

EDITORIAL

TALKING ABOUT MY GENERATION

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I. Entering Stormy Debates as Young Scholars

JE T'AIME, MOI NON PLUS: HOW FRANCE MADE THE UK LEGAL RATIONALE ON THE SYRIA STRIKES FAIL

Since the United States, the United Kingdom and France attacked several chemical weapons facilities in Syria on Saturday, the 14th of April 2018, the legal blogosphere has been abuzz. Yet, a key element sank into oblivion: France did not simply overlook the humanitarian intervention doctrine developed by the UK but rather deliberately ignored it. This note tells the story of how France makes the UK legal rationale fail on the Syria strikes; or how the 'Je t'aime, moi non plus' Franco-British alliance went unnoticed.

The general consensus on the blogosphere is that under the conventional *jus ad bellum* framework, the UK, the US and France's strikes cannot be considered lawful for four reasons: (i) they cannot be justified under the right of self-defense, (ii) they were not authorized by the UN Security Council, (iii) they have not been consented to by the Syrian government, and (iv) reprisals are unlawful.¹ I concur with this four-part conclusion. Alongside this

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¹ Jack Goldsmith and Oona Hathaway, 'Bad Legal Arguments for the Syria Strikes' (*Just Security*, 14 April 2018) <www.justsecurity.org/54925/bad-legal-arguments-syria-strikes/> accessed on 24 April 2018; Marko Milanovic, 'The Syria Strikes: Still Clearly Illegal' (*EJIL:Talk!*, 15 April 2018) <www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/> accessed on 1 May 2018; Mary Ellen O'Connell, 'Unlawful Reprisals to Rescue against Chemical Attacks' (*EJIL:Talk!*, 12 April 2018) <www.ejiltalk.org/unlawful-

consensus, voices have also been heard in support of a humanitarian intervention justification, starting from the UK government itself.² I would like to confront the idea that the humanitarian intervention doctrine could offer a persuasive justification for the strikes. What I propose here is not a redundant conceptual exercise but rather it is to show that France, by deliberately excluding the humanitarian intervention doctrine and choosing a distinct legal rationale to justify the strikes, invalidates – or at least undermines – the attempt of the UK to legally justify the strikes on the humanitarian intervention ground.

President Macron, domestically, articulated an extensive interpretation of the Security Council authorization as a justification for the strikes. The detailed attempt to use a different normative framework was presented in an interview with President Macron, which appeared on the French television and deserves some attention. Although unconvincing, the clear choice of an alternative *jus ad bellum* norm to justify the strikes confirms that France deliberately diverged from the UK rationale.

The UK government argued that the Syria strikes were lawful under the humanitarian intervention doctrine. In its own words, the strikes (i) objectively constituted the only possible way to alleviate an extreme humanitarian distress, (ii) which required immediate and urgent relief. Besides, the strikes were (iii) the minimum necessary means to achieve that

reprisals-to-the-rescue-against-chemical-attacks/> accessed 1 May 2018. For a more nuanced point of view, see Monica Hakimi, 'The Attack on Syria and the Contemporary Jus ad Bellum' (*EJIL:Talk!*, 15 April 2018) <www.ejiltalk.org/the-attack-on-syria-and-the-contemporary-jus-ad-bellum/> accessed on 1 May 2018; Monica Hakimi, 'Pigs, Positivism, and the Jus ad Bellum', (*EJIL:Talk!*, 27 April 2018) <www.ejiltalk.org/pigs-positivism-and-the-jus-ad-bellum/> accessed on 1 May 2018.

² UK Government, Prime Minister's Office, Policy Paper, 'Syria Action – UK Government legal position', 14 April 2018, <www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> accessed 24 April 2018. See also for scholarly support of the humanitarian intervention doctrine, Harold Hongju Koh, 'The Real "Red Line" Behind Trump's April 2018 Syria Strikes' (*Just Security*, 16 April 2018) <www.justsecurity.org/54952/real-red-linebehind-trumps-april-2018-syria-strikes/> accessed 18 April 2018.

end, and (iv) were conducted *for no other purpose*.³ As it was argued approximately a year ago after the 2017 US strikes in Syria,⁴ the overwhelming state support following the 2018 strikes⁵ would reveal that the *jus ad bellum* actually contains or is developing a humanitarian intervention exception to Article 2(4) of the Charter of the United Nations (UN).⁶ Without entering the discussion of how advanced the process towards accepting humanitarian intervention is as an additional exception to the prohibition on the use of force, the 2018 Syrian strikes cannot be considered either as justified on that basis or, thus, as triggering such law-making momentum.

Why is that? Because France did not leave the humanitarian intervention doctrine aside just by mistake. In an interview conducted by journalists Edwy

³ These criteria are recalled by the UK government itself. See UK Prime Minister's Office Policy Paper (n 2). The last criterion will be crucial to understanding how the French rhetoric makes the UK's justification fail. [Emphasis added by the author]

⁴ The US used force in response to the Syrian government's chemical weapon attacks on the 4th of April 2017. After those strikes, Harold Koh talked about an 'important moment of lawmaking' with regards to the plausibility of the humanitarian intervention justification. Harold Hongju Koh, 'Not Illegal: But Now the Hard Part Begins' (*Just Security*, 7 April 2017) <www.justsecurity.org/39695/illegal-hard-part-begins/#more-39695> accessed 14 April 2018.

⁵ It should be noted that after the US, the UK, and France conducted the strikes, the Security Council met in an emergency session. The draft resolution that would have condemned the strikes was not adopted. Russia, China, and Bolivia supported the resolution; eight states voted against it, and four abstained. See UN Security Council, 'Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression', 14 April 2018, SC/13296, <www.un.org/press/en/2018/sc13296.doc.htm> accessed 30 April 2018. See also Alonso Gurmendi Dunkelberg et al, 'Mapping State's Reactions to the Syria Strikes of April 2018' (*Just Security*, 22 April 2018) <www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018/> accessed 22 April 2018: the map shows that States broadly condoned the 2017 operation against Syria. 19 states and one regional organization expressly supported the strikes without pronouncing on their legality. Many states – around 20 – neither fully supported nor criticized the strikes and only 11 states, including Syria itself and Russia have opposed the air strikes under international law.

⁶ Andrew Bell, 'Syria, Chemical Weapons, and a Qualitative Threshold for Humanitarian Intervention' (*Just Security*, 10 April 2018) <www.justsecurity.org/54665/syria-chemical-weapons-international-law-developing-qualitative-threshold-humanitarian-intervention/> accessed on 1 May 2018.

Plenel and Jean-Jacques Bourdin on the 15th of April 2018, President Macron, while not expressly dismissing the humanitarian intervention doctrine, did reject the idea that the strikes were aimed at or capable of improving the humanitarian intervention in Syria.⁷ When challenged on the possibility to affirm that peace can be obtained through the use of force, President Macron replied that, of course, one cannot seriously argue that peace can be obtained by military attacks.⁸ On the contrary, he insisted that the 'only' reason for taking action was to respond to a violation of international law and to restore the credibility of the international community. The simple fact that President Macron considered the strikes as being, by themselves, unable to lead to 'peace' is of course not sufficient to establish that he excluded humanitarian intervention. However, the fact that he mentioned that the *only* reason for the strike was a goal other than the improvement of the humanitarian situation arguably reveals that he did exclude the idea that the strikes performed a humanitarian function.

Some might say that this conclusion is erroneous as Macron did not categorically and expressly exclude the humanitarian intervention justification. Yet, the interview illustrates that Macron refused to argue that the strikes constituted a humanitarian intervention considering that the operation would not demonstrably improve the humanitarian situation in Syria.⁹ Macron, thus, preferred to put forth a different rationale to the UK's reasoning; possibly the only one that he found defensible.

This leads us to a second point: it appears that Macron deliberately left out the humanitarian intervention justification because he intended to articulate – contrarily to what has been said –¹⁰ a claim under the traditional *jus ad bellum*

⁷ 'Macron, un an après: le grand entretien en intégralité', BFM-TV, Mediapart, (Paris, 15 April 2018) Interview conducted by Edwy Plenel (Mediapart) and Jean-Jacques Bourdin (BFM-TV), <www.youtube.com/watch?v=mt0as7x-kfs> accessed 24 April 2018 (BFM-TV & Mediapart Interview).

⁸ Ibid.

⁹ Koh, 'Not Illegal' (n 4). According to Harold Koh's test for judging the international lawfulness of claimed humanitarian interventions, the limited force has to be used 'for genuinely humanitarian purposes that was necessary and proportionate to address the imminent threat' and that 'would demonstrably improve the humanitarian situation'.

¹⁰ See for instance, O'Connell (n 1).

framework. I understand his rhetoric as justifying the strikes by an extensive interpretation of the UN Security Council authorization, which constitutes a conventional exception to the prohibition on the use of force.¹¹ Although the French legal rationale falls short of being convincing, it is essential to acknowledge the two steps followed by President Macron in his attempt to substantiate that the attacking states were acting on some form of extremely extensive, partly silent and retroactive, authorization of the Security Council. First, he insisted that the UK, the US, and France had acted not outside of the UN framework but rather as three of the five permanent members of the UN Security Council. Second, he tried to establish the implicit and/or *a posteriori* approval of the two remaining permanent members, Russia and China. Let me elaborate on this.

When criticized for acting in lieu of the international community in the absence of Security Council authorization, President Macron asserted that, on the contrary, it was 'the international community' that was taking action through these strikes.¹² More precisely, he argued that France was acting in its function as one of the permanent members of the Security Council, along with two other permanent members, the US and the UK. He concluded, as if it were sufficient or *should be* sufficient to amount to a Security Council authorization, that three approvals 'constitute the majority'. He then repeatedly insisted that the strikes aimed at restoring the credibility of the international community as a whole, and not to pursue a state-centered enterprise in a marked disdain for the UN framework.

Since the majority argument was unlikely to convince, Macron focused on the two remaining permanent members, China and Russia, by entering an equally doubtful demonstration. He claimed that, while officially condemning the strikes, President Putin had agreed in principle to such action during his visit

¹¹ Pursuant to Article 2(4) of the Charter of the United Nations, the use of force is prohibited. One of the exceptions to this principle is that the United Nations Security Council may authorize the use of force to maintain and restore peace and security. Under the collective security system established by Chapter VII of the UN Charter, the Security Council is to take measures in such cases, including the authorization of military action. Article 27 of the UN Charter provides that decisions are made by an affirmative vote of nine members including the concurring votes of the permanent members.

¹² BFM-TV & Mediapart Interview (n 7).

to France in 2017.¹³ Macron even insinuated that Putin may have given an off-the-record green light just before the strikes.¹⁴ Concerning China, Macron questionably argued that 'it has not escaped [our] notice that China dissociated itself from Russia on several occasions' and that neither China's nor Russia's official reactions after the strikes suggested that they would take military action in response to the strikes that might lead to an escalation of violence.

Although no accepted interpretation of the *jus ad bellum* norms makes the French argumentation admissible, the *jus ad bellum* logic lies at the foundation of Macron's rationale. In fact, France is very clearly trying to push for a justification of the strikes under a certain interpretation of the Security Council authorization exception to the prohibition on the use of force. This approach relies on the cumulative effect of three claims: i) the three attacking states (France, the UK, and the US) performed their duties and functions as permanent members of the Security Council by conducting the strikes; ii) the two other permanent members (China and Russia) gave an off-the-record, implicit, retroactive consent; iii) action was required to save the legitimacy of the UN system, which previously proved unable to act upon the atrocities perpetrated by the Syrian forces.

Macron's refusal to admit that the trilateral intervention contravenes the *jus ad bellum* norms and institutional setting, exemplifies that France did work on framing a legal justification and did not accidentally distinguish itself from the UK's rationale. The French reasoning would be keen to persuade us that

¹³ President Macron refers to an interview of President Putin conducted by Alexis Brézet and Renaud Girard, Interview of President Vladimir Putin, 'Vladimir Poutine au Figaro: 'Arrêtez d'inventer des menaces russes imaginaires!', *Le Figaro*, 30 May 2017, <www.lefigaro.fr/international/2017/05/30/01003-20170530ARTFIG00381-vladimir-poutine-au-figaro-arretez-d-inventer-des-menaces-russes-imaginaires.php> accessed 24 April 2018.

¹⁴ This was suggested twice by President Macron. First, prior to the strikes: Interview conducted by journalist Jean-Pierre Pernaut, 'Emmanuel Macron au 13H de TF1 : l'entretien integral', *JT TF1*, 12 April 2018, 4'30', <www.lci.fr/france/replay-interview-emmanuel-macron-au-jt-13h-de-tf1-jean-pierre-pernaut-l-entretien-integral-2084367.html> accessed 24 April 2018; and second, after the strikes: BFM-TV & Mediapart Interview (n 7)", 6'50: 'I had Putin [on the phone] in the morning [preceding the strikes]'.

the strikes did not circumvent the persistent vetoes of Russia and China, but were rather based on their off-the-record or implicit approval for a 'yes' that trumped their vetoes. All this had a unique goal: to remedy the harm caused by the inertia of the UN; not so much the harm caused to the Syrian population whose protection was not the purpose and within the capacity of the strike, but the harm caused to the legitimacy of the international community.

So, how can we have a serious discussion about whether the 2018 Syrian strikes are justified under the humanitarian intervention doctrine when at least one of the three attacking states does not consider that they are aiming to improve the humanitarian situation in Syria or at least, does not sufficiently believe that the strikes could demonstrably improve the humanitarian situation? France's decision not to frame the operation as humanitarian intervention and, thus, not to rebut the criticism that the strikes were 'meaningless' for the improvement of the humanitarian situation in Syria,¹⁵ arguably leads to the rejection of the humanitarian intervention exception for the entire operation considering its alleged collective character. Contrary to what has been argued, the 2018 Syria strikes do not trigger a momentum of law-making and have not lent support to the humanitarian intervention doctrine. If anything, the strikes challenge the way the UN institution operates by trying to replace the Security Council authorization with a retroactive and/or implicit authorization by the international community.

¹⁵ Samuel Moyn, interviewed by Christopher Lyndon on Radio Open Source, 'Another Look at the Crisis in Syria', 19 April 2018, <radioopensource.org/the-trump-doctrine-in-the-middle-east/> accessed 20 April 2018.

II. In this Issue

This issue reflects the European Journal of Legal Studies' long-standing commitment to explore a broad range of legal issues with a diversity of theoretical approaches. The Spring 2018 Issue opens with a set of articles focusing on legal interpretation, either discussing the purposes of interpretation or the practice of interpreting. First, *Orlin Yalzanov* examines legal uncertainty under a law-and-economics framework, aiming not so much at challenging but rather at refining and sophisticating the current approaches to legal uncertainty. He ingeniously proposes an alternative categorization by distinguishing between two types of legal uncertainty. Second, *Lize R. Glas* creatively undertakes to clarify the requirements of procedural fairness applicable to the European Court of Human Rights (ECtHR), by 'translating' what procedural fairness, as interpreted by the ECtHR, entails for the self-same court.

This second article interestingly paves the way to *Vladislava Stoyanova's* scrutiny of the ECtHR's responses to cases concerning violations of migrants' human rights, in a context of countries hardening their immigration policies, and where populist narratives reject the intervention of the ECtHR on these matters. The analysis concludes, on the one hand, that the Court is willing to examine the Member States' decisions affecting migrants, and to condemn significantly harmful ones, and, on the other, that there is an emergence of unusual and less rigorous judicial reasoning in such cases. Remaining in the realm of rights litigation, *Volha Parfenchyk* tells the story of the Italian litigation for citizens' access to preimplantation genetic diagnosis (PGD). To do so, she explores how citizens' needs and interests interact with new technologies, constitutional rights and constitutional history. In that context, she resourcefully challenges the capacity of rights litigation to ensure the recognition of citizens' access to PGD in what she frames as a traditionally conservative society.

Following this set of articles, *Davor Petrić* invites us to go beyond the strict framework of the European Union to understand the global effects of EU energy regulation. The author shows the global influence of the EU in energy relations despite the absence of a consolidated internal and external approach to energy policy. The nuanced reasoning underlines the limits posed to the efficiency of such externalization by the EU's internal checks

and divisions. Also challenging EU institutions is *Riccardo Fadiga's* article, which showcases the rigorous thinking of this Issue's New Voices contribution. The article scrutinizes the European Commission's remedy to unlawful tax rulings. Although Fadiga supports the Commission's intent of limiting Member States' abuse of fiscal autonomy, he criticizes their method of doing so, which, he argues, violates the principle of protection of legitimate expectations.

Finally, we are delighted to present in this issue a review by *Raphaële Xenidis* of Iyiola Solanke's book *Discrimination as Stigma: A Theory of Anti-Discrimination Law*. In this book review, Raphaële Xenidis seriously engages with the core theses of the book, shedding light on the precious theoretical tools and shifts that the book adds to discrimination theory. The review also successfully opens a critical dialogue with Solanke on the limits of the proposed anti-stigma principle.

III. Young Scholars Working Together and Supporting Each Other

WORKING TOGETHER

This issue is the first one that I have run along with four outstanding women, Anna Krisztián and Janneke van Casteren, the EJLS Managing Editors, as well as Maria Haag and Rūta Liepiņa, the EJLS Executive Editors. I would like to thank them on behalf of the Entire Board for their unwavering commitment to the Journal. After several esteemed editors had to leave the Journal last year, the team nevertheless grew in number in September 2017 by welcoming twelve new in-house editors and twelve external editors. The EJLS being a peer-reviewed journal, the quality of the articles featuring in this issue is due to the editors' rigorousness and professionalism. Very soon, two Heads-of-Section will be handing over their posts to a new generation of Heads-of-Sections. Stavros Makris and Sergii Masol will be greatly missed in the Journal. We are convinced that they will do a marvelous job in accompanying the next generation of European Law and International Law Heads-of-Sections throughout the following months.

SUPPORTING EACH OTHER

Reiterating the essence of our Journal, a platform dedicated to and promoting excellent young scholarship, we had the pleasure of awarding a prize to Guilherme del Negro this March for his contribution on 'The Validity of Treaties Concluded Under Coercion of the State: Sketching a TWAAIL Critique' featuring in the Autumn 2017 Issue's New Voices section. Thanks to the renewed support of the President of the European University Institute, Professor Renaud Dehousse, and the EUI Law Department, I have the honor to announce ahead of the forthcoming calls for submissions that for the Autumn 2018 Issue and the Spring 2019 Issue, we will be able to reward not one but two of our peers for their creativity and the quality of their work. One prize will be awarded to the best New Voices contribution, and the other to the best General Article written by a young scholar.