

of the opposition's military strength.<sup>3</sup> Therefore, despite a lack of unity among regime opponents, it may be safe to conclude that there is a potential government-in-waiting, able to take charge should the Asad regime decide it has had enough.

The regime's support inside the country is much diminished. Some reports place the number of Syrian military defectors as in the range of 40,000–60,000 soldiers. Unable to trust the Sunni majority units, the regime depends on Alawite majority forces. Such units have been used over and over again all over the country and are tiring and wearing thin: they are unable to hold territory under their control as demands elsewhere call them off territory they may recently have seized. For example, the regime has had to pacify Homs three times, and still the uprising there continues. The same is true in Idlib, Deraa, Hama, and even rural Damascus.

Syria's economy and finances are a shambles. Inflation has wiped out savings. Alawites are preparing for the day of regime collapse by arranging exile or retreat to their mountain strongholds.<sup>4</sup>

As the conflict has dragged on, Iran and Hizbollah have intervened, trying to bolster the regime. The same is true of Russia.<sup>5</sup> The regime thus depends on outside support for its continued life. Its demise would strike a blow at its supporters.

Public debate on Syria seems averse to highlighting these realities of the Syrian conflict. Almost as if to copy the solution to the Sherlock Holmes mystery—the Silver Blaze<sup>6</sup>—where the watchdog did not bark because it was familiar with the criminal, so too the international community, so familiar over so long a period with Syrian violations of Article 2(4)<sup>7</sup> of the UN Charter, does not mention them. Is it fatigue? Is it fear of the consequences of taking notice? One day, a victim state may conclude that enough is enough. At that point, one can be sure the international community and international legal community will take notice. If one believes that enforcing the UN Charter's most basic principle is essential to minimum order, one might wish that the international community not wait.

#### REMARKS BY HAROLD HONGJU KOH\*

It is my honor to speak here again at the Annual Meeting of the American Society of International Law. A year ago, I spoke before this audience about the international legal

<sup>3</sup> Joseph Holliday, Senior Research Analyst, Institute for the Study of War, Briefing: Understanding Syria's Armed Opposition (Mar. 13, 2012).

<sup>4</sup> Michael Young, *Homs, Anvil of Syria*, NOW LEBANON, Feb. 10, 2012, at <http://www.nowlebanon.com/NewsArchiveDetails.aspx?ID=363038>; Isabelle Lasserre, *Khaddam: 'Assad planifie la partition de la Syrie'*, LE FIGARO, Jan. 25, 2012, at <http://www.lefigaro.fr/international/2012/01/25/01003-20120125ARTFIG00633-khaddam-assad-planifie-la-partition-de-la-syrie.php>.

<sup>5</sup> Alex Spillius, *Syria: Iran's Elite Quds Force 'Advising Asad Regime'*, TELEGRAPH (London), Feb. 9, 2012, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9072798/Syria-Irans-elite-Quds-force-advising-Assad-regime.html>; Stephen Collinson, *Head of Al Quds Force Leads Iran's Initiative to Arm Syrian Regime*, MIDDLE EAST ONLINE, Jan. 14, 2012, at <http://www.middle-east-online.com/english/?id=50001>; Michael S. Schmidt & Yasir Ghazi, *Iraqi Leader Backs Syria, with a Nudge from Iran*, N.Y. TIMES, Aug. 12, 2011, at A6, available at <http://www.nytimes.com/2011/08/13/world/middleeast/13iraq.html>; *Iranian Weapons Alleged for Syria*, UPI.COM, Apr. 15, 2012, [http://www.upi.com/Top\\_News/World-News/2012/04/15/Iranian-weapons-alleged-for-Syria/UPI-95931334496954/](http://www.upi.com/Top_News/World-News/2012/04/15/Iranian-weapons-alleged-for-Syria/UPI-95931334496954/); Geetha Pillai, *Syria Arms Imports Surge Almost 600%, Most Supplied by Russia*, INT'L BUS. TIMES, Mar. 20, 2012, available at <http://www.ibtimes.co.uk/articles/316657/20120320/syria-unrest-russia-arms-imports-exports-china.htm>; *Russian Warships to Patrol Syrian Coast Permanently*, RTT NEWS, Apr. 13, 2012, at <http://www.rttnews.com/1859771/russian-warships-to-patrol-syrian-coast-permanently.aspx?type=gn&Node=B1>.

<sup>6</sup> Arthur Conan Doyle, *The Adventure of the Silver Blaze*, 4 STRAND MAG. (1892).

<sup>7</sup> U.N. Charter art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .").

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basis for the United States' military operations in Libya. In that same spirit of openness and dialogue, I am grateful for the opportunity to engage so many distinguished international lawyers in this room about the very serious challenges we face in Syria today.

Let me divide my comments this morning into three: First, what, precisely, is happening in Syria? Second, what are the U.S. government and the international lawyers within it doing to address the crisis? And third, by what legal principles should this crisis be assessed and lawfully and effectively addressed?

Starting with the facts on the ground, everyone here knows the situation in Syria is extremely grave. As President Obama noted earlier this month, "what's happening in Syria is heartbreaking and outrageous. . . . [President Bashar al-Assad] has lost the legitimacy of his people. And the actions that he's now taking against his people [are] inexcusable . . . ." The Assad regime's brutality is well-documented and not subject to dispute. As Secretary Clinton has detailed,

the regime is creating an appalling humanitarian disaster. Tanks, mortars, and heavy artillery continue to target civilians in residential areas, including women and children. Security forces have cut off electricity and communications, sabotaged water supplies, invaded hospitals, and forced thousands of Syrians to flee their homes. The UN has found crimes against humanity. And now there are reports of troops massing for even more deadly assaults.<sup>1</sup>

The Assad regime's massacre of hundreds of citizens in the city of Homs is only the most flagrant example of its lawlessness and ruthlessness. The regime seems determined to suppress democratic dissent through bloodshed. Our best estimates are that the crisis has already claimed over 9,000 lives and uprooted tens of thousands of Syrians.

Given this alarming snapshot, what should we be doing about it? How can the United States best respond to the situation in Syria, consistent with domestic and international law as well as our values and interests? There are no easy answers, and there is no single tool capable of solving all the problems. The country sits at the hub of a geopolitically sensitive area, bounded by Turkey, Iraq, Jordan, Israel, and Lebanon. Its rulers have had powerful protectors in Russia and China, as evidenced by their vetoes of not one but two Security Council resolutions. Syria is home to a complex mix of ethnic and religious communities. The opposition is still coalescing and faces enormous challenges. People are uncertain about what comes after Assad. There is no denying that this is an enormously challenging moment for all of us who are committed to international human rights and to the rule of law.

Many in our government, and in the State Department, have been working around the clock to evaluate options and facilitate a resolution. President Obama and Secretary Clinton have devoted themselves to an all-out diplomatic effort to help bring increasing pressure to bear on the Assad regime. Secretary Clinton led our efforts at the Friends of Syria Conference in Tunis in February, and has spoken out about the crisis and been engaged behind the scenes on a daily basis. Ambassador Susan Rice has led our efforts at the United Nations, tirelessly working to build a unified position. And from the beginning of the crisis, my colleague Ambassador Robert Ford has displayed extraordinary heroism by risking his own personal safety to engage directly with the Syrian people, including through his travels to Jassim and Hama. He has also used social media to establish channels of communication with the Syrian

<sup>1</sup> *Travel Diary: Secretary Clinton Addresses Friends of Syria Meeting*, DIPNOTE (U.S. Dep't of State Official Blog) (Feb. 24, 2012), [http://blogs.state.gov/index.php/site/entry/travel\\_diary\\_friends\\_of\\_syria\\_tunis/](http://blogs.state.gov/index.php/site/entry/travel_diary_friends_of_syria_tunis/).

people, encouraging them to embrace nonviolent protest and calling the world's attention to the urgency of the human rights and humanitarian situation.

While our efforts have not yet resulted in a resolution to the Syrian crisis, neither have we stood idly by. To the contrary, the U.S. government, together with our partners, has been actively pushing on numerous fronts. We have engaged in ceaseless diplomacy in the Security Council, General Assembly, Human Rights Council, Friends of the Syrian People, and numerous other venues to build international consensus around the Arab League plan and further isolate the Assad regime. We are providing over \$17 million in humanitarian assistance through the UN and other organizations to support the people of Syria, and we are pursuing every available avenue to get that assistance to those in need. We have helped the Syrian opposition prepare to participate in the Syrian-led transition process that the Security Council has endorsed. We have redoubled our efforts to put financial pressure on those responsible for human rights abuses in Syria, including through three executive orders in the past year imposing increasingly severe sanctions. We have sought to ensure that Syrian nationals present in the United States are not forced to return to unsafe conditions, most notably by designating Syria for Temporary Protected Status under federal immigration laws. We have strongly supported the work of the Human Rights Council and the Office of the High Commissioner for Human Rights in documenting and publicizing human rights abuses through the Commission of Inquiry for Syria. And we have begun to discuss issues of accountability with our Arab and international partners. I am particularly proud of the contributions that dozens of lawyers from my own office—what we call the “L-Syria team” of the Office of the Legal Adviser—have made to these efforts.

It is our firm hope that the UN Security Council's Presidential Statement of last Wednesday, March 21, will mark a step forward toward a more unified international approach. Like our regional and global partners, the United States has made clear that Assad must immediately end his campaign of savagery against his own people, allow humanitarian aid to enter the country, and make way for a political transition that protects the rights of all Syrians. At the same time, we have made clear that now is the time for all nations to stand behind these demands. The Security Council's statement last week expressed strong support for the six-point plan put forward by the UN and Arab League Joint Special Envoy and former UN Secretary-General, Kofi Annan. Most critically, the Council echoed Annan's call for all sides to end the violence, with the onus on the government to take the first steps. The statement calls for immediate implementation of a daily pause in hostilities for the delivery of humanitarian assistance, and also for political dialogue and the release of detained persons. The statement further expresses support for a Syrian-led political transition to a democratic, plural political system. And the statement closes by indicating that the Council “will consider further steps as appropriate.” Without speculating on how exactly events might unfold in the weeks ahead, I know the administration will constantly assess what is happening inside Syria and adjust its tactics accordingly.

What international legal principles and other guidelines should govern our actions going forward? Let me close by suggesting three.

First, we must recognize that the primary responsibility for international peace and security in the United Nations system continues to rest with the Security Council. Under the UN Charter, only the Security Council can make certain decisions, such as sanctions determinations, that all UN member states are under a legal obligation to carry out. The General Assembly has already played a very important role in this crisis, as have regional organizations such as the Arab League—a role that Chapter VIII of the UN Charter expressly recognizes.

We both support and applaud the constructive steps that have been taken by the General Assembly and particularly the Arab League, which has been a leader in seeking to resolve this crisis. But we will also continue to press ahead in the Security Council to build on the advances made in the March 21st Presidential Statement, with its unanimous endorsement of a UN-supervised cessation of violence, humanitarian access to all areas in need, and the beginning of a Syrian-led political transition.

Second, as international lawyers charged with dealing with complexity, we should avoid the trap of seeing this dynamic and multifaceted situation in one-dimensional terms. For that reason, I do not agree with those who insist upon viewing our commitment to solving the Syrian crisis solely through the lens of military intervention. The international community's commitment to solving a problem should not be measured so narrowly. As we have seen throughout the Arab Awakening, different circumstances call for different responses. In addressing the Arab Awakening in Tunisia, Egypt, Libya, Bahrain, and elsewhere, this administration has carefully and consistently applied a smart power approach to foreign policy that rejects "one-size-fits-all" thinking.

In so saying, we specifically see no inconsistency between the U.S. approach to Syria and the U.S. approach to Libya. Neither our legal theories, nor our strategic objectives, nor our moral commitments have changed. What *is* different are the facts. As President Obama observed several weeks ago, in Libya we had "a UN Security Council mandate . . . and we knew that we could execute very effectively in a relatively short period of time." As difficult as Libya was, the President added, "[t]his is a much more complicated situation. . . . [T]he notion that the way to solve every one of these problems is to deploy our military, that hasn't been true in the past and it won't be true now." With respect to Libya, the Security Council of course adopted two important resolutions, 1970 and 1973. The proposed Security Council resolutions on Syria have differed substantially from Resolutions 1970 and 1973 in their terms. Moreover, from a practical perspective, it is by no means clear that the type of actions taken to protect Libyan civilians would have the same effect in Syria.

But that does not mean that the international community has turned away from the Syrian people or ignored the responsibility of the Syrian government to protect its civilian population. The Syrian government has been condemned for committing human rights violations by the General Assembly and the Human Rights Council; it has been placed under sanctions by the Arab League, the United States, and the European Union; and it has been the subject of a searching report by a UN Commission of Inquiry—which found credible evidence that it has committed crimes against humanity. As I alluded to earlier, the United Nations and the Arab League appointed Kofi Annan as a Special Envoy to seek both a cessation of hostilities and political reform. And on Sunday, Secretary Clinton will join the next Friends of Syria meeting in Istanbul, which will endorse the Syrian opposition's plan for a peaceful political transition. I recite this list not to suggest that we are satisfied with where things stand in Syria: Of course we aren't. But the principle of a "responsibility to protect" vulnerable civilians, or R2P, itself recognizes the importance of pursuing such options. This list of actions does give a sense of how—consistent with the principle of R2P—we and our international partners have been continually seeking out, developing, and using the tools that are available to us and appropriate to the situation to advance the protection of the Syrian population.

Third and finally, a commitment to ensuring that the Assad regime cedes power and a commitment to denying impunity for gross human rights violations can and should be maintained simultaneously. Like so many aspects of the situation, this issue is a delicate

one. But as I have already noted, the United States has strongly encouraged efforts to use emerging technologies to document and expose human rights abuses in Syria. In addition to the information that Ambassador Ford has shared on his own Facebook page, the State Department has set up a dedicated page on the “Humanrights.gov” website where we are posting satellite imagery of the Syrian Army’s attacks on civilian areas, alongside policy statements from U.S. officials. We have co-sponsored resolutions in the General Assembly and the Human Rights Council stressing the need for accountability. At the State Department last week, I met with Paulo Pinheiro, Chair of the UN’s Commission of Inquiry on Syria, which has forthrightly stated that crimes against humanity have occurred and that the Syrian people will need to have a leading voice on issues of accountability. The international community must continue to work to uncover and tell the truth about what Assad and his thugs are doing, and ultimately, as Secretary Clinton has said, “there must be accountability for senior figures of the regime.” While it is critical that a political transition occurs, the anticipation of certain forms of post-transition accountability may help to facilitate that process—for example, by opening up space for the regime’s opponents and encouraging defections by those officials who want to distance themselves from its crimes. We think it of the utmost importance that we work with governments and NGOs alike to continue documenting human rights violations and collecting evidence to keep shining a light on the inexcusable actions the Asad regime is taking against its people, and so the international community can uncover and tell the truth about what is occurring.

In sum, in Syria, like elsewhere in the Middle East during this remarkable Arab Spring, we do not have the luxury of confronting a simple situation. And neither should we expect simple answers to such difficult questions. As the organizers of this Annual Meeting have reminded us in choosing its theme, the central challenge for international lawyers in the 21st century is “confronting complexity.” What that means—in this and every setting that modern international lawyers face—is avoiding simplistic analogies and short-sighted solutions in favor of thoughtful, nuanced approaches that might deliver lawful and durable solutions to complex global problems.

### **THE UNITED NATIONS AND SYRIA: A WORK IN PROGRESS?**

*By Steven Mathias\**

As the crisis in Syria continues, and in the context in which the Security Council, as of the time of this panel being convened, has issued two Presidential Statements on the subject but failed to adopt two resolutions because of non-concurring votes of certain Permanent Members, it may be best to begin by noting that the United Nations, taking into account all of its parts, has in fact been active from an early date in seeking to address the Syrian crisis.

In March 2011, the Secretary-General urged the Syrian authorities to refrain from violence and called on the government in Syria to listen to the legitimate aspirations of the people and address them through inclusive political dialogue and genuine reforms.<sup>1</sup> Throughout the crisis, the Secretary-General has on various occasions also called for the protection of civilians in Syria, the need for humanitarian access, and the release of political prisoners. The Secretary-General has also engaged in dialogue with the President of Syria to encourage him to end

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<sup>1</sup> The statement of March 18, 2011, is attributable to the spokesperson for the Secretary-General on Syria.