹⁴ prohibits the use of force (as did the earlier Kellogg-Briand Pact),⁹⁵ and Article 2(3) mandates the *peaceful* resolution of disputes.⁹⁶ Yet, states still enjoy the right to use force in self defense⁹⁷ where such is strictly necessary⁹⁸ and proportionally used.⁹⁹ The right to use force in self defense is expressly provided for in the U.N. Charter.¹⁰⁰ The state may justifiably use force to protect essential state functions and the lives of the state's subjects (humanitarian rescue).¹⁰¹ The general prohibition of the use of force admits specific exceptions¹⁰² and there is at least some ambiguity as to whether certain uses of force are permitted. How much violence is needed to be considered an armed attack which entails the justified and proportional use of force in self defense¹⁰³ will simply depend on the actual facts¹⁰⁴ and on the actor,¹⁰⁵ which will generally be hotly disputed.

92. HERDEGEN, *supra* note 61, § 33(3), at 219.

93. See, e.g., Ved P. Nanda, *Self-Determination under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981).

94. Article 2(4) of the United Nations Charter provides: "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." U.N. Charter art. 2, para. 2.

95. Kellogg-Briand Peace Pact art. 1, Aug. 27, 1928, 46 Stat. 2343 (treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy); see also G.A. Res. 3314 (XXIX), art. 1, U.N. Doc. A/Res/3314 (Dec. 14, 1974).

96. U.N. Charter art. 2, para. 3 (stating that members shall settle their disputes by "peaceful means").

97. The use of force must be strictly *necessary* (no alternative) and proportional (no greater than that needed for self-preservation). Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8).

The threatened use of force may be defended against, but such threat must be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Letter from the Honorable Daniel Webster, Department of State, to Lord Ashburton (Aug. 6, 1842), available at http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2.

98. D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 10 (Frederick A. Praeger, Inc. 1958).

99. Legality of the Threat or Use of Nuclear Weapons, *supra* note 97; see also Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 391-413 (1993), available at <http://www.jstor.org/discover/10.2307/2203645?uid=3739600&uid=2&uid=4&uid=3739256&sid=2110165736125>; see generally HEINTSCHEL VON HEINEGG, *supra* note 11, § 422, at 195.

100. U.N. Charter art. 51.

101. Clearly a case where the State acquiesces, and also clearly a case prior to the U.N. Charter. There is however doubt as to whether such is good law in the post-Charter era because of the prohibition of the use of force. KÜNG & ECKERT, *supra* note 68, § 425, at 294-50.

102. HERDEGEN, *supra* note 61, § 33(3), at 220.

103. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 103, 195 (June 27) (noting that there is a right to self defense consequent to an "armed attack").

104. Oil Platforms (Islamic Republic of Iran v. U.S.), 2003 I.C.J. 161, ¶ 77 (Nov. 6) ("[T]he court cannot assess in isolation the proportionality of that action to the attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation . . .").

105. See, e.g., Abraham D. Sofaer, *On the Necessity of Preemption*, 14 EUR. J. INT'L L. 209 (2003) (arguing that imminent attack is not a necessary prerequisite to preemptive attack against a non-state actor). I disagree with Sofaer.

5. Jurisdiction Based on Territoriality versus Jurisdiction Based on Nationality

Yet another contradiction of international law is the concept of exclusive jurisdiction and the expression of jurisdiction as arising principally out of territorial connection¹⁰⁶—the territorial principle¹⁰⁷—*or* on the basis of the nationality of the plaintiff or defendant¹⁰⁸—the nationality principle.¹⁰⁹ Since states may assert jurisdiction on the basis of territory¹¹⁰ or nationality and because people travel, conflicts of law are inevitably built into the international system.

6. Rights with No Remedies

As a general rule, international law does not create rights or duties inhering in individuals.¹¹¹ Where it does, it does so exceptionally. Even where an individual right or duty is recognized as existing, there may be no method for the direct legal enforcement of the right by the individual.¹¹² Historically, enforcement of international law was a political question, not a legal one. International law would be enforced at the sovereign prerogative of the aggrieved state, whether by friendly or unfriendly means.¹¹³ Thus, the availability of directly enforceable individual remedies under public international law has to be seen as exceptional because of the split between public law and private right. The idea that one may have a right without a legal remedy fuels the wrong-headed idea that international law is somehow lacking positivity. It makes international law seem out of touch with reality. This split between right and remedy is strange to eyes accustomed to looking at national law where the existence of vested legal rights entails directly enforceable legal remedies; this split is one of the unfortunate consequences of the dualist world view. The sense that international law and international reality are somehow disconnected can be rectified by understanding the relationship between individual (generally human) rights and international law by way of general rules (pre-war) with specific exceptions (post-war) and also by seeing rights in terms of the public law/private law and national law/international law splits.

106. See, e.g., *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

107. HERDEGEN, *supra* note 61, § 26(4), at 183.

108. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987).

109. HERDEGEN, *supra* note 61, § 26(9), at 185.

110. *S.S. Lotus*, 1927 P.C.I.J. at 18; HEINTSCHEL VON HEINEGG, *supra* note 11, § 385, at 167.

111. OESER & POEGGEL, *supra* note 69, at 51–52 (individual rights incompatible with coordination view of international law); KÜNG & ECKERT, *supra* note 68, § 39, at 46; HEINTSCHEL VON HEINEGG, *supra* note 11, § 116, at 69; see also *id.* § 1041, at 496; HERDEGEN, *supra* note 61, § 7(5), at 65; see also *id.* § 12, at 100–02.

112. E.g., abduction is generally seen as a violation of international law, but the remedy is in the hands of the state whose citizen or subject was abducted, not the individual person. *Attorney Gen. v. Eichmann*, 36 I.L.R. 5 (1962) (Isr.).

113. Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 526 (2001); ROLAND PORTMANN, *LEGAL PERSONALITY IN INTERNATIONAL LAW* 280 (2010).

7. Sovereign Equality versus Reality

The existence of rights with no remedy is not the only example of an area where international law seems out of touch with reality. The principle of sovereign equality,¹¹⁴ that all states have equal worth among other states,¹¹⁵ is contradicted by the realities of economics and demographics. Even well governed and prosperous city-states like Singapore (a megalopolis, in fact) are relatively powerless in comparison with vast continental countries like the U.S., Russia, and China. This has ever been the lament of international lawyers—the large states do what they can while the small states do what they must.¹¹⁶

8. Massacres as Crimes Against Humanity

Most of this article is about how the U.S. and Russia can work out their differences despite ambiguous international law, so as to prevent as much death and maiming as possible. I have maintained that most international law governs economic rather than military interactions and is clear and unambiguous. However, even in the field of the law of armed conflict, there are international laws which are clear and unambiguous. There really is no question that the government of Syria has systematically violated the most basic right—the right to life. Mass killing,¹¹⁷ especially of unarmed persons and most especially of prisoners, is a crime against humanity.¹¹⁸ Likewise, torture is also universally prohibited. War crimes,¹¹⁹ crimes against humanity, and torture¹²⁰ are non-derogable international customary laws¹²¹—*ius cogens*¹²²—and violators are consequently subject to universal

114. U.N. Charter art. 2, para. 1; see generally HERDEGEN, *supra* note 61, § 28(1), at 197. For the opposition of sovereign equality and war, see Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 LAW & CONTEMP. PROBS. 147, 147–67 (2004).

115. See generally Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 207–20 (1994).

116. “[R]ight, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.” THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR bk. V, at 89–91 (Richard Crawley trans., The Temple Press 1914) (c. 431 B.C.).

117. Sévanc Garibian, *Crime Against Humanity*, ONLINE ENCYCLOPEDIA OF MASS VIOLENCE (June 19, 2008), http://www.massviolence.org/IMG/article_PDF/Crime-against-Humanity.pdf.

118. Richard Vernon, *What is Crime against Humanity?*, 10 J. POL. PHIL. 231, 231–49 (2002); Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT’L L. 178, 179–80 (1946) (noting that most crimes against humanity are also war crimes).

119. War crimes today probably include rape, certainly when such is a systematic practice intended to degrade, subjugate, and destroy an entire people. Theodor Meron, Editorial Comment, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. OF INT’L L. 424, 424–28 (1993).

120. Universal Declaration of Human Rights art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, European Convention on Human Rights, Mar. 9, 1953, C.E.T.S. No. 5, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf (last amended by Protocol No. 14, C.E.T.S. No. 194, June 10, 2010); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113–14.

121. For an overview of *jus cogens*, see KÜNG & ECKERT, *supra* note 65, § 20, at 33.

122. HERDEGEN, *supra* note 61, § 16(14), at 139–40.

jurisdiction.¹²³ It is evident that these are massive crimes under international law, and that those crimes and torts, when finally vindicated, will entail liability¹²⁴—such as under the Alien Tort Statute.¹²⁵

9. The Rights Orchestra

Despite contradictory general principles of international law, this author argues that we in fact live within “an anarchical society” of States¹²⁶ and states subject themselves *and each other* to law. It is not the law of the jungle. *This is a game with rules—and everyone knows what the rules are.* Now that you know what the rules are, let us see if we can make them work.

B. Resolving Antinomies

The above mentioned contradictory principles of international law are antinomies. Antinomies are contradictory principles, each of which purports to be true yet which are mutually irreconcilable.¹²⁷ Willard Quine argued that we can divide paradoxes into three categories: 1) those which are veridical—they are shocking, yet true; 2) those which are falsidical—they are false and misleading; and 3) antinomies—they are self-contradicting.¹²⁸ To pacifist Christians, the existence of antinomy demonstrates the failure of law, and the resolution of the human dilemma is impossible in human terms, entailing faith in God as the only alternative to the failure of reason.¹²⁹

I take a more worldly view of antinomy: I have to face the world as it is, even as I yearn for a better world, and know that a better world is possible. I think that most of the apparent antinomies can be resolved, and I am certain that our task as jurists is to present well-argued rules which attract compliance through their suasive power.

Why do people obey law? One reason is force and fear. Another more effective one is hope and desire. Well considered laws, laws that work justice, attract compliance and are replicated by those not subject to them. That is, we can, and morally we must, structure the law so as to attain justice and the true peace—not the peace of the grave.

123. For a theoretical overview see David Luban, *A Theory of Crimes against Humanity*, 29 YALE J. INT'L L. 85, 86 (2004).

124. On individual liability, see, e.g., HEINTSCHEL VON HEINEGG, *supra* note 11, at 115.

125. Historically, political crimes were not subject to extradition. Manuel R. García-Mora, *Crimes against Humanity and the Principle of Nonextradition of Political Offenders*, 62 MICH. L. REV. 927 (1964). That defense no longer exists. It is a casualty of terrorism. The rule against political extradition has since been replaced by the idea of universal liability for violations of *ius cogens* and also by the norm *aut dedere aut iudicare*—extradite or prosecute.

126. See HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (Columbia University Press 1977).

127. W. V. QUINE, *THE WAYS OF PARADOX AND OTHER ESSAYS* (Random House, Inc. 1966).

128. *See id.*

129. For a more conventional view of antinomy in law, see Charles J. Reid, Jr., *The Three Antinomies of Modern Legal Positivism and Their Resolution in Christian Legal Thought*, 18 REGENT U.L. REV. 53 (2005).

The reason antinomies in international law are so problematic, and in fact dangerous to peace and human well-being, is that they allow states to justifiably take any position they please and to argue, and not merely pretextually, that their position is permitted, even compelled, by laws we all agreed to.

For example, Russia can justifiably argue that the principles of non-intervention¹³⁰ and sovereign equality¹³¹ indicate that no state has any right to tell the Syrian government or people who to keep or remove from power. Incidentally, as a matter of positive law, Russia probably has the better position here, at least going by *lex lata*.

While Russia has a good argument, so do the Syrian rebels. As a matter of the natural law of self-preservation, the natural right to self defense,¹³² and also as a matter of the positive international right to national self-determination, the people of Syria have a right to rebel against their own government when that government has become destructive of their very lives, where no alternative exists to arms. *Dura lex, sed lex*—the law of the jungle.

As a matter of positive law, the United States has the least defensible position but it is not an entirely indefensible position. The United States wishes to oust Assad from power, arguing he has become destructive to the lives of his own people. Assad has used force disproportionately and in violation of basic human rights, thus he must go. The United States, already having undertaken humanitarian relief,¹³³ will almost certainly move more toward humanitarian intervention. Under pre-war international law, states had as a part of their untrammelled despotic sovereign rights the right to use violence,¹³⁴ *a fortiori* where such was designed to prevent or extinguish human rights tragedies. For example, France intervened in Syria on humanitarian grounds as early as the 1800s. Russia also intervened for humanitarian reasons in the Middle East as early as the 19th century. U.N. Charter Article 2(4) changed that. Since 1945 the use of force internationally requires approval by the U.N. Security council except in cases of immediate self defense.

What is an international lawyer to do in the face of Cerberus, the three-headed dog of hell (hatred, fear, poverty)?¹³⁵ While it is all too easy to criticize Russia for coddling a brutal tyrant and for tolerating, or even encouraging, human rights abuses, Russia is in fact not *doing* anything other than asserting the recognized rights to non-interference in domestic affairs and to national self-determination.¹³⁶

130. HEINTSCHEL VON HEINEGG, *supra* note 11, §§ 470–71, at 231–32.

131. Even in the Soviet era this was the case. OESER & POEGGEL, *supra* note 69, at 53.

132. See, e.g., THOMAS HOBBS, *LEVIATHAN* (C. B. MacPherson ed., Penguin Books 1968) (1651). For a contemporary view, see HEINTSCHEL VON HEINEGG, *supra* note 11, § 428, at 199.

133. Press Release, Maria Otero Under Secretary for Civilian Security, Democracy, and Human Rights; Kelly Clements, Deputy Assistant Secretary of State for the Bureau of Population, Refugees, and Migration; and Mark Bartolini, Director of the Office of U.S. Foreign Disaster Assistance, U.S. Humanitarian Assistance to Those Affected by the Conflict in Syria (July 19, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/07/195276.htm>.

134. OESER & POEGGEL, *supra* note 69, at 196.

135. See VIRGIL, *THE AENEID OF VIRGIL* 144 (Allen Mandelbaum trans., Bantam Books 2004) (c. 19 B.C.E.); see also HOMER, *THE ILIAD* (Anthony Verity trans., OUP Oxford 2012).

136. See, e.g., James Mayall, *Non-Intervention, Self-Determination and the 'New World Order'*, 67 INT'L AFF. 421, 421–29 (1991), available at <http://www.jstor.org/stable/2621944>.

The political solution to this legal impasse is simply to ask Russia to propose a resolution before the U.N. Security Council, which would be acceptable to the Russian Federation. However, Russia has consistently proven itself unable to shoulder the responsibility of shaping a solution, to form a constructive workable resolution, their own action has brought this moral duty—and opportunity—to their own foreign ministry. It seems however that the Russian Foreign Minister Sergey Lavrov (the Russian homologue to Secretary of State) does not have a solution or a resolution. And so, without vision or power, Russia evacuates Russians from Syria, while Syrians die due to Russian intransigence coupled with an absence of a Russian resolution as an alternative.

Back to the law: I regard the apparent contradictions in international law as reconcilable. I would like to suggest ways to do so. Antinomies fuel the flawed and dangerous arguments that international law somehow is not law. Antinomies lead to avoidable conflicts—conflicts which cost lives and fortunes. Understanding and resolving the antinomies is crucial to building peace through the rule of law.

1. The Positivity of International Law

Sometimes, seeing antinomies and lacunae, ill-informed people argue that international law is not in fact law at all. However, that is not the case. Antinomies and lacunae also exist in national law. We can think of the idea of judicial review, which essentially holds that a given law is illegal; the principles of judicial review and of parliamentary supremacy are contradictory, even antinomious. The idea that the parliament has plenary powers, yet can somehow limit itself, is even more clearly illogical; it is an antinomy (we have full powers: therefore we can limit our power). Likewise, lacunae exist in national law. The legislator cannot foresee everything, and legislative will is sometimes unambiguous. Similarly, violations of national law occur all the time. However, no one seriously suggests that the existence of criminals implies the non-existence of national criminal law. It is a dangerously naive and foolish position to think international law has no positivity—to think that way prevents the formation of the rule of law and the attainment thereby of peace and prosperity.¹³⁷ The idea that international law is no law at all is a destructive, yet self-fulfilling prophecy. While I cannot prove the existence of God, I can certainly prove the existence of war—and of peaceful regular international commerce. So while there clearly are illegalities, gaps, and apparent contradictions in international law, it is the only earthly law we have, and it is so much better than no law at all, as any war veteran can attest. If the law as it is does not work justice then our job as jurists is to create better laws. I propose to do so through efforts to resolve the various antinomies described above. We can resolve the antinomies with structured and logical thoughts based on materialism.

137. Christina M. Cerna argues that good governance, i.e., rule of law and human rights, are necessary for business. Cerna, *supra* note 45, at 295.

2. Pre-war versus Post-war International Law

I argue that the main cause of the antinomies described is the result of a radical transformation of international law that resulted from two world wars.

In the pre-war era, states had an absolute and unlimited right to use force.¹³⁸ That is no longer the case. States now may only use force in self defense.¹³⁹ Likewise, in the pre-war era individuals had no directly enforceable human rights or duties under international law.¹⁴⁰ That is also no longer the case. Individuals now enjoy rights and duties under international human rights law. These rights may even, at times, be directly enforced by individuals as a matter of law, and not merely indirectly enforced by the citizens' aggrieved state using the political remedies of international law, which are potentially violent countermeasures such as retorsions and reprisals.¹⁴¹

The pre-war era states were autarchic and isolated. There was an essential unity of the territory of the state and the market. Thus, any state could only expand its market or obtain access to raw materials by war. This system of autarchic and isolated nation states enjoying an absolute right to make war doomed the world to at least two global wars (not counting Napoleon or the entire 17th century). Fortunately for us, that system failed so catastrophically that it has been replaced. Rather than an impoverished world of autarchy we live in a world of interdependence and resultant prosperity. In 2008, global recession (in some places a depression) did not unleash a general global war among the first world countries, unlike 1929. The problem we face today: Can we extinguish the local wars in the third world—before they extinguish us? That is why we must focus on situations like Syria.

Unlike the isolated and autarchic states of the pre-war international system, states today are intensely networked and interdependent. The global norms of the free movement of goods, capital, enterprises, and even workers create interdependence and prosperity through trade, both of which in turn prevent and obviate war. For example, although Russia and the U.S. have very little bilateral trade or investment, Russia and the E.U. are intensive trading partners.¹⁴² Russia provides the bulk of E.U. petrol products and the E.U. is Russia's largest trading partner.¹⁴³ The Russian Federation thus wants to maintain good relations at least with Europe, even though it has little to lose from bad relations with the U.S. China, in contrast, invests heavily in the U.S. and has massive export trade with the

138. OESER & POEGGEL, *supra* note 69, at 196.

139. *See, e.g.*, HERDEGEN, *supra* note 61, § 4(8), at 36.

140. John King Gamble et al., *Human Rights Treaties: A Suggested Typology, A Historical Perspective*, 7 *BUFF. HUM. RTS. L. REV.* 33, 39 (2001).

141. East and West German views on international law regarded violent reprisals as illegal breaches of the principle of peaceful resolution of disputes. OESER & POEGGEL, *supra* note 69, at 35; HERDEGEN, *supra* note 61, § 59(4), at 397; KÜNG & ECKERT, *supra* note 65, § 396, at 236.

142. *Russia Trade Picture*, *supra* note 32.

143. *Id.*

U.S.¹⁴⁴ Despite its formal status as a people's dictatorship, it is more constrained in practice with respect to the U.S. than the ostensibly democratic Russian Federation. So, the puzzle we all face is how to extend the rule of law and the protection of human rights into the third world in order to build trade, create interdependence, and create prosperity to prevent and obviate war; democracy will follow inevitably from law and prosperity. If some variant of Peronism or neo-communism would work to build global peace through prosperity, I would push that. However, Peronism is adapted to the idea of an autarchic national economy. Meanwhile, Marxist ideologies never understood, and thus never implemented, the idea of peace-through-trade. If market economies, fundamental rights, and the rule of law are the norms then liberalism must develop an effective theory of economic development and legal transformation of BRIC type countries into rule of law states with strong protection of basic human rights.

3. The Rule-Exception Principle

The best way to comprehend the apparent contradictions in international law highlighted here is to understand antinomies within international law using the rule-exception principle. We see general rules with specific exceptions in law all the time. Our point of departure is, and should be, the essentially dualist pre-war rules of international law that are the general rules. The essentially monist post-war rules are specific exceptions to those pre-war general rules. The rule-exception principle is augmented in its capacity to describe the rule of law by the fact that the burden of proof is on whoever wishes to argue for an exception to the general rule. In this way, what appears at first glance to be a confused mess of contradictory and/or unrealistic rules becomes structured and coherent. Antinomies may also be resolved, as indicated above, by noting the structure and source of law and the interrelation between national and international law. As to international lacunae—gaps in the coverage of international law—they simply imply the need for treaties. Anyone who is dissatisfied with a legal regime is always free to try to draft a model convention, whether in the framework of an NGO (Non-Government Organization) such as the OECD (Organization for Economic Co-operation and Development) or via his or her own government. If you do not like the apparatus, build your own.

4. Monism and Dualism

Antinomies in international law may also result from the dichotomy of monism versus dualism.¹⁴⁵ Recall that monists argue that the national and international legal orders form a seamless whole—that there is one global legal order.¹⁴⁶ Hans Kelsen,

144. *China*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/china> (last visited Jan. 20, 2013).

145. *See generally* J. G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936).

146. For the basics on monism and dualism, see HERDEGEN, *supra* note 61, § 22(1), at 152.

whom I otherwise generally disagree with, correctly took up monism.¹⁴⁷ Dualism, in contrast, argues that the national and international legal orders are separate and distinct; that each has its own sources and structure, and that they operate on different subjects.¹⁴⁸ In reality, the world has taken up a mix of monism and dualism.¹⁴⁹ For example, the common law and German law both regard customary international law¹⁵⁰ as directly effective, an integral part of domestic law, but regard treaties as requiring a domestic enabling act.¹⁵¹ Unlike the common law, German law regards international law, insofar as domestically effective, as superior to the German constitution.¹⁵² France is a monist regime.¹⁵³ Treaties, like international law generally in French law,¹⁵⁴ are an integral part of French law. Treaties are thus presumed to be self-executing and require no parliamentary enabling act to have domestic effect. Treaty law is hierarchically superior to French domestic law.¹⁵⁵ French treaties do require ratification, however.¹⁵⁶ Meanwhile, the common law is dualist as to treaties: they are presumed to have no direct domestic effect and require an enabling act or specific explicit language in the treaty itself indicating that it is intended to have direct effect in national law.¹⁵⁷ It is a general rule that international law is presumed to apply to states only.¹⁵⁸ Exceptionally, however, international law today—unlike the pre-war era—creates directly enforceable rights and duties inhering to private law natural and artificial persons. Those exceptions may be enforced before U.S. Courts if they are part of customary international law or are the result of Senate ratified treaties intended to have direct domestic effect, which was also the case in the pre-war system.

147. See, e.g., Danilo Zolo & Hans Kelsen, *International Peace through International Law*, 9 EUR. J. INT'L L. 306 (1998).

148. See, e.g., KÜNG & ECKERT, *supra* note 65, § 215, at 139.

149. See, e.g., KÜNG & ECKERT, *supra* note 65, § 217, at 140–41.

150. Customary international law is defined throughout this world as those actual state practices (usages) which states regard as legally permitted or compelled (opinio juris). See Statute of the International Court of Justice art. 38(1)(b) (annexed to the Charter of the United Nations); see, e.g., North Sea Continental Shelf (Federal Republic of Ger./Den.; Federal Republic of Ger./Neth.), 1969 I.C.J. 3, 9 (Feb. 20); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

151. Herdegen, *supra* note 61, § 22(2), at 153; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, art. 59, § 2 (Ger.) [BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY [GG] [Constitution]] [hereinafter GG].

152. KÜNG & ECKERT, *supra* note 65, § 226, at 145; GG, *supra* note 151, art. 25.

153. “Une claire option moniste paraît a priori résulter du texte de l'article 55 de la Constitution du 4 octobre 1958, lequel déclare que ‘les traités ou accords régulièrement ratifiés ou approuvés ont dès leur publication une autorité supérieure à celle des lois[.]’” (“A clear monist option appears to result a priori from Art. 55 of the French Constitution of October 4, 1958 which declares that ‘treaties or agreements regularly ratified or approved have on publication an authority superior to that of laws[.]’”) PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 404 (6th ed., Dalloz 2002) (author’s translation).

154. “le 14^e alinéa du Préambule de la Constitution du 27 octobre 1946 auquel on sait que le Préambule de la Constitution de 1958 fait un renvoi exprès, proclame l’attachement de la République aux règles du droit public international[.]” (“Line 14 of the preamble of the constitution of October 27, 1946, to which the preamble of the constitution of 1958 makes direct reference, declares the attachment of the republic ‘to the rules of public international law’”). DUPUY, *supra* note 153, at 408 (author’s translation).

155. FRENCH CONST. Oct. 4, 1958, art. 55.

156. DUPUY, *supra* note 153, at 404.

157. Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988).

158. Historically, international law applied exclusively to states. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). That is no longer the case.

The sources and structure of international law vary somewhat from the civilianist regimes from whence they sprang:¹⁵⁹ there is no international civil code. The sources and structure of international law are especially unlike common law. It is unambiguous that the sources of international law are custom, treaty, general principles of law,¹⁶⁰ and legal scholarship¹⁶¹ (doctrine).¹⁶² Court decisions in international law have no binding precedential effect on later cases. *Stare decisis* does not exist in international law¹⁶³ (*caveat lector*: European Court of Justice decisions and possibly also European Court of Human Rights decisions are binding and form precedent for future courts).¹⁶⁴ As to their hierarchy, *jus cogens* are superior to treaties,¹⁶⁵ which may deviate from custom, which are superior to general principles of law; general principles serve primarily to fill gaps in the law (*lacunae*).¹⁶⁶ While international law does accord a constitutive character to legal scholarship, as a source of general principles and of *opinio juris*,¹⁶⁷ the U.S. is quite reluctant to admit legal scholarship as a source of international law, and indeed, internationally, legal scholarship is the weakest source of international law.

However, by understanding the sources and structure of international law and its relationship to national law, we can see most readily that international law indeed has positivity; it is valid law, just like national law. In fact, most national legal orders are at least partly monist. Strictly dualist regimes are rare, and are usually undemocratic and impoverished. Such states usually opt for dualism to isolate domestic law from international law; dictatorial and tyrannical regimes and abusers of human rights usually argue for the dualist view of international law, so as to shield their wrongful actions from legal scrutiny. This just means we must press home the monist view all the more earnestly.

In any event, some antinomies may result from the dichotomy of “either dualism or monism.” For examples, the principles of non-interference and of no directly enforceable rights held by private persons, are expressions of the dualist

159. Article 38, paragraph 1 of the Statute of the International Court of Justice correctly lists the sources of international law and their hierarchy.

160. HERDEGEN, *supra* note 61, § 14(4), at 105.

161. Sources of international law include “the works of jurists, writing professedly on public law.” *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820)); “[T]he works of jurists [*i.e.*, scholars] and commentators are . . . resorted to by judicial tribunals, *not for the speculations of their authors concerning what the law ought to be*, but for trustworthy evidence of what the law *really is*.” *Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added). The court wants *lex lata*, not *de lege ferenda*.

162. For an overview of the sources of international law, see KÜNG & ECKERT, *supra* note 65, § 17, at 31.

163. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW 103 cmt. b (1987) (noting the “traditional view that there is no *stare decisis* in international law”); see Procedure of the International Court of Justice, 1945 I.C.J. Acts & Docs 59, available at <http://www.yale.edu/lawweb/avalon/decade/decad026.htm#art59> (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”).

164. Case C-28-30/62, *Da Costa v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 31; Case C-283/81, *CILFIT*, 1982 E.C.R. 3415; Case C-66/80, *Int’l Chemical Corp. v. Amministrazione delle Finanze dello Stato*, 1981 E.C.R. I-191.

165. HEINTSCHEL VON HEINEGG, *supra* note 11, §§ 322–23, at 143.

166. KÜNG & ECKERT, *supra* note 65, § 34, at 42.

167. International custom consists of actual state practice (usages) and the belief that such usages are legally compelled or permitted (*opinio juris*). HEINTSCHEL VON HEINEGG, *supra* note 11, § 230, at 111. The custom may be recent but then must be nigh universal. *Id.* § 257, at 120.

view. Knowing this, we can then condition and structure the extent of such principles, arguing that while our point of departure may be non-intervention, and no directly enforceable rights held by the individuals, those are general rules which admit specific exceptions. Namely, human rights are exceptions to the principle of no directly held rights; humanitarian relief and U.N. authorized humanitarian intervention¹⁶⁸ is an exception to the general rule of non-intervention. These exceptions are justified to avoid injury to basic human well-being, which would otherwise result.

5. Recursivity

The antinomies described here do not arise out of self-reference, although recursivity may be a source of antinomies. To present a complete heuristic, I mention recursion. The most famous scholars on the subject are Gunther Teubner, who discusses self-reference in law under the rubric of autopoiesis—the self-development of law,¹⁶⁹ and Volkmar Gessner, who similarly argues that legal certainty is an emergent property of networked law.¹⁷⁰ However, the problem of recursivity is not as central to the antinomies in the complexes of norms described here. Even where antinomy results from dualism—where national law erects one norm, but international law presents us a contradictory norm—the mutual imbrication of national law and international law may allow us to structure our way out of the apparent antinomy. This occurs by invoking the legal presumption that national law and international law are coherent and non-contradictory¹⁷¹ and also by relying on the burden of proof to resolve doubtful cases, as well as by recalling the hierarchical position of a given legal source within the State's domestic legal order. Dualism may create apparent antinomy, but mutual imbrication—self-reference in one legal order with interchange with other legal orders—may nonetheless dispel it.

In other words, if we fail to understand how national law and international law are respectively structured and interrelated then we also risk failure to construct the international rule of law, whether due to believing that international law is somehow mythical or pointless or by propounding poorly considered laws which will attract neither respect nor compliance, let alone replication. The failure to structure the international rule of law leads in turn to injustice and to avoidable conflicts, including militarized conflicts. We owe the youth something better than laziness or stupidity. Taxpayers may also prefer to avoid another decade of

168. The U.N. has however repeatedly authorized humanitarian interventions. S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992); S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992) (resolutions concerning humanitarian intervention in Somalia); S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998); S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998); S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998) (resolutions allowing humanitarian intervention in Kosovo).

169. GUNTHER TEUBNER, *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* (1988).

170. VOLKMAR GESSNER & ALI CEM BUDAK, *EMERGING LEGAL CERTAINTY: EMPIRICAL STUDIES ON THE GLOBALIZATION OF LAW* (1998).

171. See generally Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 291–323 (2006), available at <http://www.jstor.org/stable/3651149>.

wasteful war spending and economic recession by using the rule of law and diplomacy rather than the force of arms.

6. International Law as Self-Constraint

International law may be best understood as self-constraint. A real constraint on international illegality is the fact that whatever the state permits itself to do, it implicitly permits other states to do. Thus, states constrain themselves in hopes that other states will be constrained or persuaded to comply with the general rule that state proposed. This constraint is real because, as a matter of logic, whatever a state regards as legal for itself—it must also regard as legal for other states.

For example, if the U.S. claims that it may legally assassinate, then such a claim implies it is also legal for Russia to assassinate. Likewise, if the U.S. thinks humanitarian intervention is legal for itself, then humanitarian intervention is also legal for Russia. Similarly, the Israeli government sometimes argues that its aggressions, for example, when it unilaterally and illegally¹⁷² bombed an Iraqi nuclear reactor,¹⁷³ are cases of legitimate self defense—anticipatory self defense.¹⁷⁴ These arguments¹⁷⁵ are truly foolish because the claims empower Israel's neighbors to argue that their aggressions are anticipatory self defense. Anticipatory self defense is illegal under international law.¹⁷⁶ Moreover, a rule of law which would allow anticipatory self defense resulted in a world of constant war. Indeed, international law prior to the U.N.—the body that contributed so much to the very creation of the Israeli state—allowed states to engage in any aggression at any time and thus allowed anticipatory self-defense. However, the rule prior to the U.N. resulted in war after war. As such, the proposed Israeli norm has never been taken up by any other state, not even by Israel's close allies. It is also why the United States should think carefully before deciding to advocate a norm of lawful unilateral humanitarian intervention to secure the right to democracy. Certainly, “humanitarian intervention” is more defensible than “anticipatory self defense” in a logic of shaping a world of peace and justice through the rule of law, human rights and democracy. However, democracy at gunpoint cannot work. Promulgation of norms often works best through emulation. NATO member states can and should persuade other states to adopt NATO member norms such as democracy, liberty of expression, freedom of religion, tolerance, and charity because such values attract compliance because they work substantive justice. Such values transcend states and even religions, and by their very transcendence they are powerfully attractive. An orchestra of rights, even if disciplined and constrained by reality, operates harmonically.

172. HEINTSCHEL VON HEINEGG, *supra* note 11, § 435, at 206–07.

173. *Id.* §§ 435–36, at 207–08.

174. To be clear, the purported right to “anticipatory self-defence[sic]” is flat out rejected by the U.N. HERDEGEN, *supra* note 61, § 34(19), at 237–38.

175. See, e.g., Beres Louis Rene, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense under International Law*, VAND. J. TRANSNAT'L L. 111 (1993–94).

176. HEINTSCHEL VON HEINEGG, *supra* note 11, § 432, at 202.

C. Would U.S. or NATO Intervention in Syria Be Lawful? If So, When?

The U.S. position on Syria is that the Syrian people have a right to democracy and to self-determination, and that the ruler of Syria, Assad, is systematically and brutally repressing the Syrian people in violation of the most basic human right—the right to life; and that this in turn entails some right to overthrow Assad’s regime to which the U.S. can legally contribute to, somehow. The U.S. approach is nothing more than the neo-conservative “regime change” theory—this time represented by the U.S. left, rather than the right. If it were not facing a vacuum of ideas on the part of Russia or China (PRC) then it would be indefensible interventionism. But in the face of blind intransigence and grave human rights violations, in the absence of any vision or alternative presented by Russia or the PRC, the United States and its NATO allies are justified to propose alternatives which otherwise might be questionable. The U.S. position has moral force, and claims to fulfill the U.S. duty to respect and protect¹⁷⁷ human rights, (an international rule which in my view is yet in formation, i.e. *de lege ferenda*, more political than legal);¹⁷⁸ is there any *legal* basis for this chain of claims expressly or implicitly made by the U.S. to contribute to regime change in Syria?

1. The Right to Democracy

Our first question must be whether there is a right to democracy under international law; this is a more difficult question than one may think. While our own first-world liberal democratic values of government by consent, whether directly or via elected representatives, might lead us to naturally presume there is an international norm of democracy that is not the case according to history. Throughout thousands of years of human history, states have been governed by theocrats, dictators, kings, and emperors. Democracy, even as the clear modern trend for two centuries, is in fact an exceptional phenomenon. If we wish to decode the keywords “American exceptionalism” in a helpful sense, I would suggest understanding the U.S. Republic as exactly what it claims to be. The U.S. is a new secular order—*novus ordo saeculorum*. It is a world-order (kosmos) of democracy instead of royalty, a civil and not religious state, governed by a principle of consent and freedom rather than order and constraint. However, although American exceptionalism *was* exceptional, it has become less so as America’s founding ideas have increasingly found resonance elsewhere – the exception (secular democracy and absence of constraint) has become the rule, and the rule (theocratic hierarchical authority) has become the exception. When looking at *international law* we have to

177. For an argument that sovereignty is the responsibility to protect *see, e.g.*, HEINTSCHEL VON HEINEGG, *supra* note 11, § 384, at 166. I regard that as desirable but wishful thinking, at best *de lege ferenda* and certainly not *lex lata*. Note for example the principle of immunity of the state and its agents.

178. But a political right may nevertheless at times be effective. *See* Louis Henkin, *NATO’s Kosovo Intervention: Kosovo and the Law of “Humanitarian Intervention”*, 93 AM. J. INT’L L. 824, 826 (1999), available at http://heinonline.org/HOL/Page?public=false&handle=hein.journals/ajil93&men_hide=false&men_tab=citnav&collection=journals&page=824 (“[It is the] responsibility of the world community to address threats to international peace and security resulting from genocide and other crimes against humanity.”).

recognize the fact that most states have historically been governed by aristocratic and theocratic forces, essentially expressing the Aristotelian idea of the state as the family writ large. This implies all of the opportunities and constraints that familiar relations require. A minority of states are still governed in such ways.

Given this history we can question whether a right to democracy exists as *lex lata*, i.e., as existing positive international law. However I argue that there is a right to democracy under international law. People are best governed when they are self-governing. Other scholars have recognized the emerging right to democracy.¹⁷⁹ The right to democracy is *de lege ferenda* and such a right would likely not be considered as binding customary international law before a U.S. court after *Sosa v. Alvarez-Machain*.¹⁸⁰ Today's theocratic dictatorships are the persistent objectors to the rising customary law of democratic self governance. The right to democracy is certainly not yet *jus cogens* but one day may be.

We can see the right to democracy in the very foundations of the international legal system. Peoples, i.e., nations,¹⁸¹ constitute states.¹⁸² This is why international law is also known as "the law of *nations*" (*jus gentium*). States are constituted by peoples and in their mutual intercourse states in turn constitute the international system.¹⁸³ A democratic basis, of a sort, is the foundation of international law.

We may also consider the right to democracy from the perspective of other rights, which are unambiguous. Since at least the 1970s, there is a positively recognized international right to national self-determination.¹⁸⁴ Furthermore, there is also an internationally recognized right to revolution. The right to rebel is a consequence of the natural law right to self defense, i.e., the right to self-preservation. The right to revolution is seen in positive law in the fact that insurgent movements, if sufficiently organized and successful, enjoy belligerent rights in domestic armed conflicts and can become a successor government to the state power which they opposed.¹⁸⁵

We may also look to international treaty law for evidence of the right to democracy. The Universal Declaration of Human Rights¹⁸⁶ and the International Covenant on Civil and Political Rights¹⁸⁷ indicate democratic rights and principles under international law. Likewise, U.N. Resolutions recognize democracy as a key norm.¹⁸⁸

179. Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 544 (1992).

180. 542 U.S. 692 (2004) (noting that alien tort claims may only invoke norms which are *lex lata*, not *de lege ferenda*).

181. KÜNG & ECKERT, *supra* note 65, § 66, at 62–63.

182. KÜNG & ECKERT, *supra* note 65, § 49, at 51–52. The alternative theory is that the international system constitutes states. However, that is not logical.

183. OESER & POEGGEL, *supra* note 69.

184. *Id.*

185. HERDEGEN, *supra* note 61, § 11(2), at 98.

186. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

187. International Covenant on Civil and Political Rights, art. 25, Dec. 19, 1966, 999 U.N.T.S. 171.

188. See G.A. Res. 50/172 ¶ U.N. Doc. A/RES/50/172 (Dec. 22, 1995); G.A. Res. 56/154 ¶ U.N. Doc. A/RES/56/154 (Feb. 13, 2002) (noting national sovereignty in electoral processes for protecting human rights).

Taken together,¹⁸⁹ the right of a people to form a state,¹⁹⁰ the right of a people to national self-determination,¹⁹¹ the right of the governed to rebel against an unjust government when no alternative exists to secure their own survival, in concert with various treaty rights to democratic representation and self-expression indicate that there is a global norm—the right to democracy. A right to democracy exists at least *de lege ferenda*. Such are the birth pangs of new rules of international law. The right to democracy is however not *jus cogens* because it is immediately confronted by the fact of dictatorship. The naked declaration of the right to democracy is immediately confronted by the reality of dictatorships around the world. However, dozens of dictatorships in South America in the eighties and in Eastern Europe in the nineties went out of business. More will follow. Still, a minority of governments on earth remain governed by theocratic regimes or secular dictatorships: they may be seen as persistent objectors to the rising customary law principle of democratic self-determination. Dictatorships still exist. We can and should help them out of the sad black and white world of fear and poverty and into the spectral world of hope and comfort—the brighter future that everyone wants. That is how we extend human rights—by persuading people. If we think someone is not respecting human rights, as we would like him to, then we must explain to him why respecting basic rights is in his best interests. No one likes threats and lectures. Everyone wants the good life; point out how to get it and they will go for it.

Furthermore, in advancing the rule of law, the protection of human rights, and the right to democracy we must be very careful of cultural blindness. While it may shock you, a peoples' dictatorship may very well be popular. Who does not admire a strong and effective leader who does good things? A people's dictatorship can be considered by the governed to be well-governed and legitimate by the governed. Likewise, an Islamic Republic may be well loved by the governed. One must not be too quick to judge any other culture but one's own, to universalize local values, lest we misconstrue or misunderstand others actions and intentions or make broad brush generalizations. For example, I am personally fine with just about any family structure. However, different cultures believe in different family forms. For example, Muslim polygamists think they are being fair and charitable—they have fewer divorces. Likewise, gay marriage might shock some cultures, yet in others it is normal. Simply because a people do not enjoy self-representation the same as others does not mean they do not enjoy self-representation.

Even if there were no international right to (western style liberal) democracy there is certainly an internationally recognized right to rebel. Just as Russia is right to claim there is no unilateral NATO right to attack Syria's government, even in order to help the Syrian people, there is a right of the Syrian people to wage war against their own government, i.e., insurgency. Whether such will redound to the

189. See Cerna, *supra* note 45 (arguing that, if all people have human rights and democracy is a human right then all people have a right to democracy).

190. HEINTSCHEL VON HEINEGG, *supra* note 11, § 115, at 68.

191. *Id.*

benefit of Islamic Jihadis is another question. Just as one must be careful of cultural blind-spots, one must also be careful of the unintended consequences of advocating or using violence. Violence should be our last resort, not merely for humanitarian reasons - we are all human. We should also be hesitant to use violence because death is irrevocable and entails emotional wounds among the survivors that never heal, and which may one day bear the bitter fruit of vengeance or unintended consequences. We live in the world for which we set an example.

2. Does the Right of a People to National Self-Determination or to Democracy Imply a Right of Other States to Intervene?

From the idea of a right to democracy, the U.S. would like to argue for some right of other states to intervene to help an oppressed people obtain democracy. That claim is more tenuous than the claim for a right to democracy under international law. First of all, Article 2(4) of the U.N. Charter clearly outlaws the unilateral use of force except in self defense; any military intervention requires the approval of the Security Council of the U.N.¹⁹² However, if approved by the Security Council, humanitarian intervention is legal.¹⁹³

So, the right to democracy is an example of a case where a right, if it exists at all, may have no effective means of legal enforcement. Political remedies such as violent revolution are the only option. When people make extreme legal claims that have a weak basis in positive law, the result is that they undermine the idea of the efficacy of international law which, as a status quo power, is not in the interests of the U.S. or any of its NATO allies.

3. Humanitarian Missions under International Law

Although the right to democracy under international law is tenuous, and there is no right to unilateral humanitarian intervention under international law,¹⁹⁴ that does not mean international law cannot be plausibly invoked in the case of Syria. First, while Russia has vetoed the U.S.'s proposed resolutions regarding Syria, that

192. Although, with Security Council approval an intervention to secure democratic rights may well be legal and no unlawful intervention in the internal affairs of another state. See Karsten Nowrot & Emily Schebaker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 378 (1998-1999), available at http://heinonline.org/HOL/Page?public=false&handle=hein.journals/amuilr14&men_hide=false&men_tab=citnav&collection=journals&page=321 (describing lawful pro-democracy humanitarian intervention).

193. See U.N. Charter art. 32; U.N. Charter art. 42; Hurd, *supra* note 70.

194. Cf. Nowrot & Schabaker, *supra* note 192, at 321, 372. Author Nowrot regards the legality of unilateral humanitarian intervention as uncertain:

Even if the international community of states once accepted a customary doctrine of humanitarian intervention, it is not at all clear that the doctrine survived the United Nations Charter. Given the recent United Nations authorized humanitarian interventions in Somalia, Iraq, and the former Yugoslavia, however, it is possible to conclude that humanitarian intervention may be legally authorized by the Security Council. The legal status of unauthorized interventions, however, is tenuous.

Id. at 372.

simply means the U.S. and its NATO allies can, and should, put the ball in the Russian court. Russia thinks the proposed resolutions were not even-handed since they only proposed the possibility of sanctions against the government of Syria. Russia ought to table a resolution that contains proposals Russia considers even-handed and would achieve the desired goal of peace and stability in Syria. However, the Russian Foreign Minister, Sergey Lavrov does not have any alternative resolution ready after a half a year of crisis. The Russian Federation has shown itself incapable of generating or implementing any alternative to Washington and NATO. While it might have been sensible to have given Russia opportunities to elaborate alternatives, the Russian Federation has had plenty of opportunities to do so and has instead only engaged in dilatory and ham-handed political grandstanding.

The following sections shall discuss ways in which humanitarian missions can be constructed so as to help people out of this mess.

a. Humanitarian Rescue

First, it is fairly clear that there is an actual state practice,¹⁹⁵ constant both before and after the U.N. Charter, which permits states to lawfully rescue their own nationals in danger. No one credible suggested that the Israeli raid on Entebbe, Uganda (a state which suffered self-inflicted genocide) in response to an illegal hostage taking, was illegal. The violation of Uganda's sovereign territory was regrettable, but necessary and justified by the higher norm of the protection of innocent life and by the failure of Uganda to properly police its own territory. Similarly, the French intervention at Kolweizei was also regarded as entirely legal. If Russia were to land its naval infantry it has stationed in the Eastern Mediterranean in order to protect its own nationals from insurgency, that would be legal under international law *a fortiori* if they were invited to land by the Syrian government. Thereto, we can note that the Russian government did not veto the extension of the U.N. peacekeeper mission, which ended in August 2012 due to the impasse among the members of the Security Council.¹⁹⁶ I have not yet seen an indication that the Kremlin is other than disgusted or jaded at the waste of human life in Syria. Ending the peacekeeping mission in Syria was a mistake; it should have been extended and included Russian forces. Both Russia and NATO would like something other than a civil war and human rights abuse in Syria. However, while Russia's cogent support of its ally is sensible, it is right of Russia to criticize the west for failure to consider the aftermath of the removal of Assad. Russia is not committed to the person Assad, rather it is committed to an orderly outcome which will not fuel fundamentalist extremist violence. While Russia is not proposing a better future for the Syrian people the West did not think through the aftermath of

195. Actual state practice is one element of customary international law. See, e.g., KÜNG & ECKERT, *supra* note 65, § 26, at 37.

196. *Monitoring a Cessation of Armed Violence in all its Forms*, UN.ORG, <http://www.un.org/en/peacekeeping/missions/unsmis/> (last visited Mar. 10, 2013).

regime change in Libya, Egypt—or Syria. So, the Russian intransigence and blindness is only relatively to be condemned.

b. Humanitarian Relief (*devoir d'ingérence*)

Just as one can distinguish a few clear cases where states legally intervene with executive power to defend the very lives of their citizens, we can also note the fairly unquestioned practice of humanitarian relief.¹⁹⁷ Humanitarian relief is the provision of non-military means such as food, medicine, and water—the non-violent necessities required for human survival. Peacekeeping keeps belligerents separated and is preventative. The U.S. has been undertaking humanitarian relief in Syria with neither approval nor condemnation, neither by the U.N. nor by the Russian Federation.¹⁹⁸

Humanitarian relief in French law is known as the *devoir d'ingérence*—the duty of provision of resources in the face of an ungoverned or unmanageable situation.¹⁹⁹ Humanitarian relief does not involve the use of force and is a form of peacekeeping. Peacekeeping is the provision of military forces to observe, and if possible, keep separated the conflicting factions. It is not likely that humanitarian relief requires U.N. Security Council authorization since it is not a use of force. It is an intervention, but a non-violent intervention, and when justified by necessity,²⁰⁰ it should be seen as lawful. It is an actual state practice, not condemned by any state, and simply does not evoke the U.N. Charter Article 2(4).

197. See, e.g., 10 U.S.C.A. § 2561 (WEST 2012) (“Humanitarian assistance”).

198. U.S. *Humanitarian Aid Reaching Syria and Neighboring Countries*, U.S. DEP’T OF STATE (Aug. 2, 2012), <http://www.state.gov/r/pa/prs/ps/2012/08/195965.htm> (cooperation with UN); Press Release, U.S. Embassy, Moscow, U.S. Humanitarian Assistance to Syria (May, 11 2012), available at http://moscow.usembassy.gov/pr_051112.html.

199. Operations Paix, Lexique, “*Devoir et Droit d’Ingérence*” (2012), <http://www.operationspaix.net/41-lexique-devoir-et-droit-d-ingerence.html>.

Le droit d'ingérence est la reconnaissance du droit des États de violer la souveraineté nationale d'un autre État, en cas de violation massive des droits de la personne. Le devoir d'ingérence, quant à lui, est conçu comme plus contraignant. Il désigne l'obligation morale faite à un État de fournir son assistance en cas d'urgence humanitaire. Ni le droit, ni le devoir d'ingérence n'ont d'existence dans le droit humanitaire international. L'ingérence elle-même n'est pas un concept juridique défini. Au sens commun, il signifie intervenir, sans y être invité, dans des affaires qui relèvent essentiellement de la compétence nationale d'un État. (The right to intervene in an ungovernable situation [humanitarian intervention] is the recognition of the right of states to violate the national sovereignty of another state in case of massive violations of human rights. The duty of a state in the face of ungovernable situation [humanitarian relief], as for it, is conceived more restrictively. It designates the moral obligation of a state to furnish its assistance in the case of a humanitarian emergency. Neither the right nor the duty of states in the face of an ungovernable situation [i.e. neither humanitarian intervention nor humanitarian relief] are part of the international law of armed conflict [i.e. international humanitarian law]. “Failed State” [l’ingérence] itself is not a juridically defined concept. In the usual sense it indicates intervention, without invitation, into the affairs which refer to the essential competences of the state.)

Id.

200. On necessity as a justification, see HERDEGEN, *supra* note 61, § 34, at 241.

c. Humanitarian Intervention

One can, and should, distinguish humanitarian intervention (*droit d'ingérence*) from humanitarian relief.²⁰¹ Humanitarian intervention entails the use of force to protect a populace from a state.²⁰² It is peace making. Peace making is the forcible ending of hostilities. A humanitarian intervention may seek to merely separate warring parties or may go further and seek to remove a person, persons, or entire government.²⁰³ After the various U.N. sanctioned military and paramilitary activities in Yugoslavia, it seems fairly clear that humanitarian intervention with the approval of the U.N. Security Council is legal²⁰⁴ at least where approved by the U.N. Security Council.²⁰⁵ That is because humanitarian intervention is a use of force and is, generally speaking, not a use of force in self defense. The use of force in humanitarian intervention must, like the use of force generally, be necessary, proportional, and approved by the Security Council. Additionally, the use of force in humanitarian intervention must be not only necessary to prevent some greater harm but also likely to be effective thereto.²⁰⁶ Without the approval of the U.N. Security Council,²⁰⁷ humanitarian intervention, however desirable it may be to some,²⁰⁸ would be illegal²⁰⁹ for otherwise there would be abuse of such right.²¹⁰ Thus, even if the Syrian people have a right to rebel (they do) and a right to

201. See, e.g., Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 340 (1994-95) (humanitarian assistance distinguished from humanitarian intervention).

202. HEINTSCHEL VON HEINEGG, *supra* note 11, § 451, at 218.

203. *Id.* § 456-57, at 222-23.

204. *Id.* § 451, at 219.

205. *Id.* § 454, at 220.

206. *Id.* § 455, at 221-22.

207. The view from Russia likewise seems to be that the Security Council approval of humanitarian intervention is required if such a right exists at all. See Л.Н. Тарасова, *К ДИСКУССИИ О ПРАВОМЕРНОСТИ ГУМАНИТАРНОЙ ИНТЕРВЕНЦИИ, 9 ВОПРОСЫ ЦИВИЛИСТИЧЕСКОЙ НАУКИ И СОВРЕМЕННОСТЬ* [*On the Discourse of Legality of Humanitarian Intervention, Nine Questions of Contemporary Civil Law Science*], Vol. 1, No. 14, *Вестник Волгоградского государственного университета*. Серия 5: Юриспруденция, 99 (2011), available at http://new.volsu.ru/upload/medialibrary/178/2_jbqfkwlzmdzxgct.pdf (noting that the legal status of humanitarian intervention under international law is ambiguous, but probably does not exist without U.N. Security Council approval).

208. Often, U.S. authors argue, perhaps understandably, and certainly from good intentions, for a unilateral right to humanitarian intervention to prevent gross violations of basic human rights. I think those arguments are wrong as a matter of positive law and do not recognize the fact that enabling unilateral humanitarian intervention for one state enables it for all states. See, e.g., Amy Eckert, *The Non-Intervention Principle and International Humanitarian Interventions*, 7 INT'L LEGAL THEORY 49 (2001), available at http://heinonline.org/HOL/Page?public=false&handle=hein.journals/intl7&men_hide=false&men_tab=citnav&collection=journals&page=49 (arguing that international law permits unilateral intervention to prevent gross violations of human rights).

209. Henkin, *supra* note 178.

210. The reason that unilateral intervention is illegal is because of the fact that otherwise spurious claims to "humanitarian" intervention would be made any time any state wished to interfere in the internal affairs of other weaker states. The Russian literature is reserved regarding the right to humanitarian intervention, and critical of its potential for abuse. П.А. ЦЫГАНКОВ, *Гуманизация международных отношений: противоречия и парадоксы* 1 ГРАЖДАНСКОЕ ОБЩЕСТВО И ПРАВОВОЕ ГОСУДАРСТВО ОБЩЕСТВЕННЫЕ НАУКИ И СОВРЕМЕННОСТЬ 51, 57 (1998). The fact of human rights atrocities committed in the name of humanitarian intervention and the problem of pretextual abuse of the idea of the right to humanitarian intervention was noted as early as 1910. See Anton Rougier, "La théorie de l'intervention d'humanité," 17 REVUE GENERALE DE DROIT INT'L PUB. 468 (1910).

democracy (maybe), those rights simply do not entail a unilateral right of the U.S. or NATO to intervene militarily in Syria's internal affairs. It is true that the refugees fleeing Syria make the Syrian situation an international concern, properly subject to governance by the U.N. Security Council.²¹¹ It is also true that the Syrian destruction of a Turkish aircraft and aircrew²¹² by Syria entails NATO's right to proportional reprisals.²¹³ However, there is currently no legal right to intervene militarily in Syria to oust Assad. That indicates it is all the more necessary to prevail upon the Russian government's self interest in being seen as the force on the right side of history. Unfortunately, to present the Russian Federation has consistently proven to be intransigent and blind on the idea of just how to shape a better future for the Syrian people.

d. Summary

In my opinion, the best way forward in Syria is to reintroduce, extend, and if possible, expand the role of the peace keeping observers' mission by establishing refugee zones protected by NATO and, if possible, also by Russian naval infantry, preferably pursuant to an extension of UN Security Council Resolution 2043.²¹⁴ While the Russian diplomatic apparatus may move at a glacial pace, when the vertical power system does make a decision the apparatus moves in unison and rapidly, i.e., decisively. However, given Russia's consistent repeated failures over the past half year to propose any solution I do not expect Russia to contribute other than negatively to this crisis. This is unfortunate for the Russian Federation. However, Putin's team lacks vision. Lavrov's Ministry of Foreign Relations has not shaped a resolution which would ensure a better future for all Syrians, but has consistently blocked efforts by the United States and its allies to do so.

211. Thus, for example, international Refugees were seen by the U.N. Security Council as endangering international peace in Iraq, Haiti, Burundi, Rwanda, and Zaire and thus subject to the U.N. Security Council's ambit. Nowrot & Schabaker, *supra* note 192, at 350–51.

212. Ibrahim Kaya, *What Does International Law Say About the Downing of the Turkish Jet?*, TODAY'S ZAMAN (June 26, 2012), <http://www.todayszaman.com/news-284711-what-does-international-law-say-about-the-downing-of-the-turkish-jet-by-ibrahim-kaya.html>.

213. The North Atlantic Treaty art. 5, Apr. 4, 1949, available at http://www.nato.int/nato_static/assets/pdf/stock_publications/20120822_nato_treaty_en_light_2009.pdf (“[A]n armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence [sic] recognised [sic] by Article 51 of the Charter of the United Nations”). If the Republic of Turkey becomes a Party “[f]or the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack . . . on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed” Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, art. 6(1), S.C. Res. 2043, U.N. Doc. S/Res/2043 (Apr. 21, 2012), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2043%282012%29.

III. CONCLUSION

This article began with a summary of the political stakes and a discussion of the relevant laws. We conclude with the laws, which are hopeful, and then turn to the politics, which are less than hopeful.

Some ambiguity in international law is inevitable because one of its major sources is international custom. Customary international law is defined²¹⁵ as actual state practice (usages) and the belief that such usages are lawful (*opinio juris*).²¹⁶ Both usages and *opinio* will inevitably be somewhat uncertain. Whoever wishes to plead a customary law must bear the burden of proof that the custom even exists,²¹⁷ which helps to resolve uncertain cases. Furthermore, the formation of new customs under international law is always possible and may entail the violation of existing customs. When is the violation of an existing custom illegal and when does the illegality become sufficiently widespread that a new custom has replaced an old one? Ambiguity and even illegality are built into customary international law.

International law is also open textured, in that the general principles of law, often elaborated through legal scholarship, invite a chorus of voices to the orchestra. Our task as conductors is to orchestrate the voices of jurists—voices which while few in number represent tens or even hundreds of millions of people—to channel that chorus of claims for justice into laws, which while few in number are fundamental and undeniable due to the attractive power of basic justice and clear thinking. The dead of all wars past accuse with their bones when we fail at this. Brave people—men, women, and children who stood and fell, living and loving and hoping for justice—are our judges. Our jury consists of those whom we may yet save.

Although international law is open textured, it is usually unambiguous. Some ambiguity in international law is inevitable because of customary law. Customary international law changes over time. Nevertheless, we can structure apparently conflicting norms by considering their sources and hierarchical priority, by rules and exceptions, burdens of proof, and carefully understanding the connections between national laws and international law. International law emerges from the tears and blood of these struggles.

Our grandparents fell in global wars and our parents faced each other down in the Cold War. Marx rightly predicted that technological progress would *inevitably* make the abundance of social production available to all, creating a world of peace and plenty with civil society replacing state and violence. Our task now is to extend the logic of peace through prosperity and interdependence from the global core to its periphery.

215. See, e.g., HEINTSCHEL VON HEINEGG, *supra* note 11, § 233 at 111.

216. HERDEGEN, *supra* note 61, § 16(1), at 129.

217. HEINTSCHEL VON HEINEGG, *supra* note 11, § 231, at 111.

IV. PREDICTIONS

Poetic I may be, but politically my predictions are less sonorous. Many Syrians have already died. Many more will likely die. Continued descent into Syrian civil war seems likely. It is likely, but not inevitable, that U.S.–Russian relations will worsen rather than improve. Conflict in the Islamic world will likely continue, and these conflicts will cost cash, needlessly prolonging the global recession. More money will likely be wasted on wars that could have been avoided. I regard Syria as a lost opportunity to elaborate the rule of international law and to stabilize the Islamic world. I also suspect that the Syrian situation signals the start of a U.S.–Russian “cold peace” as can be seen in visa problems, expulsion of the U.S. Agency for International Development from Russia, the Russian “foreign agent” NGO registration requirements, and then the Magnitsky and anti-Magnitsky Acts, as well as in existing and proposed Russian anti-gay legislation, the termination of anti-criminal cooperation and Russian rearmament. Worst, bilateral U.S.–Russian tension is not the result of any ideological split. It is simply due to intransigence, inadaptability, lack of expertise and refusal to conceive of better futures than “the long war.” The U.S. and R.F. have a common interest in opposing terrorism. However, the U.S. foreign relations Establishment and its counterpart the Russian *nomenklatura* seem locked into stupid cold war logic of constant conflict. They lack expertise and vision.

There is however one real hope. Russia and the E.U. are strong trading partners. Interdependence fosters peace and prosperity. Global interdependence prevented another global war after the global depression of 2008 (unlike 1929, which led to 1939). Furthermore, I do not expect the current cold peace to break down into the proxy wars, which characterized the cold war. I do not expect Syria to be a proxy battlefield for the U.S. and R.F., unlike the Arab–Israeli wars of 1948–1982, the Vietnam War, the Korean War and other brush-fire wars. But cold-peace is sub-optimal. Somehow the U.S. Establishment and the *nomenklatura*, must learn to cooperate despite the hard past. It is in their common interest to do so. However, institutional habits seem to change at a glacial pace. If the cold peace is to melt into the white nights of a Petersburg summer then it is for Europe to bring the old rivals to a new understanding.

