

A stylized world map in a light blue-grey tone, showing the outlines of continents and a grid of latitude and longitude lines. It serves as a background for the top section of the cover.

# Case Western Reserve Journal of International Law

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Volume 45

Fall 2012

Issues 1 & 2

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PREVENTING MASS ATROCITY CRIMES:  
THE RESPONSIBILITY TO PROTECT AND  
THE SYRIA CRISIS

*Paul R. Williams, J. Trevor Ulbrick  
& Jonathan Worboys*

# PREVENTING MASS ATROCITY CRIMES: THE RESPONSIBILITY TO PROTECT AND THE SYRIA CRISIS

*Paul R. Williams,\* J. Trevor Ulbrick,† & Jonathan Worboys‡*

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## I. INTRODUCTION

The Responsibility to Protect (R2P) is a complicated and “emerging norm”<sup>1</sup> of international law that seeks to provide a means for the international community to prevent mass atrocity crimes occurring within the boundaries of a sovereign state.<sup>2</sup> Since its emergence in 2001, in the wake of humanitarian tragedies in Bosnia, Rwanda, Kosovo, and Darfur, R2P has been hailed as a way of resolving what one commentator called the “problem from hell.”<sup>3</sup> Under R2P, however, the use of force is reserved for actions within the UN Charter’s Chapter VII framework. As the Syria crisis has demonstrated, this position continues to hinder efforts by the international community to protect populations from mass atrocity crimes.

This article argues that when peaceful measures have been exhausted and the Security Council is deadlocked, R2P’s third pillar should allow the use of only those low-intensity military options, such as no-fly zones and humanitarian safe havens, that are focused on protecting populations. This approach would advance R2P’s development by establishing specific criteria that allow for the limited use of force when the Security Council fails to act. In doing so, R2P will be able to fulfill its primary purpose of preventing mass atrocities within a sovereign state, thus preventing humanitarian tragedies similar to those witnessed in Bosnia, Rwanda, Darfur, and now Syria.

At the time of writing, attacks by Syrian government forces and militias have killed upward of 75,000 civilians, and approximately

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1. The Secretary-General’s High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶ 203, U.N. Doc. A/59/565 (Dec. 2004) (describing the Responsibility to Protect as an “emerging norm”) [hereinafter *A More Secure World*]. *See also* S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (“Reaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity[.]”). Notably, this resolution was ultimately supported by Russia and China, each of whom had initially expressed reservations about the implications of R2P for state sovereignty.
  2. The international community’s ultimate response to the Syria crisis will contribute to the shape of R2P.
  3. SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2003).

1,000,000 refugees have fled into neighboring states.<sup>4</sup> The international community has tried to resolve the Syria crisis through diplomatic overtures and sanctions, but its attempts have been unsuccessful. Although the UN Human Rights Council has concluded that Syria's humanitarian crisis is being driven by a "state policy" of deliberate attacks against civilians,<sup>5</sup> military intervention by the Security Council has not been forthcoming.

Russia and China oppose any coercive measures against Syria, with Russia contending that the international community should "strictly adhere to the norms of international law. . . ."<sup>6</sup> While Russia's opposition is likely grounded in their strategic self-interest,<sup>7</sup> some states remain concerned that humanitarian action "could be abused by powerful states as justification for interventions that serve their political interests."<sup>8</sup> Given the Security Council's ineffectiveness

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4. William Hague, Foreign Secretary, Statement to Parliament on Syria (Mar. 6, 2013), *available at* <https://www.gov.uk/government/speeches/foreign-secretary-statement-to-parliament-on-syria>. *See also* *Syria Regional Refugee Response*, UN High Comm'n on Refugees, <http://data.unhcr.org/syrianrefugees/regional.php> (last visited Mar. 26, 2013).
  5. *See* Independent International Commission of Inquiry, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶¶ 50, 57, U.N. Doc. A/HCR/21/50 (Aug. 16, 2012) [hereinafter Report on Syrian Arab Republic], *available at* [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf).
  6. *Syria Crisis: Russia Warns Obama Against 'Violation' of International Law*, NBC, Aug. 22, 2012, [http://worldnews.nbcnews.com/\\_news/2012/08/22/13409128-syria-crisis-russia-warns-obama-against-violation-of-international-law?lite](http://worldnews.nbcnews.com/_news/2012/08/22/13409128-syria-crisis-russia-warns-obama-against-violation-of-international-law?lite).
  7. *See, e.g.*, Christopher Harmer, *Russian Naval Base Tartus*, INST. FOR THE STUDY OF WAR (July 31, 2012), <http://www.understandingwar.org/backgrounder/russian-naval-base-tartus> (explaining the strategic significance of Russia's naval base at Tartus).
  8. Christoph Mikulaschek, *The United Nations Security Council and the Responsibility to Protect: Policy, Process, and Practice. Report from the 39th International Peace Institute Vienna Seminar on Peacemaking and Peacekeeping*, in THE UN SECURITY COUNCIL AND THE RESPONSIBILITY TO PROTECT 20, 24 (2010), *available at* [http://www.ipacademy.org/media/pdf/publications/favorita\\_paper\\_2010.pdf](http://www.ipacademy.org/media/pdf/publications/favorita_paper_2010.pdf). For a Chinese perspective on R2P in Syria, see Qu Xing, *The UN Charter, the Responsibility to Protect, and the Syria Issue*, CHINA INST. OF INT'L STUD., (Apr. 16, 2012), [http://www.ciis.org.cn/english/2012-04/16/content\\_4943041.htm](http://www.ciis.org.cn/english/2012-04/16/content_4943041.htm). In response to the Syria crisis, other states, led by Brazil, have proposed an alternative doctrine called the Responsibility While Protecting (RWP), which holds that refining the criteria for the legitimate use of coercive force will encourage the Security Council to act decisively to prevent mass atrocity crimes. *See* U.N. General Assembly, Letter dated Nov. 9, 2011 from the Permanent Representative

in the Syria crisis, some commentators have argued that R2P advocates must either “mobilize a coalition of the willing” to intervene in Syria or “let R2P . . . rest in peace.”<sup>9</sup> Others have called for reform of the Security Council where mass atrocity crimes are at issue.<sup>10</sup>

The Syria crisis highlights the current limitations of the R2P doctrine. Despite R2P’s important contributions to the protection of populations over the past decade, the Security Council’s veto system can still create situations where states can commit mass atrocity crimes against their citizens. At present, R2P lacks a framework for the limited use of force when the Security Council fails to act. In its present formulation, therefore, R2P is missing a crucial component.

This article first provides a background to R2P, discussing the debate surrounding the legality of “the right of humanitarian intervention.” It then discusses the emergence of R2P, providing an overview of R2P’s third pillar, which authorizes the use of force. This article then continues to argue that R2P’s third pillar should provide for the limited use of force without Security Council authorization.

Since any use of force outside the Security Council would be at the limits of international law, this article sets forth specific criteria that must be satisfied before the international community could act under R2P’s third pillar: (1) a *prima facie* case must be established; (2) peaceful options must be exhausted; (3) the Security Council must be unable to act; (4) any military force used must be limited to low-intensity options designed to protect populations; (5) the use of low-intensity military force must be authorized by a legitimate authority; and (6) the intervention must come at the request of credible opposition groups. Although the use of force without Security Council authorization is a complicated and delicate question, this article argues that these criteria are the most appropriate way to develop R2P moving forward.

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of Brazil to the United Nations Maria L. R. Viotti addressed to the Secretary-General, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011).

9. Stewart M. Patrick, *RIP for R2P? Syria and the Dilemmas of Humanitarian Intervention*, COUNCIL ON FOREIGN RELATIONS (June 12, 2012), <http://blogs.cfr.org/patrick/2012/06/12/rip-for-r2p-syria-and-the-dilemmas-of-humanitarian-intervention/>.
10. See Ben Sharples, *New Zealand Wants Security Council Veto Change Amid Syria Crisis*, BLOOMBERG BUSINESSWEEK, Sept. 30, 2012, <http://www.businessweek.com/news/2012-09-29/new-zealand-wants-security-council-veto-change-amid-syria-crisis>.

## II. BACKGROUND TO THE RESPONSIBILITY TO PROTECT DOCTRINE

R2P was born out of the humanitarian tragedies of the 1990s and the international community's disagreements as to whether international law recognized a "right of humanitarian intervention," in effect a right to use force for the purposes of preventing mass human rights abuses.<sup>11</sup> Although the protection and promotion of human rights featured as one of the United Nations' principal purposes,<sup>12</sup> the UN Charter both generally prohibited the use of force<sup>13</sup> and guaranteed a state's right to be free from intervention, except for measures authorized by the Security Council under its Chapter VII powers or through state actions taken in self-defense.<sup>14</sup>

The tension created by the competing concerns of human rights and national sovereignty led to uncertainty about how far the international community could go to intervene in a sovereign state in the face of major human rights violations. Questions arose regarding whether the Security Council had the authority to intervene in matters that were wholly within the borders of a state, and whether, barring Security Council action or a valid claim of self-defense, other states could lawfully take action to stop mass human rights violations.<sup>15</sup> As a result, the international community's ability to

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11. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY VII (2001) [hereinafter ICISS REPORT], *available at* <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. Humanitarian intervention is defined as "the question of when, if ever, it is appropriate for states to take coercive – and in particular military – action, against another state for the purposes of protecting people at risk in that other state."
  12. See U.N. Charter art. 1, para. 3 ("To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language, or religion.").
  13. See *id.* art. 2, para. 4 (prohibiting the use of force against sovereign states).
  14. See *id.* art. 2 para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."); *id.* art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence. . . .").
  15. Christopher C. Joyner, *"The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 702–03 (2007).

prevent mass atrocities was handicapped.<sup>16</sup> This situation not only led to the death of nearly one million in Bosnia and Rwanda,<sup>17</sup> but also NATO's controversial (but legitimate)<sup>18</sup> military intervention to prevent mass human rights abuses in Kosovo.

*A. Kosovo*

In 1998, Yugoslav President Slobodan Milošević commenced attacks on ethnic Albanian civilians as part of a campaign against the Kosovo Liberation Army (KLA).<sup>19</sup> At first, the Security Council responded to the human rights violations with Resolution 1199.<sup>20</sup> In this resolution, the Security Council labeled the situation in Kosovo a threat to "peace and security."<sup>21</sup> The Security Council also adopted provisional measures that demanded the parties cease hostilities and take steps toward a conciliatory dialogue.<sup>22</sup> In the months that followed, as President Milošević continued to order attacks on civilians and civilian-populated areas, it became apparent that stronger measures would be required to end the mass human rights abuses.<sup>23</sup> The Security Council, however, failed to authorize further coercive measures to prevent mass atrocities.

Facing a deadlocked Security in March 1999, NATO conducted Operation Allied Force, a seventy-seven day campaign of air strikes that ended the conflict in Kosovo.<sup>24</sup> The campaign was launched following numerous failed diplomatic efforts by NATO, the UN, and the Organization for Security and Cooperation in Europe (OSCE). The mission's aim was to disable Serbia's military capacity to attack Kosovar Albanians.<sup>25</sup> It included contributions from all nineteen NATO member states, and ended with the agreement of Serbia to

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16. *See id.* at 694, 698–700, 704.

17. *See id.*

18. *See generally* INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT (2000) [hereinafter KOSOVO REPORT], available at <http://reliefweb.int/sites/reliefweb.int/files/resources/F62789D9FCC56FB3C1256C1700303E3B-thekosovoreport.htm>.

19. *Id.*

20. S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sep. 23, 1998).

21. *See id.* pmb1.

22. *See generally id.*

23. *See* KOSOVO REPORT, *supra* note 18.

24. *See* NATO's *Role in Relation to the Conflict in Kosovo*, NATO (July 15, 1999), <http://nato.int/kosovo/history.htm>.

25. U.S. Department of Defense, *Operation Allied Force* (June 21, 1999), available at <http://www.defense.gov/specials/kosovo/>.

cease hostile actions and to withdraw its military forces and political apparatus from Kosovo.<sup>26</sup>

*B. The Right of Humanitarian Intervention*

At the Security Council in March 1999, the United Kingdom justified its actions in Kosovo on the doctrine of “humanitarian intervention.”<sup>27</sup> The United Kingdom argued that an exception to the UN Charter’s prohibition on the use of force had emerged that allowed states to use force, only for the purposes of preventing mass human rights abuses, when: (1) there is convincing evidence of extreme humanitarian distress on a large scale that requires immediate urgent relief; (2) it is objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and (3) the proposed use of force is necessary and proportionate to the aim of humanitarian intervention.<sup>28</sup> Importantly, the United Kingdom asserted that the right of humanitarian intervention legally justified military intervention without explicit Security Council authorization.<sup>29</sup>

NATO’s actions in Kosovo, though ultimately regarded as legitimate,<sup>30</sup> were at the time highly controversial. Those opposing the doctrine of humanitarian intervention, as proposed by the United Kingdom, often argued it could not be considered customary international law as it lacked sufficient basis in state practice and *opinio juris*.<sup>31</sup> These individuals noted that claims of humanitarian intervention were made on a selective basis and that many instances of state practice relied upon to support such a right were justified on the basis of self-defense and not a right of humanitarian intervention.<sup>32</sup> Detractors also argued that humanitarian intervention without explicit Security Council authorization was an illegitimate

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26. See *id.*; Rand Corporation, Operation Allied Force: Lessons for Future Coalition Operations (Research Brief 72-AF, 2001), available at [http://www.rand.org/pubs/research\\_briefs/RB72/index1.html](http://www.rand.org/pubs/research_briefs/RB72/index1.html).
27. Sir Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y.B. INT’L L. 141, 157 (2002).
28. For a detailed discussion of the United Kingdom’s legal argument, see *id.* at 157–60.
29. See *id.* at 157.
30. See KOSOVO REPORT, *supra* note 18 (“The Commission concludes that the NATO military intervention was illegal but legitimate.”).
31. J. L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 46 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) (“In support of this contention, they point to the highly selective exercise of the right of unauthorized humanitarian intervention in recent history.”).
32. See *id.* at 46–47; MALCOLM EVANS, INTERNATIONAL LAW 622 (2010).



infringement on state sovereignty that violated the UN Charter's prohibition on the use of force.<sup>33</sup>

Despite these arguments, the concept of a right of humanitarian intervention gradually gained traction in the international community. Some influential academics, notably Sir Christopher Greenwood, argued "modern customary international law recognizes a right of military intervention on humanitarian grounds by States, or an organization like NATO."<sup>34</sup> In support of his conclusions, Sir Christopher traced state practice back as far as India's intervention to end repression in Bangladesh.<sup>35</sup> Others traced a customary international law right of humanitarian intervention back to Tanzania's intervention to overthrow Idi Amin in Uganda and Vietnam's use of force to end the rule of Pol Pot in Cambodia.<sup>36</sup> Supporters also contended that the historically selective use of humanitarian intervention did not disprove its existence, since humanitarian intervention was conceived as a *right* to intervene and not an obligation.<sup>37</sup> Furthermore, even those instances of state practice that relied on self-defense as a justification for their actions, were, in reality, a form of humanitarian intervention.<sup>38</sup> In Uganda, for instance, Tanzania did not merely repel attacks, but overthrew a repressive regime.<sup>39</sup>

The arguments for and against the right of humanitarian intervention demonstrate the controversial nature of the concept within international law. Humanitarian intervention evolved from a once widely disregarded policy into a compelling justification for the use of force to prevent mass human rights violations. While humanitarian intervention's status as a norm of customary international law remains contentious, state practice and *opinio juris* suggest that a strong argument can be made for the right's legality.

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33. Ian Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN MODERN WORLD 217–28 (J.N. Moore ed., 1974).

34. Greenwood, *supra* note 27, at 170.

35. *Id.* at 163.

36. See EVANS, *supra* note 32, at 621.

37. See Holzgrefe, *supra* note 31, at 47 (arguing that the very nature of a right implies an element of selectivity concerning when it is applied, which is different from the obligation to act).

38. See Greenwood, *supra* note 27, at 163.

39. *Id.*

### III. EMERGENCE OF THE RESPONSIBILITY TO PROTECT DOCTRINE

In the aftermath of Rwanda, Bosnia, and Kosovo<sup>40</sup> it was plain that the international community lacked an effective framework to prevent or stop mass atrocities. Consequently, in 2000, UN Secretary-General Kofi Annan asked: “[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?”<sup>41</sup>

In 2001, the International Commission on Intervention and State Sovereignty (ICISS),<sup>42</sup> an independent, Canadian-sponsored commission, responded by publishing a report “about the . . . ‘right of humanitarian intervention.’”<sup>43</sup> Upon considering international law’s growing emphasis on protecting populations, the ICISS report concluded that the concept of state sovereignty, and our understanding of it, must entail a state’s responsibility to protect its own citizens.<sup>44</sup> ICISS coined this proposal the responsibility to protect, or R2P.

#### *A. Content of the ICISS Report*

Following more than a year of research, interviews, and investigation,<sup>45</sup> ICISS found that since the Peace of Westphalia,<sup>46</sup> international norms had shifted such that state sovereignty was no longer inviolate.<sup>47</sup> In the twenty-first century, ICISS found sovereignty entailed responsibility: in particular, the responsibility to protect populations from mass human rights violations.<sup>48</sup>

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40. See KOSOVO REPORT, *supra* note 18.

41. ICISS REPORT, *supra* note 11, at VII.

42. See generally *id.*

43. *Id.* at VII.

44. *Id.* at XI.

45. See Lloyd Axworthy, *RtoP and the Evolution of State Sovereignty*, in THE RESPONSIBILITY TO PROTECT 3, 11 (Jared Genser and Irwin Cotler eds., 2012).

46. The Peace of Westphalia was a treaty signed by the warring states of Europe in 1648. It is regarded as providing for the modern foundations of the system of international relations. See *Treaty of Westphalia*, THE AVALON PROJECT, available at <http://avalon.law.yale.edu/17thcentury/westphal.asp>.

47. ICISS REPORT, *supra* note 11, at XI.

48. *Id.* at 32–33. In addition to atrocity crimes, ICISS also provided that:

[Military] intervention for human protection purposes [is justified] . . . to halt or avert . . . situations of state collapse and

As part of the responsibility to protect, ICISS proposed that states had three separate, but interlinked duties. First, individual states were primarily responsible for protecting their populations.<sup>49</sup> ICISS categorized this aspect of the R2P as a state's "responsibility to prevent," outlining a state's obligation to eliminate the root causes of mass atrocities.<sup>50</sup>

Second, ICISS found that where a state fails to protect its population—or is the driving force behind mass atrocities—the responsibility to protect shifts to the international community.<sup>51</sup> ICISS categorized this aspect of R2P as the "responsibility to react," stating that in responding to mass atrocities, the international community must first exhaust peaceful options, following which force can be used in extreme circumstances.<sup>52</sup>

Third, ICISS found that after the use of force to prevent mass atrocities, states should help post-conflict states rebuild. In doing so, ICISS held that states should provide full assistance to support recovery efforts, reconstruction, and reconciliation.<sup>53</sup> ICISS framed this aspect of R2P as the "responsibility to rebuild," making clear that when acting pursuant to its responsibility to rebuild, the international community should pay particular attention to addressing the causes of harm that an intervention was designed to halt or avert.<sup>54</sup>

In reaching its conclusions, the ICISS report addressed two of international law's most controversial questions: when could states use force to protect populations and which authorities would be competent to authorize it? ICISS first found that the international community could use force to prevent atrocities when attempts to resolve crises by peaceful options had been exhausted and the

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the resultant exposure of the population to mass starvation and/or civil war; and overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.

*Id.* at 32–36.

49. *Id.* at XI.

50. *Id.*

51. *Id.* at 29.

52. ICISS discussed the meaning of "extreme" stating that the use of force should be confined to "cases of violence which so genuinely 'shock the conscience of mankind' or which present clear and present danger to international security, that they require coercive military intervention." *Id.* at 31.

53. *Id.* at XI.

54. *Id.*

circumstances faced by the international community were extreme.<sup>55</sup> To ensure these principles were adhered to, ICISS provided a six-part test for determining whether the use of force for humanitarian purposes is warranted.<sup>56</sup> According to ICISS, for intervention to be legitimate: (1) just cause must exist; (2) the assistance must be provided as a last resort; (3) the acting states must have rightful intentions; (4) the action must be proportional to the humanitarian crisis; (5) the action must have a reasonable chance of success; and (6) the action must be authorized by a legitimate authority.<sup>57</sup>

Regarding the competent authorities to authorize the use of force (for the purposes of protecting populations), ICISS found that the UN was the principal organization charged with the task.<sup>58</sup> Presumably in recognition of the fact that there were likely to be future instances in which the Security Council would be deadlocked, as it had been throughout much of the 1990s, ICISS provided that when the Security Council fails to act, regional or sub-regional organizations could take collective action within their boundaries.<sup>59</sup> Moreover, ICISS provided that a UN General Assembly Uniting for Peace Resolution could provide “a high degree of legitimacy for an intervention.”<sup>60</sup>

#### *B. UN Evolution of R2P*

Post-2001 and the ICISS report, the UN began to shape R2P. In doing so, the UN contributed to the doctrine’s codification and international acceptance, but its actions also marked a subtle shift away from the ICISS formulation of R2P. In particular, the UN did not endorse or build on the ICISS Report’s discussion of how the international community may respond to mass atrocities when the Security Council fails to act.<sup>61</sup>

R2P first featured on the UN agenda in 2004 when a UN High-level Panel on Threats, Challenges, and Change (UN High-level Panel) produced a report titled *A More Secure World: Our Shared Responsibility*.<sup>62</sup> Pursuant to its mandate of generating new ideas about the policies and institutions required for the UN to be effective

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55. *Id.* at 31.

56. *See id.* at 32–37.

57. *Id.* at XII (applying the principles to “military interventions”).

58. *Id.* at 53.

59. *See id.* at 53–54. ICISS included regional coalitions as capable of taking collective intervention within the boundaries on the basis that member states to those organizations are more familiar with local political actors and are more likely to feel the impact of the human catastrophe.

60. *Id.* at 53.

61. *See id.* at 53–55.

62. *See A More Secure World*, *supra* note 1.

in the twenty-first century,<sup>63</sup> the UN High-level Panel went on to recognize the “emerging norm that there is a collective international responsibility to protect.”<sup>64</sup>

It was not until the following year at the World Summit that the UN began to shape R2P. In September 2005, 170 heads of state<sup>65</sup> came together at the General Assembly to “take action on grave global threats that require bold global solutions.”<sup>66</sup> This meeting produced the World Summit Outcome Document. The World Summit Document, at paragraphs 138 and 139, recognized each state’s responsibility to protect populations from mass atrocity crimes: genocide, crimes against humanity, war crimes, and ethnic cleansing.<sup>67</sup> Importantly, in paragraphs 138 and 139, states recognized that they were “prepared”<sup>68</sup> to take action to prevent mass atrocity crimes on a “case-by-case basis.”<sup>69</sup> In making their findings, the World Summit

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63. *See id.* at 1.

64. *Id.* at 66.

65. William W. Burke-White, *Adoption of the Responsibility to Protect*, in THE RESPONSIBILITY TO PROTECT 17, 21 (Jared Genser and Irwin Cotler eds., 2012).

66. Secretary-General Kofi Annan, Address to the 2005 World Summit (Sept. 14, 2005), *available at* <http://www.un.org/webcast/summit2005/statements/senglish3.pdf>

67. For an overview of these crimes, see Tarun Chhabra and Jeremy B. Zucker, *Defining the Crimes*, in THE RESPONSIBILITY TO PROTECT 37 (Jared Genser and Irwin Cotler eds., 2012).

68. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

69. *Id.* ¶¶ 138–39.

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of

noted that the protection of populations by the use of force was only available when authorized in accordance with the UN Charter's Chapter VII framework.<sup>70</sup>

In the wake of the UN General Assembly's acceptance of R2P, the UN Security Council "reaffirmed" the doctrine in April 2006.<sup>71</sup> Specifically, the UN Security Council adopted paragraphs 138 and 139 of the World Summit Document in its landmark Resolution 1674 on the Protection of Civilians in Armed Conflict.<sup>72</sup> In endorsing the World Summit's formulation of R2P, the Security Council confirmed the main protection responsibilities of R2P, also reaffirming the Security Council's prerogative on the use of force.

In 2009, the UN codification of R2P continued when UN Secretary-General Ban Ki-moon presented a report (Secretary-General's Report) clarifying R2P so that states could implement it in a "fully faithful and consistent manner."<sup>73</sup> According to the Secretary-General's Report, R2P should be understood as comprising three conceptual pillars.<sup>74</sup> First, each state has the responsibility to provide security for their populations and protect them from genocide, war crimes, and crimes against humanity.<sup>75</sup> Second, when a state lacks the capacity to protect its populations from these crimes, the international community has the responsibility to provide assistance, helping states to meet their obligations.<sup>76</sup> Third, if a state "manifestly

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the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out. *Id.*

70. *Id.*

71. See S.C. Res. 1674, *supra* note 1 ("Reaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.").

72. *Id.* Notably, the resolution was ultimately supported by Russia and China, each of whom had initially expressed reservations about the implications of Responsibility to Protect for state sovereignty.

73. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 2, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*]. At the subsequent General Assembly debate, over fifty states explicitly endorsed the Secretary-General's three-pillar formulation.

74. *Id.* ¶ 11.

75. *Id.* ¶ 11(a).

76. *Id.* ¶ 11(b).

fails” in its protection responsibilities, the international community should respond in a timely and decisive manner, by taking a range of peaceful, coercive, or forceful measures in accordance with the UN Charter.<sup>77</sup> With time, the Secretary-General’s “three pillar” approach has become widely accepted, having been endorsed by more than fifty states.<sup>78</sup>

#### IV. R2P’S THIRD PILLAR AND THE USE OF FORCE

The use of force to protect populations is one of the most controversial issues in international law. In Bosnia and Rwanda, states and regional organizations failed to protect populations from mass atrocities. When states used force to end mass atrocities in Kosovo without Security Council authorization, however, their actions were viewed as controversial.<sup>79</sup> With the rise of R2P, the international community was provided with a framework for preventing or halting the mass atrocity crimes that characterized these humanitarian tragedies.

##### *A. Pillar Three of the Responsibility to Protect*

R2P is primarily concerned with the prevention of atrocity crimes through peaceful means. In doing so, R2P respects the importance international law attaches to state sovereignty,<sup>80</sup> while also providing a framework that regularizes the use of force to protect populations. Only in rare instances will R2P permit the international community to use force. In these circumstances R2P’s three-pillar framework ensures the international community will only use force when absolutely necessary.

According to the Secretary-General’s Report, R2P’s third pillar requires that when a state has “manifestly failed” to protect its population, the international community should respond “in a timely and decisive manner,” through a “reasoned, calibrated and timely response” in accordance with the UN Charter.<sup>81</sup> This formulation of

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77. *Id.* ¶ 11(c).

78. See GLOBAL CENTER FOR THE RESPONSIBILITY TO PROTECT, IMPLEMENTING THE RESPONSIBILITY TO PROTECT: THE 2009 GENERAL ASSEMBLY DEBATE: AN ASSESSMENT 5–6 (Aug. 2009).

79. See KOSOVO REPORT, *supra* note 18.

80. See U.N. Charter art. 2 para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

81. *Implementing the Responsibility to Protect*, *supra* note 73, ¶ 11.

R2P means that before the Security Council can authorize the use of force, peaceful and coercive, non-military options must have been exhausted. In practice, the exhaustion of peaceful measures means that the international community should first resort to diplomacy, attempt to secure ceasefires, impose sanctions, or refer the situation to the International Criminal Court (ICC), before authorizing the use of force. When turning to the question of authorizing the use of force to protect populations, the Secretary-General's Report provides that military force can only be authorized through Chapter VII of the UN Charter.<sup>82</sup>

*B. Libya*

The March 2011, NATO led, intervention to prevent atrocity crimes being committed by the government of Libya against its own citizens marks the first major instance of Security Council practice under R2P's third pillar.<sup>83</sup> Following extensive human rights abuses and statements of intent to commit mass atrocities by Muammar Qaddafi,<sup>84</sup> on February 26, 2011, the Security Council passed Resolution 1970<sup>85</sup> in an attempt to resolve the Libya crisis peacefully. The resolution cited the "Libyan authorities' responsibility to protect its population,"<sup>86</sup> further referring the Libyan situation to the ICC and imposing an arms embargo, travel ban, and asset freeze on a number of specified individuals.<sup>87</sup>

In the weeks that followed Resolution 1970, it became clear that Qaddafi had no intention of stopping his attacks and that if the international community was to successfully protect the Libyan population, stronger measures were required.<sup>88</sup> As a result, on March 2, 2011, the Security Council authorized all necessary measures to protect civilians and civilian-populated areas under threat of attack by Qaddafi forces.<sup>89</sup> The authorization of the use of force resulted in a

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82. *Id.* ¶¶ 49–50.

83. *Responsibility to Protect: The Lessons of Libya*, THE ECONOMIST, May 19, 2011, <http://www.economist.com/node/18709571>.

84. *See The Crisis in Libya*, INT'L COALITION FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya> (last visited Mar. 6, 2013).

85. Press Release, Security Council, In Swift, Decisive Action Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protestors (Feb. 26, 2011), available at <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>.

86. S.C. Res. 1970, pmbl., U.N. Doc. S/RES/1970 (Feb. 26, 2011).

87. *See id.*

88. *The Crisis in Libya*, *supra* note 84.

89. S.C. Res. 1973, pmbl., U.N. Doc. S/RES/1973 (Mar. 17, 2011).



NATO military campaign that disabled forces loyal to Qaddafi and brought an end to their attacks on civilians.<sup>90</sup>

Resolution 1973 authorized the use of force in Libya on the basis of R2P's third pillar. The Security Council explicitly invoked Libya's failure to uphold its responsibility to protect its population as justification for Chapter VII intervention.<sup>91</sup> Moreover, the Security Council issued Resolution 1973 following the exhaustion of peaceful means in Resolution 1970, acting in accordance with the R2P doctrine.<sup>92</sup>

From the R2P perspective, the importance of Libya was threefold. First, Resolution 1973 reaffirmed pillars one and two of the doctrine. Resolution 1973 reiterated the responsibility of the Libyan authorities to protect its population, reaffirming that the parties to armed conflicts bear the primary responsibility of taking all feasible steps to ensure the protections of civilians.<sup>93</sup>

Second, the Security Council authorized intervention in Libya demonstrates international law's extension to allow the use of force in situations where atrocity crimes may occur, or are imminent; Resolution 1973 stated "that widespread and systematic attacks currently taking place in the Libya Arab Jamahiriya against the civilian population may amount to crimes against humanity."<sup>94</sup>

Third, intervention in Libya reaffirmed the Security Council's belief that the protection of civilians and civilian populated areas is of fundamental importance to the international community. This is because Resolution 1973 expressed the Security Council's "determination to ensure the protection of civilians and civilian populated areas."<sup>95</sup>

## V. R2P AND THE SYRIA CRISIS

Despite its rapid development and use in Libya, the Syria crisis demonstrates that R2P is still missing a crucial component: what to do when the Security Council fails to act in the face of ongoing mass atrocity crimes. One argument is that nothing can be done; the Security Council must authorize any use of force under R2P and the stability of the international order requires so. This article argues that

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90. *The Crisis in Libya*, *supra* note 84.

91. S.C. Res. 1973, *supra* note 89, pmbl.

92. *See id.* (noting that Libyan authorities failed to comply with resolution 1970).

93. *See id.*

94. *Id.* This standard of proof equates to a civil test of balance of probabilities and is contrasted with higher burdens of proof such as a "prima facie case" and "beyond reasonable doubt".

95. *Id.* (emphasis omitted).

there is an alternative. In the face of Security Council inaction, a regional organization or coalition of the willing should be able to authorize and undertake the limited use of force to protect populations from mass atrocity crimes. The case of Syria indicates why such an evolution of the R2P doctrine is necessary, and how it might be applied in practice.

In March 2013, after twenty-four months of conflict, the scale of the Syria crisis rivals the worst humanitarian tragedies of the past two decades.<sup>96</sup> In August 2012, the UN Human Rights Council found that the Syria crisis was being driven by a “state policy” of deliberate attacks against civilians amounting to war crimes and crimes against humanity.<sup>97</sup> Although Syria would appear to present a textbook case for Security Council action under its Chapter VII powers, Russia and China have vetoed three separate resolutions aimed at holding the Assad regime accountable. Although Russia claims that its opposition is grounded in concerns that R2P may be abused by powerful states, the real reason is likely strategic; Russia has close ties with the Syrian Government and an interest in maintaining the status quo. For instance, Syria hosts a significant Russian naval base at Tartus.<sup>98</sup>

*A. Preventing and Halting Atrocity Crimes When the Security Council Fails to Act*

Whether R2P’s third pillar should allow limited use of force when the Security Council fails to act is a complicated and delicate question. The international community is generally adverse to any use of force outside the Security Council;<sup>99</sup> and it is a foundational principle of international law that the use of force should be avoided wherever possible.<sup>100</sup> Moreover, any use of force without Security Council authorization raises concerns that powerful states could unnecessarily violate a weaker state’s sovereignty and that the importance the UN Charter attaches to state sovereignty may be undermined.<sup>101</sup>

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96. The crises in Bosnia, Kosovo, and Rwanda all involved mass atrocity crimes, though to be sure the death toll in Rwanda was far greater than in the Balkan conflicts or in Syria as of March 2013. In particular, several analysts have drawn parallels between Syria and Bosnia crises. See, e.g., Jackie Northam, *Syrian Conflict a Haunting Reminder of Bosnia*, NPR, June 23, 2012, <http://www.npr.org/2012/06/23/155622562/syrian-conflict-a-haunting-reminder-of-bosnia>.

97. Report on Syrian Arab Republic, *supra* note 5, ¶¶ 50, 57.

98. See Sharples, *supra* note 10.

99. See U.N. Charter, art. 2 para. 4 (prohibiting the use of force against sovereign states).

100. See *id.* art. 2 para. 7, art. 51.

101. Mikulaschek, *supra* note 8, at 20, 24.

At the same time, the prohibition of mass atrocity crimes is now recognized as *jus cogens*,<sup>102</sup> or fundamental to the international system. Such status in international law is vitally important, because it reminds the international community that it should prevent atrocity crimes wherever possible. Moreover, as Bosnia, Rwanda, Kosovo, Darfur, and now Syria demonstrate, the Security Council will not always act to prevent mass atrocities, either in a timely and decisive manner, or at all.

When the Security Council fails to act, this article argues that R2P's third pillar should allow a regional organization or coalition of the willing to authorize and undertake the limited use of force to protect populations from atrocity crimes. To mitigate concerns regarding state sovereignty and the use of force without Security Council authorization, R2P's third pillar should only allow low-intensity military operations in limited instances. The criteria that ensure this careful balance are outlined below:

1. *A prima facie case must be established:* Before force can be used to prevent or halt mass atrocity crimes, a prima facie case must be established that atrocity crimes are occurring (or about to occur). This prima facie case would need to be established using evidence gathered by neutral, internationally respected sources, such as the UN Human Rights Council, the International Committee of the Red Cross, or the International Criminal Court. This is now possible due to the development of international criminal law, which has codified the elements of atrocity crimes.
2. *Peaceful options must be exhausted:* Consistent with R2P's second pillar, peaceful options for preventing or stopping the atrocity crimes—commencing with diplomacy and progressing to more coercive tactics such as sanctions—must be exhausted before any low-intensity military options could be considered.
3. *The Security Council must be unable to act:* The Security Council must be unable to act effectively in the crisis. In practice, one or more of the Security Council's five permanent members, each of which wield a veto, must have repeatedly blocked resolutions aimed at compelling the state in question to prevent or stop mass atrocity crimes and fulfill its responsibility to protect its

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102. See M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 17 (1996) (noting that crimes against humanity, genocide, war crimes, and torture are international crimes rising to the level of *jus cogens*, and therefore, states have an obligation to extradite or prosecute suspected criminals).

population. Moreover, the prospects for effective Security Council action must be remote, *i.e.*, because one or more permanent members have announced their intention to oppose any coercive measures against the state committing atrocities.

4. *Any military force used must be limited to low-intensity options designed to protect populations:* States would only be privileged to use low-intensity military options designed to protect populations, such as no-fly zones and humanitarian safe zones. Limiting military force in this way would help to ensure that states are acting out of the right intentions and using force that is proportional to achieving R2P's humanitarian goals.
5. *The use of low-intensity military force must be authorized by a legitimate authority:* Consistent with the ICISS report, this article argues that the legitimate authority for a no-fly zone or humanitarian safe haven could come from a number of sources, including a broad international coalition, a regional political or security organization, or the UN General Assembly.
6. *The intervention must come at the request of credible opposition groups:* Implementing a no-fly zone or humanitarian zone within a sovereign state would also require a specific request for intervention from opposition groups that represent victims of atrocity crimes.

*B. Pillar Three of the Responsibility to Protect When the Security Council Fails to Act*

This article discusses each criterion below, describing the safeguards that ensure consistency with international law governing the use of force. Moreover, to illustrate how these criteria would apply in future instances of mass atrocities, this article uses the Syria crisis as a practical case study.

1. A *prima facie* case must be established

Before the international community can use low-intensity military options to protect populations, a *prima facie* case of ongoing mass atrocity crimes must be established.<sup>103</sup> *Prima facie* here is used in the

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103. This view is supported by recent Security Council practice and academic opinion. When authorizing Chapter VII powers in UN Security Council Resolution 1973 (2011), war crimes had not been proven, therefore supporting the requirement of *prima facie* case only. For detailed academic discussion on the evidentiary standards required for R2P, see Stuart Ford, *Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity? The Responsibility to Protect and*

strong sense of the common law concept; as described by the U.S. Supreme Court, a *prima facie* case constitutes evidence sufficient to create a “legally mandatory, rebuttable presumption” on the part of the opposing party.<sup>104</sup> In the context of R2P, the *prima facie* case requirement would place the burden of proof on the international community,<sup>105</sup> mitigating concerns about R2P’s abuse by self-interested states. As the ICISS report noted, legitimate humanitarian interventions must have a “just cause,” which contemplates the use of force only in situations where large scale loss of life or ethnic cleansing were occurring or about to occur. Consistent with the ICISS report, a *prima facie* case requirement would also help to ensure that any use of force under R2P would be “to halt or avert human suffering.”<sup>106</sup>

A *prima facie* case of ongoing mass atrocity crimes need not be made in a formal court of law. Instead, international organizations, which are now capable of investigating mass atrocity crimes and making their findings publicly available, can provide an independent, transparent source of evidence. The UN Human Rights Council (UNHRC), an inter-governmental body of forty-seven states “responsible for the promotion and protection of all human rights around the globe,” can establish commissions of inquiry to determine the existence of atrocity crimes. The International Committee for the Red Cross (ICRC) now lists protecting civilians in armed conflicts as one of its primary objectives; its delegates visit conflict areas to ensure that “authorities and other constituted groups comply with their obligations under” international humanitarian and international human rights law.<sup>107</sup> Similarly, the ICC Office of the Prosecutor has a dedicated investigations unit tasked with gathering possible evidence of atrocity crimes.<sup>108</sup> Recognized experts, such as leading academics and former prosecutors, can also play a key role in evaluating whether atrocity crimes are occurring within a sovereign state.

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*Individual Criminal Responsibility in the Aftermath of Cyclone Nagris*,  
38 DENV. J. INT’L L. & POL’Y 227, 240 (2010).

104. See *Tex. Dep’t of Cmty. Aff. v. Burdine*, 450 U.S. 248, 254 n.7 (1981).

105. See *supra* note 103 and accompanying text.

106. See ICISS REPORT, *supra* note 11, at XII.

107. *Protection of the Civilian Population*, INT’L COMM. OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/what-we-do/protecting-civilians/overview-protection-civilian-population.htm>.

108. Article 53 of the Rome Statute provides that before initiating an investigation, the prosecutor must determine whether “there is a reasonable basis to proceed with an investigation” by taking into account, *inter alia*, whether there is “a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed or is being committed.” Rome Statute of the International Criminal Court, art. 53, July 17, 1998, 2187 U.N.T.S. 90.

The international community would be able to ensure objectivity in this process because it now has clear, well-defined standards by which to determine whether a state is committing mass atrocity crimes. Amongst others, the International Criminal Tribunals for Rwanda and the Former Yugoslavia and the ICC, including the Rome Statute that created it, constitute a robust jurisprudence that has codified the elements of atrocity crimes.

In the case of Syria, a *prima facie* case would consist of well-documented evidence from multiple independent sources that the Assad regime had intentionally committed mass atrocity crimes. The UNHRC has been actively involved in investigating mass atrocity crimes in Syria, and has established a Commission of Inquiry for this purpose. According to a February 2012 UNHRC Report, Assad's security forces have committed "widespread, systematic, and gross human rights violations"<sup>109</sup> by indiscriminately using heavy weapons, including tanks, artillery, and helicopter gunships, against civilians.<sup>110</sup> Additionally, the Report found that Syrian forces had deliberately shot civilians, shelled residential areas, and tortured hospitalized protesters.<sup>111</sup> That Report also found that Assad's security forces had summarily executed unarmed protesters, targeted women and children with snipers, and attacked residential areas with indiscriminate weapons such as mortars.<sup>112</sup> Echoing the language of R2P's third pillar, the Report concluded that Syria has "manifestly failed" to protect its own people.<sup>113</sup>

The majority of these attacks, the UNHRC Report found, have been directed against unarmed civilians. In one such incident, on December 21, 2011, Syrian government forces "attacked a group of activists who had sought refuge in the village mosque. . . . After the forces withdrew, 60 bodies were discovered . . . the victims appeared to have been tortured before their execution."<sup>114</sup> Since the February 2012 UNHRC Report was released, new atrocities have been reported on an almost daily basis. In the Houla region, Syrian militias aligned with the government, known as *shabiha*, executed over one hundred civilians, leading a number of western states to expel Syrian diplomats in protest.<sup>115</sup>

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109. Report on the Syrian Arab Republic, *supra* note 5, ¶ 2.

110. *See id.* ¶¶ 39–46 (describing the tactics used by Syrian state forces).

111. *See id.*

112. *See id.*

113. *Id.* ¶ 126.

114. *Id.* ¶ 42.

115. *Houla: How a Massacre Unfolded*, BBC, June 8, 2012, <http://www.bbc.co.uk/news/world-middle-east-18233934>. *See also* Martin Chulov, *Houla Massacre: UN Resolution Condemns Syria*, THE GUARDIAN (UK), June

In response to the widespread international condemnation over Houla,<sup>116</sup> the Syrian government claimed that it was legitimately targeting “terrorists,” who were themselves responsible for the mass killings.<sup>117</sup> Yet even when Syrian forces have attacked armed opposition forces, such as fighters from the Free Syria Army (FSA), they have done so in a way that also deliberately targets civilians in violation of international law. In December 2011, during a Syrian military operation in Bab Amr, Homs against the FSA, the February UN Report found that “[r]esidential buildings . . . were shelled by tanks and anti-aircraft guns,” and “[s]tate snipers also shot at and killed unarmed men, women, and children.”<sup>118</sup> The February 2012 UNHRC Report also found that defectors from the Syrian forces have been “summarily executed.”<sup>119</sup> Evaluating these findings in their totality, the UNHRC concluded that the Syria crisis is being driven by a “state policy” of deliberate attacks against civilians amounting to war crimes and crimes against humanity.<sup>120</sup>

In Syria, international experts have also contributed to building a prima facie case. Professor David Crane, former Chief Prosecutor to the Special Court of Sierra Leone, has led a team in writing a detailed report documenting the atrocities that have occurred in Syria since March 2011.<sup>121</sup> Professor Crane’s report considers and analyzes reports from news agencies and NGOs, concluding that there is evidence to support an allegation that forty individuals within the Assad regime have committed crimes against humanity.<sup>122</sup> Investigative reports by leading NGOs, such as a Human Rights Watch, reinforce Professor Crane’s conclusions.<sup>123</sup>

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1, 2012, <http://www.guardian.co.uk/world/2012/jun/01/syria-houla-massacre-un-resolution>.

116. See, e.g., Philip Gourevich, *What Has the Houla Massacre Changed?*, THE NEW YORKER, May 29, 2012, <http://www.newyorker.com/online/blogs/newsdesk/2012/05/what-has-the-houla-massacre-changed.html>.

117. *Security Council Debates Response to Houla*, ALJAZEERA, May 27, 2012, <http://www.aljazeera.com/news/middleeast/2012/05/2012527171046463842.html>.

118. Report on Syrian Arab Republic, *supra* note 5, ¶ 43.

119. *Id.* ¶ 40.

120. *Id.* ¶¶ 50, 57.

121. See Syracuse University College of Law, *Report on the Syrian Crisis: Mapping Atrocity in Syria*.

122. See *id.* at 70.

123. See, e.g., HUMAN RIGHTS WATCH, THEY BURNED MY HEART (May 2012), available at <http://www.hrw.org/sites/default/files/reports/syria0512WebVersionReduced.pdf>.

As the Syria crisis illustrates, international criminal law has evolved in parallel with R2P. There is now an international consensus, supported by the jurisprudence of the Rwanda and Yugoslav tribunals and codified in the ICC's Rome Statute, regarding the elements of mass atrocity crimes. Moreover, the existence of mass atrocity crimes can now be independently evaluated and verified by neutral organizations, such as the UNHRC and the ICRC, which can be relied upon to document whether or not atrocity crimes are occurring and who might be responsible. In Syria, the UNHRC's Commission of Inquiry concluded that the Assad regime is responsible for mass atrocity crimes. This conclusion has been reinforced by reports from independent experts and NGOs. The Syria crisis demonstrates that it is now possible for the international community to present a *prima facie* case, based on objective criteria, transparent methodology, and independent sources of evidence, that a sovereign state is committing atrocity crimes.

## 2. Peaceful options must be exhausted

After establishing a *prima facie* case of ongoing atrocity crimes, the international community must exhaust peaceful means to compel the state to stop committing mass atrocities. This requirement corresponds to the "last resort" principle endorsed by ICISS and the UN High-level Panel for determining whether the use of force for humanitarian purposes is warranted and justifiable. As the ICISS report noted, "every non-military option for the prevention or peaceful resolution of the crisis [must be] explored, with reasonable grounds for believing lesser measures would not have succeeded."<sup>124</sup>

Policymakers have a number of tools that do not involve the use of military force to incentivize a recalcitrant state to change its behavior. These run the gamut of statecraft, including diplomatic overtures (peace plans, ceasefires); political sanctions (severing diplomatic relations, imposing travel restrictions on particular individuals); and targeted economic sanctions (arms embargos, restrictions on oil exports). In general, the international community should start with diplomacy before resorting to more coercive measures. Still, policymakers should have some flexibility in this regard, since the appropriate amount of pressure to apply will inevitably depend on the sanctioned state's behavior and particular facts of the crisis, as established by the *prima facie* case.

The Syria crisis illustrates the extent to which the international community must exhaust peaceful options before low-intensity military options could be considered. In Syria, the international community has tried multiple rounds of regional and UN-brokered peace plans, and sanctions without success. In fact, the Assad

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124. ICISS REPORT, *supra* note 11, at XII.



regime's attacks on civilians have intensified, with the regime increasingly relying on heavy military weapons such as cluster bombs and helicopter gunships.

A series of international peace plans have failed to stop the Assad regime from committing mass atrocity crimes. In December 2011, the Syrian government signed a peace plan sponsored by the Arab League,<sup>125</sup> agreeing to form a national unity government, hold elections,<sup>126</sup> and allow Arab League monitors to enter the country. In the three weeks following the monitors' arrival, however, more than 400 people died, prompting the League to suspend its mission on January 28, 2012.<sup>127</sup> The following month, the Arab League temporarily halted cooperation with the Syrian government after the government rejected an Arab League resolution calling for a joint Arab League-UN peacekeeping mission.<sup>128</sup> On February 16, 2012, the UN General Assembly condemned "widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities," calling upon the government to implement the Arab League's peace plans.<sup>129</sup>

In March 2012, the Arab League and the UN renewed their efforts by jointly appointing Kofi Annan as the UN-Arab League Special Envoy to Syria. Annan produced a Six Point Plan for ending the conflict, supported by all members of the Security Council.<sup>130</sup> Assad agreed to the Annan Plan, which required Syrian forces to withdraw from populated areas and imposed a ceasefire.<sup>131</sup> On April 14, 2012, the Security Council subsequently adopted Resolution 2042, supporting the ceasefire and authorizing thirty unarmed observers to monitor implementation of the Annan Plan. A week later, the Security Council passed Resolution 2043, which established the UN

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125. *Syrian Government Accepts Annan Peace Plan*, BBC, Mar. 27, 2012, <http://www.bbc.co.uk/news/world-middle-east-17522398>.

126. Kareem Fahim, *Arab League Proposes New Peace Plan for Syria*, N.Y. TIMES, Jan. 23, 2012, at A8.

127. Colum Lynch, *400 Killed in Syria Since Arab League Monitors Arrived*, U.N. SAYS, WASH. POST, Jan. 10, 2012, [http://articles.washingtonpost.com/2012-01-10/world/35438262\\_1\\_arab-league-french-ambassador-gerard-araud-latakia; Arab League Suspends Syria Mission](http://articles.washingtonpost.com/2012-01-10/world/35438262_1_arab-league-french-ambassador-gerard-araud-latakia; Arab League Suspends Syria Mission), BBC, Jan. 28, 2012, <http://www.bbc.co.uk/news/world-middle-east-16774171>.

128. *Syria Rejects New Arab League Peace Mission Proposal*, BBC, Feb. 13, 2012, <http://www.bbc.co.uk/news/world-middle-east-17008597>.

129. G.A. Res. 66/253, ¶ 2, U.N. Doc. A/Res/66/253 (Feb. 21, 2012).

130. *Syria 'Agrees' to Peace Plan Deadline, Annan Tells UN*, BBC, Apr. 2, 2012, <http://www.bbc.co.uk/news/world-middle-east-17587438>.

131. *Id.*

Supervision Mission in Syria (UNSMIS), a ninety-day deployment of up to 300 additional unarmed military observers.<sup>132</sup>

Similarly, sanctions have also been ineffective in pressuring the Assad regime to stop its attacks on civilians. The United States, European Union, and Arab League imposed extensive sanctions that restrict the travel and freeze the assets of Syrian officials,<sup>133</sup> block the purchase of Syrian oil,<sup>134</sup> and target Syrian information technology.<sup>135</sup> The EU has also imposed seventeen rounds of sanctions, targeting luxury items as well as goods and technologies that can be used for internal suppression.<sup>136</sup>

### 3. The Security Council must be unable to act

Before force can be used outside the Security Council, the international community must have repeatedly tried, and failed, to achieve consensus within it. Moreover, the prospects for any future Security Council action must be remote due to opposition by one of the Council's Permanent Members. By setting a high diplomatic threshold, this criterion ensures that the Security Council's primary role in authorizing the use of force is respected. It also ensures that states cannot abuse R2P to bypass the Security Council and use force for their own aims.

In Syria, for instance, the Security Council has failed to pass three strongly-worded resolutions authorizing peaceful measures to end the conflict due to open Russian and Chinese opposition. In October 2011, the first resolution threatened sanctions if the Syrian government did not immediately end violence against civilians.<sup>137</sup> In February 2012, the second resolution did not threaten sanctions but called on Assad to leave office and supported the Arab League's peace plan.<sup>138</sup> In July

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132. S.C. Res 2042, ¶ 5, U.N. Doc. S/RES/2043 (Apr. 21, 2012).

133. Katherine Marsh, *Syria Sanctions Declared as Violent Crackdown Continues*, THE GUARDIAN (UK), May 6, 2011, <http://www.guardian.co.uk/world/2011/may/06/syria-sanctions-crackdown-eu>.

134. See Report on Syrian Arab Republic, *supra* note 5, ¶ 34.

135. Fact Sheet, U.S. Treasury Dep't, Off. of Public Aff., New Executive Order Targeting Human Rights Abuses via Information Technology (Apr. 23, 2012), available at [http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ghravity\\_eo\\_fact\\_sheet.pdf](http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/ghravity_eo_fact_sheet.pdf).

136. Stephen Castle, *European Union Tightens Sanctions*, N.Y. TIMES, July 24, 2012, at A8.

137. *Russia and China Veto UN Resolution Against Syrian Regime*, THE GUARDIAN (UK), Oct. 4, 2011, <http://www.guardian.co.uk/world/2011/oct/05/russia-china-veto-syria-resolution>.

138. Paul Harris et al., *Syrian Resolution Vetoed by Russia and China at United Nations*, THE GUARDIAN (UK), Feb. 4, 2012, <http://www.guardian.co.uk/world/2012/feb/04/assad-obama-resign-un-resolution>.

2012, Russia and China vetoed a United Kingdom-drafted resolution sponsored by the US, France, and Germany that threatened sanctions unless the Syrian government withdrew heavy weapons from populated areas within ten days.<sup>139</sup> Even as the international community has seemingly abandoned efforts to stop the crisis through Security Council action, violence in Syria has continued to intensify.

4. Military force must be limited to low-intensity options designed to protect populations

Any use of force would be limited to low-intensity military options, such as the creation and enforcement of a no-fly zone or humanitarian safe zone. These options would satisfy both the “right intentions” and “proportionality” standards proposed by the ICISS report and the UN High-level Panel for the legitimate use of force for humanitarian purposes.<sup>140</sup> Under the “right intentions” standard, states must be motivated by a desire to save civilian lives rather than self-interest.<sup>141</sup> One test for “right intentions” is whether the military force is “directed against the territorial integrity or political independence” of the state.<sup>142</sup> In addition, the military force used must be proportional to the humanitarian goal of protecting at-risk populations.<sup>143</sup> During the 2003 Iraq war, for instance, the United States and its allies found wide support for no-fly zones to protect the

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139. *Russia, China Veto Syria Resolution at U.N.*, THE WALL STREET JOURNAL, July 19, 2012, available at <http://www.bbc.co.uk/news/world-middle-east-18233934>.

140. See ICISS REPORT, *supra* note 11, at XII. Although these criteria were initially designed to test the legitimacy of the use of force with Security Council authorization, they can also be applied to the use of force without Security Council authorization. As discussed above, first two criteria—“just cause” and “last resort”—largely track the first two pillars of R2P. Syria presents a “just cause” for intervention because the international community has established a *prima facie* case of ongoing mass atrocity crimes. The use of force in Syria would be a “last resort” because a succession of peace plans, ceasefires, and economic sanctions have not stopped the Assad regime from attacking civilians.

141. Joyner, *supra* note 15, at 712. It is important that the intervening state/states not be perceived as acting primarily with an ulterior motive, using humanitarian interventions as a pretext for less legitimate motives such as revenge, power or land grabs, or strategic interests. See, e.g., INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND 54–55 (Dec. 2001) (discussing how India’s 1971 intervention in Pakistan was ill-received by the international community because India did not even claim humanitarian reasons as the primary justification for its intervention).

142. Joyner, *supra* note 15, at 714.

143. A More Secure World, *supra* note 1, ¶ 207(d).

Kurds, while the eventual invasion of Iraq to overthrow Saddam Hussein was met with considerable resistance from the international community.<sup>144</sup>

In Syria, given the Assad regime's use of air power against the civilian population, a no-fly zone—an area above Syria patrolled by the air forces of coalition of states—could be a proportional military response to the crisis.<sup>145</sup> No-fly zones were a fixture during 1990s peacekeeping operations<sup>146</sup> and were imposed on Iraq in 1991<sup>147</sup> and in Bosnia in 1992.<sup>148</sup> In 2011, the Security Council authorized a no-fly zone in Libya.<sup>149</sup> There, as in Syria, the government used fighter jets and helicopter gunships against civilian protestors.<sup>150</sup> States have sometimes been willing to establish no-fly zones in the past without Security Council authorization. In 1991, for instance, the United States, the United Kingdom, and France established a no-fly zone in Iraq in order to protect the Kurdish civilian areas, and did so without explicit Security Council authorization.<sup>151</sup> The no-fly zone prevented Iraqi air forces from using Iraqi airspace,<sup>152</sup> and commentators credit it with deterring further Iraqi aggression against the Kurdish population.<sup>153</sup>

Humanitarian safe zones are another low-intensity military option consistent with right intentions and proportionality criteria. The purpose of a humanitarian zone is to shelter and protect civilian populations facing an imminent crisis or threat.<sup>154</sup> Although humanitarian zones are often created without a state's consent, their primary objective is to safeguard civilian populations. Like no-fly zones, however, humanitarian zones are generally ineffective unless

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144. See, e.g., *Iraq War Legitimacy 'Questionable,' Says Ex-Diplomat*, BBC, Nov. 29, 2009, <http://news.bbc.co.uk/2/hi/8382194.stm>.

145. Alexander Benard, *Lessons From Iraq and Bosnia on the Theory and Practice of No-Fly Zones*, 27 J. STRATEGIC STUD. 454, 455 (2004).

146. *Id.*

147. *No-Fly Zones: The Legal Position*, BBC, Feb. 19, 2001, [http://news.bbc.co.uk/2/hi/middle\\_east/1175950.stm](http://news.bbc.co.uk/2/hi/middle_east/1175950.stm).

148. S.C. Res 781, ¶ 1, U.N. Doc. S/RES/781, (Oct. 9, 1992).

149. S.C. Res 1973, *supra* note 89, ¶ 6.

150. *Fresh Violence Rages in Libya*, ALJAZEERA, Feb. 22, 2011, <http://www.aljazeera.com/news/africa/2011/02/201122261251456133.html>.

151. See *No-Fly Zones: The Legal Position*, *supra* note 147.

152. *Operation Northern Watch*, GLOBAL SECURITY, [http://www.globalsecurity.org/military/ops/northern\\_watch.htm](http://www.globalsecurity.org/military/ops/northern_watch.htm) (last visited Mar. 6, 2013).

153. Benard, *supra* note 145, at 465.

154. See HIKARU YAMASHITA, *HUMANITARIAN SPACE AND INTERNATIONAL POLITICS: THE CREATION OF SAFE AREAS 4* (2004).

there are armed forces with the authority and resources to protect them.

The experience of the United States and its allies in Iraq, where they created a humanitarian zone in 1991 against the express wishes of the Iraqi government, demonstrate how effective these zones can be in protecting civilians. Saddam Hussein's attacks on Kurdish populations in the north had led an estimated 1.5 million Kurds to flee their homes, with many heading towards Turkey and Iran.<sup>155</sup> Kurdish leaders appealed to France, Saudi Arabia, the UK, and the US, requesting immediate action by the UN. In early April, the Security Council passed Resolution 688 encouraging states "to contribute to . . . humanitarian relief efforts" and demanding that Iraq allow such efforts within the state.<sup>156</sup>

The Iraqi government strongly opposed the plan for humanitarian zones, and said it would do everything in its power to prevent their creation. Nonetheless, in mid-April, coalition forces moved into northern Iraq with the express intention of setting up camps for Kurdish refugees and coordinating humanitarian aid.<sup>157</sup> The zone lasted about three months and safeguarded some 450,000 Kurdish refugees before they were able to return home.<sup>158</sup>

5. The use of low-intensity military force must be authorized by a legitimate authority

When the Security Council fails to act to prevent or halt atrocity crimes, a legitimate authority must authorize any use of force.<sup>159</sup> In accordance with earlier instances of humanitarian intervention without Security Council authorization,<sup>160</sup> the legitimacy of an intervention will be greater where military action is undertaken by a

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155. *Iraq Conflict History*, INT'L CRISIS GRP., <http://www.crisisgroup.org/en/publication-type/key-issues/research-resources/conflict-histories/iraq.aspx> (last updated Jan. 2010).

156. S.C. Res. 688, ¶¶ 2, 6 U.N. Doc. S/RES/688 (Apr. 5, 1991).

157. Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, 2 EUR. J. INT'L L. 114, 119–20 (1991).

158. *Id.* at 121.

159. See, e.g., ICISS REPORT, *supra* note 11, at XII.

160. The military intervention in Kosovo was led by NATO.

regional security organization, a coalition of the willing,<sup>161</sup> or some form of multilateral operations.<sup>162</sup>

One possible basis for this authority would be a broad-based international coalition, including representatives from neighboring states. A regional political or security organization, such as the European Union, the African Union, or the Arab League, could also legitimately authorize an R2P intervention. The ICISS report endorsed regional or sub-regional organizations pursuing collective action within their boundaries, on the basis that member states to those organizations are more familiar with local political actors and are more likely to bear the costs of any humanitarian crisis on their borders.<sup>163</sup> Like the ICISS report, the UN High Level Panel also approved of the trend towards using regional coalitions to stop atrocity crimes.<sup>164</sup> Another possible basis of authority would be the General Assembly's "Uniting for Peace" procedure.<sup>165</sup>

6. The intervention must come at the request of credible opposition groups

An intervention taken pursuant to specific requests from victims' representatives would also increase its perceived legitimacy and chances of success. In northern Iraq, for instance, leaders of the Kurdish community appealed to France, the UK, and the US to protect their people from Saddam Hussein;<sup>166</sup> similarly, during the Kosovo crisis, the Kosovo Liberation Army requested help from the international community on numerous occasions.<sup>167</sup> Both requests led

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161. For example, unilateral intervention by Vietnam in Cambodia in 1975 was widely condemned because of the global distrust of communist governments at that time. See SEAN D. MURPHY, *HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER* 104 (1996).

162. Mikulaschek, *supra* note 8, at 24; Saban Kardas, *Humanitarian Intervention: The Evolution of the Idea and Practice*, PERCEPTIONS: J. INT'L AFF., Fall & Winter 2003, at 21.

163. ICISS REPORT, *supra* note 11, at 53.

164. A More Secure World, *supra* note 1, ¶ 272 ("Recent experience has demonstrated that regional organizations can be a vital part of the multilateral system. . . . The key is to organize regional action within the Charter and the purposes of the United Nations. . . .")

165. ICISS REPORT, *supra* note 11, at 53.

166. Malanczuk, *supra* note 157, at 121.

167. Carlotta Gall, *Conflict in the Balkans: In Kosovo; Top Ethnic Albanian Rebel Asks NATO to Start Strikes*, N.Y. TIMES, Mar. 23, 1999, <http://www.nytimes.com/1999/03/23/world/conflict-balkans-kosovo-top-ethnic-albanian-rebel-asks-nato-start-strikes.html?pagewanted=all&src=pm>.

to international military interventions that were widely viewed as legitimate, despite the absence of Security Council authorization.

Applying this criterion to Syria, a request for low-intensity military operations could come from a consensus among several groups representing victims of atrocity crimes, including the National Coalition for Syrian Revolutionary and Opposition Forces (Syrian National Coalition) interim Prime Minister, Mr. Ghassan Hitto,<sup>168</sup> Local Coordinating Committees, Revolutionary Council, and the Free Syrian Army. To be sure, achieving consensus among opposition groups during a humanitarian crisis can be challenging. Syrian opposition groups initially disagreed about whether foreign military intervention was necessary or prudent,<sup>169</sup> their views changed as the crisis intensified.<sup>170</sup>

## VI. CONCLUSION

International law relating to the use of force to prevent atrocity crimes is still evolving. Even so, the R2P doctrine reflects a growing international consensus on several issues: (1) sovereignty entails the inherent responsibility to protect populations from mass atrocity crimes, the prohibition of which is fundamental to the international system; (2) the protection of populations from mass atrocities is primarily the responsibility of the state; (3) when a state is unable to prevent atrocity crimes from occurring, the international community should encourage and help that state to meet its sovereign obligations; (4) when a state manifestly fails to protect its population, the international community should first attempt to protect populations through peaceful means; and (5) once peaceful measures have been exhausted, the international community has the right to use force to bring an end to mass atrocities.

Despite R2P's important role in shaping the international community's responses to mass atrocities, the doctrine has limitations. As the Syria crisis demonstrates, instances of mass human rights violations reminiscent of Bosnia and Rwanda still persist, largely because of Security Council inaction. As a result, the international

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168. The United States, United Kingdom, France, Turkey, and Gulf States have recognized the National Coalition for Syrian Revolutionary and Opposition Forces as the legitimate representative of the Syrian people. *See US Recognises Syria Opposition Coalition Says Obama*, BBC, Dec. 12, 2012, <http://www.bbc.co.uk/news/world-middle-east-20690148>.

169. Randa Slim, *Meet the Syrian Opposition*, FOREIGN POL'Y, Nov. 1, 2011, [http://mideast.foreignpolicy.com/posts/2011/11/02/meet\\_syrias\\_opposition](http://mideast.foreignpolicy.com/posts/2011/11/02/meet_syrias_opposition).

170. *See, e.g., Syria Rebel Leader Wants Libyan-style Arab Initiative*, REUTERS, Sept. 19, 2012, <http://www.reuters.com/article/2012/09/19/us-syria-sieda-libya-idUSBRE88I0H020120919>

community must now ask what happens when the Security Council fails to act. In answering this delicate question, this article has argued that R2P's third pillar should allow a regional organization or coalition of the willing to authorize, and use, limited military force to protect populations from mass atrocity crimes. To balance countervailing concerns, this article has proposed a framework for the use of limited military force under R2P's third pillar when the Security Council fails to act. These criteria have attempted to reconcile the *jus cogens* status of the prohibition of atrocity crimes, with the importance that international law attaches to both state sovereignty and the UN Charter's general prohibition on the use of force.

First, a *prima facie* case of atrocity crimes must exist. Second, peaceful options to compel the state to protect its populations, such as diplomatic pressure and sanctions, must be exhausted, ensuring that force is used only as a last resort. Third, the Security Council must be unable to act because of repeated vetoes and continued opposition by permanent members. Fourth, any military force used must be limited to only those low-intensity options designed to protect populations, such as no-fly zones and humanitarian safe zones. Fifth, force must be authorized by a legitimate authority, which could come from a broad international coalition, a regional political or security organization, or the UN General Assembly. Sixth, the intervention must come at the request of credible opposition groups that represent the victims of mass atrocity crimes.

Over the past decade, R2P has made significant contributions to the protection of populations from mass atrocities. The doctrine has tackled, and engendered consensus on, some of international law's most difficult and controversial questions regarding the use of force. In doing so, R2P has pushed debates forward in important ways. While these developments should be applauded, the next phase of R2P's development must critically reflect, and as the framers of R2P once did, build consensus around some of the most controversial and complex issues of present-day international law. By establishing specific criteria that allow for the limited use of force when the Security Council fails to act, R2P would enable the international community to prevent the next Rwanda or Srebrenica.





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# How the War Against ISIS Changed International Law

Michael Scahrf

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# HOW THE WAR AGAINST ISIS CHANGED INTERNATIONAL LAW

Michael P. Scharf

*In an effort to destroy ISIS, beginning in August 2014, the United States, assisted by a handful of other Western and Arab countries, carried out thousands of bombing sorties and cruise missile attacks against ISIS targets in Iraq and Syria. Iraq had consented to the airstrikes in its territory, but Syria had not, and Russia blocked the UN Security Council from authorizing force against ISIS in Syria. The United States invoked several different legal arguments to justify its airstrikes, including the right of humanitarian intervention, the right to use force in a failed state, and the right of hot pursuit, before finally settling on self-defense. Use of force in self-defense has traditionally not been viewed as lawful against non-state actors in a third state unless they are under the effective control of that state, but the United States argued that in the aftermath of the 9/11 attacks by al Qaeda, such force can be justified where a government is unable or unwilling to suppress the threat posed by non-state actors operating within its borders. This view was not, however, initially accepted by Russia, China, or even the United Kingdom. But that changed in the aftermath of ISIS attacks against a Russian jetliner and a Paris stadium and concert hall in 2015, leading to the unanimous adoption of a UN Security Council resolution calling on States to use all necessary measures to fight ISIS in Syria without offering a legal basis for military action. This article examines the evolution of the right to use force in self-defense against non-state actors and makes the case that events in 2015 triggered a “Grotian Moment”: a fundamental paradigm shift that will have broad implications for international law.*

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## I. INTRODUCTION

In 2014, a militant group calling itself the Islamic State (ISIS)<sup>1</sup> rapidly took over more than thirty percent of the territory of Syria and Iraq.<sup>2</sup> In the process, it captured billions of dollars worth of oil fields and refineries, bank assets and antiquities, tanks and armaments, and became one of the greatest threats to peace and

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1. ISIS is also known as ISIL and Daesh.
  2. Matthew G. Olsen, Director, National Counterterrorism Center, Remarks for the Brookings Institution (Sept. 3, 2014) *available at* [http://www.nctc.gov/docs/2014-09-03\\_remarks\\_for\\_the\\_brookings\\_institution.pdf](http://www.nctc.gov/docs/2014-09-03_remarks_for_the_brookings_institution.pdf) (“[t]oday, ISIL has more than 10,000 fighters and controls much of the Tigris-Euphrates basin—the crossroads of the Middle East—an area similar in size to the UK.”).

security in the Middle East.<sup>3</sup> In an effort to “degrade and defeat” ISIS, beginning in August 2014 the United States, assisted by a handful of other Western and Arab countries, launched thousands of bombing sorties and cruise missile attacks against ISIS targets in Iraq and Syria.<sup>4</sup> While the Iraqi government has consented to foreign military action against ISIS within Iraq, the Syrian government did not.<sup>5</sup> Rather, Syria protested that the air strikes in Syrian territory were an unjustifiable violation of international law.<sup>6</sup>

The United States initially claimed the airstrikes against ISIS were justified variously by a right of humanitarian intervention, a right to use force in the territory of failed states, and a right of hot pursuit, before settling on the argument that the airstrikes in Syria were lawful acts of collective self-defense on behalf of the government of Iraq.<sup>7</sup> Use of force in self-defense has traditionally not been viewed as lawful against non-state actors in a third state unless they are under the effective control of that state,<sup>8</sup> but the United States has argued that since the 9/11 attacks such force can be justified where a government is unable or unwilling to suppress the threat posed by the

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3. Janine Di Giovanni et al., *How does ISIS Fund its Reign of Terror?* NEWSWEEK (Nov. 6, 2014), available at, [www.newsweek.com/2014/11/14/how-does-isis-fund-its-reign-terror-282607.html](http://www.newsweek.com/2014/11/14/how-does-isis-fund-its-reign-terror-282607.html) [https://perma.cc/3CV2-QVU5].
  4. Claire Mills et al., *ISIS/Daesh: The Military Response in Iraq and Syria*, House of Commons Briefing Paper No. 06995, Sept. 11, 2015, at 4-7.
  5. Ben Smith, *ISIS and the Sectarian Conflict in the Middle East*, House of Commons Library Research Paper 15/16, Mar. 19, 2015, at 55 (demonstrating that the United States did warn the Assad regime about the imminent launch of airstrikes in September 2014 but did not request the regime’s permission).
  6. *Id.*
  7. Letter from Samantha J. Power, Representative of the United States of America to the United Nations, to Ban Ki-moon, Secretary-General of the United Nations (Sept. 23, 2014), available at <https://www.justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/> [https://perma.cc/2Z37-LHPC].
  8. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (merits), 1986 I.C.J. 14, ¶ 191 (June 26), <http://www.icj-cij.org/docket/files/70/6503.pdf> [https://perma.cc/J4LN-6EJP]; Oil Platforms (Iran v. U.S.) 2003 I.C.J. 161, ¶¶ 195-196 (Nov. 6), <http://www.icj-cij.org/docket/files/90/9715.pdf> [https://perma.cc/G6EX-745M] [hereinafter *Oil Platforms*]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) 2005 I.C.J. 169 (Dec. 19), <http://www.icj-cij.org/docket/files/116/10455.pdf> [https://perma.cc/752C-HYG9] [hereinafter *Armed Activities*].

non-state actors operating within its borders.<sup>9</sup> This view was not, however, accepted by Russia, China, or even the United Kingdom, which initially refused to join the United States in bombing ISIS targets in Syria.<sup>10</sup>

Article 51 of the UN Charter provides for protection of a State's "inherent right" of self-defense.<sup>11</sup> Reference to an "inherent right" means the question is not one of treaty interpretation but rather discerning whether the evolving customary international law principles governing self-defense support the U.S. position. Usually, customary international law changes slowly over many decades.<sup>12</sup> But sometimes, world events are such that customary international law develops quite rapidly.<sup>13</sup> Some scholars call these transformative

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9. See Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 487 (2012).
  10. See Smith, *supra* note 5, at 58; Written Evidence from the Rt Hon Hugh Robertson MP, Minister of State, Foreign and Commonwealth Office to the Foreign Affairs Committee on humanitarian intervention and the responsibility to protect (Jan. 14, 2014), *available at* [www.publications.parliament.uk/pa/cm201415/cmselect/cmdfence/582/58205.htm](http://www.publications.parliament.uk/pa/cm201415/cmselect/cmdfence/582/58205.htm) [<https://perma.cc/4TBS-KAW8>].
  11. U.N. Charter art. 51.
  12. Vincy Fon & Francesco Parisi, *Customary Law and Articulation Theories: An Economic Analysis* 3, GEO. MASON UNIV. SCH. L., L. & Econ. Working Paper Series No. 2-24 (2000), [http://www.law.gmu.edu/assets/files/publications/working\\_papers/02-24.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/02-24.pdf) [<http://perma.cc/E4HK-PJ3T>] (explaining that historically, crystallization of new rules of customary international law was viewed as a protracted process that took decades, if not centuries, to complete. French jurisprudence generally required the passage of at least forty years for the emergence of an international custom, while German doctrine generally required thirty years) (last visited Feb. 22, 2014); see G.I. Tunkin, *Remarks on the Judicial Nature of Customary Norms in International Law*, 49 CALIF. L. REV. 419, 420 (1961); Manley O. Hudson, *Special Rapporteur on Article 24 of the Statute of the Int'l Law Comm'n, Ways and Means for Making the Evidence of Customary International Law More Readily Available*, Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/16 (Mar. 3, 1950) (the ILC, at the beginning of its work, demanded State practice "over a considerable period of time" for a customary norm to emerge).
  13. North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), Merits, 1969 I.C.J. 3, ¶¶ 71, 73-74 (Feb. 20) (explaining that "Although the passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of customary international law . . . an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."); *Id.* ¶ 74 (While

events and paradigm shifts<sup>14</sup> that accelerate the formation of customary international law “International Constitutional Moments,”<sup>15</sup> likening them to the rapid, radical transformation in American Constitutional Law that accompanied the New Deal.<sup>16</sup> But because these changes occur largely outside a constitution or treaty framework, elsewhere I have made the case that a more apt term for this phenomenon is “Grotian Moment,” named for Hugo Grotius, the 15<sup>th</sup> Century Dutch scholar and diplomat whose masterpiece *De Jure Belli ac Pacis* helped marshal in the modern system of international law.<sup>17</sup> This article examines whether the use of force against ISIS in Syria is one of these so-called Grotian Moments, marking a rapid change in customary international law.

The article begins with background about the nature of the ISIS threat and the U.S. decision to launch airstrikes against ISIS in Syria

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recognizing that some norms can quickly become customary international law, the ICJ held that the equidistance principle contained in Article 6 of the 1958 Convention on the Continental Shelf had not done so as of 1969 because so few States recognized and applied the principle. At the same time, the Court did find that that Articles 1 and 3 of the Convention (concerning the regime of the continental shelf) did have the status of established customary law).

14. See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 150 (2d ed. 1970) (coining the phrase “paradigm shift”).
15. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 463 (2003) (Martinez, for example, has written that the drafting of the United Nations (U.N.) Charter was a “constitutional moment” in the history of international law); Leila Nadya Sadat, *Enemy Combatants After Hamdan v. Rumsfeld: Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206–07 (2007) (Sadat has similarly described Nuremberg as a “constitutional moment for law.”).
16. See BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 19 (1984); see also BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 385, 409 (1991) (coining the phrase “Constitutional moment”).
17. See generally MICHAEL P. SCHARF, *CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS* (2014) [hereinafter *Grotian Moments*] (noting that the term “Grotian Moment” was first coined by Princeton Professor Richard Falk). See INTERNATIONAL LAW AND WORLD ORDER 1265–86 (Burns H. Weston et al. eds., Thomson/West 4th ed. 2006) (Grotius (1583–1645) is widely considered to have laid the intellectual architecture for the Peace of Westphalia, which launched the basic rules of modern international law); HEDLEY BULL ET AL., *HUGO GROTIUS AND INTERNATIONAL RELATIONS* 1, 9 (1992) (explaining that while the results of Westphalia may have been simplified by the lens of history, and Grotius’ role may have been exaggerated, Westphalia has unquestionably emerged as a symbolic marker and Grotius as an emblematic figure of changing historical thought.”Grotian Moment” is thus an apt label for transformational events in customary international law).

in August 2014. Next, it discusses the principles and process of customary international law formation and the phenomenon of accelerated formation of customary international law. Finally, it explores the evolution of the legal rationales to justify use of force against ISIS in Syria that were espoused by the United States, and the international reaction to these arguments, in order to determine whether or how the airstrikes and the international response have altered international law.

## II. BACKGROUND ON THE WAR ON ISIS

ISIS has its roots in the Sunni/Baathist-dominated Iraqi army of Saddam Hussein,<sup>18</sup> which was one of the largest armies in the world before the U.S.-led invasion of Iraq in 2003.<sup>19</sup> After the defeat of the Baathist regime, members of the Baathist party were banned from participating in the army or other government positions.<sup>20</sup> Dispossessed, marginalized, and subjugated under the U.S. occupation and subsequent Shi'ite-dominated Iraqi government of Iraqi Prime Minister Nouri al-Maliki, the former Sunni army personnel launched a protracted rebellion, with the insurgents taking on the name “al-Qaeda in Iraq” and later changing it to the “Islamic State of Iraq” (ISI).<sup>21</sup>

Meanwhile, the chaos in Syria, which began as protests against the Assad regime in 2011 and escalated to full-out civil war by 2014, presented ISI an opportunity to seize territory across the border.<sup>22</sup> In 2014 ISI established its “capital” in the captured Syrian town of al-Raqqah and changed the group’s name yet again to the “Islamic State of Iraq and Syria” (ISIS).<sup>23</sup> Soon thereafter, ISIS seized nearby Syrian oil wells and refineries, providing it with vast financial resources.<sup>24</sup>

ISIS then turned its sights on Mosul, the second-largest city in Iraq, which fell to ISIS in 2014.<sup>25</sup> Following this, ISIS had access to

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18. See Smith, *supra* note 5, at 1, 9.

19. John M. Broder & Douglas Jehl, *Iraqi Army: World’s 5th Largest but Full of Vital Weaknesses*, LOS ANGELES TIMES (Aug. 13, 1990), available at [http://articles.latimes.com/1990-08-13/news/mn-465\\_1\\_iraqi-army](http://articles.latimes.com/1990-08-13/news/mn-465_1_iraqi-army) [<https://perma.cc/E525-EHFE>] (noting that the Iraqi army was the 5<sup>th</sup> largest in the world).

20. See Smith, *supra* note 5, at 9.

21. Smith, *supra* note 5, at 1.

22. *Id.*

23. *Id.*

24. *Id.* at 17.

25. Martin Chulov, *Isis insurgents seize control of Iraqi city of Mosul*, THE GUARDIAN (June 10, 2014), available at

hundreds of millions of dollars from banks, as well as tanks and armaments that it captured from the Iraqi army which fled Mosul with almost no fight.<sup>26</sup> With these vast financial and military resources, ISIS began to capture city after city in Iraq and Syria with ease. Meanwhile, the Maliki government's continued suppression of the Iraqi Sunnis enabled ISIS to sweep through Sunni areas in Iraq without much resistance because of resentment toward the ruling regime.<sup>27</sup>

Experts believe the majority of top ISIS decision-makers are former members of Saddam Hussein's army, intelligence, and security forces.<sup>28</sup> But during 2014, the ranks of ISIS swelled with as many as 10,000 foreign fighters from across the Arab world and Western Europe who were attracted to its fundamentalist ideology and string of military successes.<sup>29</sup>

The name Islamic State reflects the group's avowed goal to establish an Islamic caliphate across the Eastern Mediterranean. In the lands it controls, ISIS has imposed repressive edicts and conditions on the inhabitants, similar to the Taliban's former rule in Afghanistan. ISIS has beheaded thousands of Christians, Kurds and Shi'ites and destroyed Shiite shrines and archeological sites in areas under its dominion in Syria and Iraq.<sup>30</sup>

ISIS's strategy of seizing and controlling territory in Iraq and Syria distinguishes it from the al-Qaeda network, which has focused on attacks on Western interests.<sup>31</sup> Due to ISIS's divergent aims, tactics, and its ongoing conflict with the al-Nusra group (which was seen as the primary representative of al-Qaeda in Syria), in 2013 central al-Qaeda leadership disowned ISIS.<sup>32</sup> The United States thus found itself with three adversaries in the Syrian conflict: The Assad government, the al-Nusra (al-Qaeda) group, and ISIS.

The first U.S. airstrikes against ISIS were in response to a humanitarian catastrophe unfolding in northern Iraq in August 2014. After capturing nearby Mosul, ISIS forces attacked a number of towns in the Sinjar area populated by a Kurdish minority known as the Yazidis – killing thousands of men and capturing hundreds of women

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<http://www.theguardian.com/world/2014/jun/10/iraq-sunni-insurgents-islamic-militants-seize-control-mosul> [<https://perma.cc/RD3V-N6JU>].

26. Smith, *supra* note 5, at 16-17.

27. *Id.* at 24.

28. *Id.* at 9.

29. *Id.* at 20.

30. *Id.* at 11.

31. Smith, *supra* note 5, at 12.

32. *Id.* at 14.



and children as slaves.<sup>33</sup> When some 30,000 Yazadis took refuge on 4,800-foot Mount Sinjar, the ISIS forces cut off their means of egress from the mountain.<sup>34</sup> At the time, Iraq had not yet given permission to the United States to use force in its territory against ISIS, but with the Yazadis' water and food supplies dwindling, President Obama authorized airstrikes on the ISIS forces in order to save their lives, saying, "When we have the unique capacity to avert a massacre, the United States cannot turn a blind eye."<sup>35</sup>

Meanwhile, under U.S. pressure, Iraqi Prime Minister Maliki stepped down a few days after the Yazadi operation, and was replaced by Haidar al-Abadi, who was seen as more moderate and more able to begin a reconciliation process with Sunnis.<sup>36</sup> At the request of al-Abadi, the United States launched operation "Inherent Resolve," consisting of widespread airstrikes on ISIS targets in Iraq in August 2014.<sup>37</sup> On September 19, 2014, France joined the United States in bombing ISIS in Iraq, and two weeks later the UK joined its two NATO allies in engaging in airstrikes in Iraq.<sup>38</sup>

Under international law, a State can use military force in another State's territory in three situations: (1) with the latter's consent, (2) with Security Council authorization, or (3) when acting in self-defense against an armed attack. Unlike Iraq, Syria has not consented to use of force against ISIS by foreign countries (other than Russia) in Syrian territory, and the U.S. State Department spokesman stated,

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33. Steve Hopkins, *Full horror of the Yazidis who didn't escape Mount Sinjar: UN confirms 5,000 men were executed and 7,000 women are now kept as sex slaves*, DAILY MAIL (Oct. 14, 2014, 11:22 AM), <http://www.dailymail.co.uk/news/article-2792552/full-horror-yazidis-didn-t-escape-mount-sinjar-confirms-5-000-men-executed-7-000-women-kept-sex-slaves.html> [<http://perma.cc/99WH-GFYW>].
34. Haroon Siddique, *20,000 Iraqis besieged by Isis escape from mountain after US air strikes*, THE GUARDIAN (Aug. 10, 2014, 9:12AM), <http://www.theguardian.com/world/2014/aug/10/iraq-yazidi-isis-jihadists-islamic-state-kurds> [<http://perma.cc/2WAR-D7M3>].
35. Helene Cooper & Michael D. Shear, *Militants Seize of Mountain in Iraq is Over, Pentagon Says*, N.Y. TIMES (Aug. 14, 2014), [http://www.nytimes.com/2014/08/14/world/middleeast/iraq-yazidi-refugees.html?\\_r=0](http://www.nytimes.com/2014/08/14/world/middleeast/iraq-yazidi-refugees.html?_r=0) [<http://perma.cc/DP69-NY7D>]; Helene Cooper, Mark Landler & Alissa J. Rubin, *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES (Aug. 7, 2014), [http://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html?\\_r=0](http://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html?_r=0) [<http://perma.cc/693E-LYVH>].
36. Smith, *supra* note 5, at 24.
37. See Mills, *supra* note 4, at 6.
38. See Smith, *supra* note 5, at 51-52.

“We’re not looking for the approval of the Syrian regime.”<sup>39</sup> At the same time, with its permanent member veto, Russia blocked Security Council authorization to use force in Syria.<sup>40</sup> Russia has long been a strong ally of the Assad regime, which allows Russia to keep its only naval base outside the former Soviet Union at the Syrian Mediterranean port of Tartus.<sup>41</sup> Russia also seems motivated by the goal of frustrating U.S. policy in the Mideast.<sup>42</sup> The Russian Foreign Ministry has said that without a Security Council resolution, any strike against Syria would constitute an unlawful act of aggression.<sup>43</sup>

Nevertheless, without Syrian consent or Security Council authorization, on September 23, 2014, the United States began airstrikes on ISIS targets in Syria, supported by Bahrain, Jordan, Saudi Arabia, and the UAE.<sup>44</sup> Later, in February 2015 and April 2015, Jordan and Canada, respectively, joined the airstrikes against ISIS in Syria.<sup>45</sup> U.S. aircraft participating in the strikes included F-15, F-16, F/A-18, F-22 fighter aircraft and B-1 bombers, as well as Tomahawk missiles deployed from US naval vessels in the Red Sea and North Arabian Gulf.<sup>46</sup>

From August 2014 through August 2015, the U.S.-led coalition had conducted more than 5,500 airstrikes on ISIS targets in Iraq and Syria, resulting in the deaths of over 15,000 ISIS fighters.<sup>47</sup> Despite

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39. See generally Mills, *supra* note 4, at 55 (describing how the United States did warn the Assad regime about the imminent launch of airstrikes in September 2014 but did not request the regime’s permission).
40. *Syria resolution authorizing military force fails in U.N. Security Council*, CBS NEWS (Aug. 28 2013, 4:48 PM), <http://www.cbsnews.com/news/syria-resolution-authorizing-military-force-fails-in-un-security-council/> [http://perma.cc/3ZGZ-96HM].
41. Smith, *supra* note 5, at 42.
42. Smith, *supra* note 5, at 14.
43. Somini Sengupta, *A Host of Possible Objections to Expanded Airstrikes in Syria*, N.Y. TIMES (Sept. 17, 2014), [http://www.nytimes.com/2014/09/18/world/middleeast/a-host-of-possible-objections-to-expanded-airstrikes.html?\\_r=0](http://www.nytimes.com/2014/09/18/world/middleeast/a-host-of-possible-objections-to-expanded-airstrikes.html?_r=0) [http://perma.cc/U5NT-ET95].
44. Julian E. Barnes & Dion Nissenbaum, *U.S., Arab Allies Launch Airstrikes Against Islamic State Targets in Syria*, WALL ST. J., <http://www.wsj.com/articles/us-arab-allies-launch-airstrikes-against-islamic-state-targets-in-syria-1411436642> [http://perma.cc/HF7M-RGTJ].
45. Mills, *supra* note 4, at 10-11.
46. Smith, *supra* note 5, at 53.
47. Jim Michaels, *15,000 Killed, but ISIS Persists*, USA TODAY (July 30, 2015, 5:55 PM), <http://www.usatoday.com/story/news/world/2015/07/29/air-campaign->

American and British commanders' claims of success,<sup>48</sup> ISIS's forces reportedly grew to over 31,500 during the period of bombing, with a steady influx of recruits from around the world replacing ISIS casualties, suggesting that the war against ISIS is likely to be a lengthy one.<sup>49</sup>

Then, on October 31, 2015, ISIS bombed a Russian jetliner over the Sinai desert, killing 224 passengers, and followed that up on November 13, 2015, by attacking a rock concert and sporting event in Paris, killing 130 and injuring 368 people.<sup>50</sup> In response, on December 2, 2015, the U.N. Security Council unanimously adopted Resolution 2249, which determined that ISIS is "a global and unprecedented threat to international peace and security," and called for "all necessary measures" to "eradicate the safe haven [ISIS] established" in Syria.<sup>51</sup>

### III. THE CONCEPT OF ACCELERATED FORMATION OF CUSTOMARY INTERNATIONAL LAW

Professor Myers McDougale of Yale Law School famously described the customary international law formation process as one of continuous claim and response.<sup>52</sup> To illustrate this process, consider the question of whether international law permits a State to use force to arrest a terrorist leader in another State without the latter's consent—a question that recently arose when the United States kidnapped an al-Qaeda leader from Libya in October 2013.<sup>53</sup> The

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kills-15000-isis-militants-pentagon-iraq-syria/30750327/  
[<http://perma.cc/6P6X-WR9L>].

48. *Id.*

49. *Id.*

50. See Armin Rosen, *ISIS pulled off 2 of its most alarming attacks in the space of less than a month*, FIN. TIMES (Nov. 18, 2015, 8:01 AM), <http://www.businessinsider.com/isis-paris-plane-attacks-2015-11> [<https://perma.cc/9M3M-3P9A>] (last visited Dec. 19, 2015); Adam Chandler et al., *The Paris Attacks: The Latest*, THE ATLANTIC (Nov. 22, 2015, 4:58 PM), <http://www.theatlantic.com/international/archive/2015/11/paris-attacks/415953/> [<https://perma.cc/NM9A-F695>] (last visited Feb. 19, 2016).

51. See S.C. Res. 2249 (Nov. 20, 2015), available at <http://www.un.org/press/en/2015/sc12132.doc.htm> [<https://perma.cc/4GZM-WEYC>] (last visited Dec. 19, 2015).

52. See generally Myres S. McDougale & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L. J. 648 (1955).

53. See Ernesto Londoño, *Capture of Bombing Suspect in Libya Represents Rare 'Rendition' by U.S. Military*, WASH. POST (Oct. 6, 2013), <http://articles.washingtonpost.com/2013-10->

claim may be express, such as demanding that its special forces be allowed to enter the territorial State to arrest the terrorist, or implicit, such as sending its special forces into the territorial State without its permission to apprehend the terrorist. The response to the claim may in turn be favorable, such as consenting to the operation or refraining from protesting the extraterritorial apprehension. In such case, the claim and response will begin the process of generating a new rule of customary international law. Some States may imitate the practice and others may passively acquiesce to it.

A “custom pioneer” (the first State to initiate a new practice) has no guarantee that its action will actually lead to the formation of a binding custom. Indeed, the response may be a repudiation of the claim, as in the case of Libya’s protest of the un-consented apprehension of the al-Qaeda operative.<sup>54</sup> In such case, the repudiation could constitute a reaffirmation of existing law, which is strengthened by the protest. Or, the claim and repudiation could constitute a stalemate, which could decelerate the formation of new customary international law. The reaction of third States is also relevant. Out of this process of claim and response, and third party acquiescence or repudiation, rules emerge or are superseded. Just “as pearls are produced by the irritant of a piece of grit entering an oyster’s shell, so the interactions and mutual accommodations of States produce the pearl—so to speak—of customary law.”<sup>55</sup> Usually, this process of customary international law formation takes many decades.<sup>56</sup> But sometimes, world events are such that customary international law develops quite rapidly.<sup>57</sup>

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06/world/42771116\_1\_kerry-terrorism-suspects-libyan-government  
[<http://perma.cc/KYV5-H8UF>] (last visited Feb. 22, 2014).

54. *Id.*

55. MAURICE H. MENDELSON, *THE FORMATION OF CUSTOMARY INTERNATIONAL LAW* 190 (1998).

56. Fon & Parisi, *supra* note 12 (affirming that historically, crystallization of new rules of customary international law was viewed as a protracted process that took decades, if not centuries, to complete. French jurisprudence generally required the passage of at least forty years for the emergence of an international custom, while German doctrine generally required thirty years); *see* Tunkin, *supra* note 12, at 420; Manley O. Hudson, *Special Rapporteur on Article 24 of the Statute of the Int’l Law Comm’n, Ways and Means for Making the Evidence of Customary International Law More Readily Available*, U.N. Doc. A/CN.4/16 (Y.B. Int’l L. Comm’n, Working Paper, 1950) (stating that the ILC, at the beginning of its work, demanded State practice “over a considerable period of time” for a customary norm to emerge).

57. The Court stated: “Although the passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of customary international law . . . an indispensable requirement would be that within the period in question, short though it might be, State practice,

In domestic law, we know what stages legislation needs to go through and how many votes are needed at each stage for a bill to become a law. Likewise for international conventions, we know what formalities must be undertaken for a text to become a treaty and the number of ratifications required to bring it into force. In contrast, there exists no agreed upon formula for identifying with precision how many States are needed and how much time must transpire to generate a rule of customary international law.<sup>58</sup>

Professor Maurice Mendelson, the Chair of the ILA's Customary International Law Committee, suggests that such a formula is unnecessary. Using the metaphor of building a house, he points out that it is often difficult or even impossible to say exactly when construction has reached the point that we can conclude a house has been created.<sup>59</sup> It is neither when the first foundation stone is laid nor when the last brush of paint has been applied, but somewhere between the two. As Mendelson puts it, "[d]o we have to wait for the roof to go on, for the windows to be put in, or for all of the utilities to be installed? So it is with customary law."<sup>60</sup> Rarely does a decision maker need to know the exact moment that a practice has crystallized into a binding rule, or as Mendelson puts it, "precisely when the fruit became ripe."<sup>61</sup> Instead, he concludes, "we are more interested in knowing, when we bite it, if it is now ripe or still too hard or sour."<sup>62</sup>

Mendelson's metaphor is apt, for example, in examining when the continental shelf concept became customary international law.

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including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." *North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.)*, Merits, 1969 I.C.J. 3, ¶¶ 71, 73-74 (Feb. 20, 1969) [hereinafter *North Sea Continental Shelf*]; While recognizing that some norms can quickly become customary international law, the ICJ held that the equidistance principle contained in Article 6 of the 1958 Convention on the Continental Shelf had not done so as of 1969 because so few States recognized and applied the principle. At the same time, the Court did find that that Articles 1 and 3 of the Convention (concerning the regime of the continental shelf) did have the status of established customary law. *Id.* at ¶ 74.

58. ANTHONY A. D'AMATO, CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88 (1971) (noting that there is no consensus as to how much time a practice must be maintained to evidence the existence of a custom); Tunkin, *supra* note 12, at 420 (arguing that the element of time is not dispositive as to whether a customary rule exists).

59. See MENDELSON, *supra* note 55, at 175.

60. See MENDELSON, *supra* note 55, at 175.

61. MENDELSON, *supra* note 55, at 176.

62. MENDELSON, *supra* note 55, at 176.

President Truman proclaimed the continental shelf concept in 1945; the 1958 Geneva Convention on the Continental Shelf recognized this entitlement on the part of coastal States, and in 1969 the ICJ acknowledged that the principle was part of customary international law in *North Sea Continental Shelf*.<sup>63</sup> Somewhere during those twenty-four years between 1945 and 1969, the coastal States' rights over the continental shelf had crystallized into customary international law, but it would be difficult to pinpoint the exact moment that occurred.

Sometimes courts or international organizations need to determine more definitively when an emerging norm has ripened into binding customary international law. The Cambodia Tribunal's determination of whether the Nuremberg trial established Joint Criminal Enterprise (JCE) liability as a principle of customary international law is illustrative.<sup>64</sup>

A. *Nuremberg as a Grotian Moment*

JCE is a form of liability somewhat similar to the Anglo-American "felony murder rule"<sup>65</sup> and the "Pinkerton rule,"<sup>66</sup> in which a person who willingly participates in a criminal enterprise can be held criminally responsible for the reasonably foreseeable acts of other members of the criminal enterprise even if those acts were not part of the plan. Although few countries around the world apply principles of co-perpetration similar to the felony murder rule or Pinkerton rule, since the decision of the Appeals Chamber of the International

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63. *North Sea Continental Shelf*, 1969 I.C.J. 3; White House News Release, President Truman's Proclamations on U.S. Policy Concerning Natural Resources of Sea Bed and Fisheries on High Seas (Sept. 28, 1945), <http://www.ibiblio.org/pha/policy/post-war/1945-09-28a.html> [<http://perma.cc/4MXC-FRSK>].

64. *Case of Ieng Sary*, Ieng Sary's Motion against the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 28 July, 2008, ERN 00208225-00208240, D97 (The Defense Motion argued in part that JCE III as applied by the *Tadic* decision of the International Criminal Tribunal for the former Yugoslavia [ICTY] Appeals Chamber is a judicial construct that does not exist in customary international law or, alternatively, did not exist in 1975–79); Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise, Case of Ieng Sary, No. 002/19-09-2007-ECCC/OCIJ, 31 December 2008; *see also* Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC-OCIJ (Dec. 8, 2009) (recognizing JCE as customary international law applicable to the ECCC).

65. *See generally* David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J. L. & PUB. POL'Y 359 (1985).

66. *See generally* Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 PIERCE L. REV. 1 (2005).

Criminal Tribunal for the Former Yugoslavia in the 1998 *Tadic* case,<sup>67</sup> it has been accepted that JCE is a mode of liability applicable to international criminal trials. Dozens of cases before the Yugoslavia Tribunal, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Panels for the Trial of Serious Crimes in East Timor, and the Special Tribunal for Lebanon have recognized and applied JCE liability during the last ten years.

These modern precedents, however, were not directly relevant to the Cambodia Tribunal because the crimes under its jurisdiction had occurred some twenty years earlier. Under the international law principle of *nullem crimen sine lege* (the equivalent to the U.S. Constitution's *ex post facto* law prohibition), the Cambodia Tribunal could only apply the substantive law and associated modes of liability that existed as part of customary international law in 1975. Therefore, a critical question before the Cambodia Tribunal was whether the Nuremberg Tribunal precedent and the UN's adoption of the "Nuremberg Principles" were sufficient to establish JCE liability as part of customary international law following World War II.

The attorneys for the Khmer Rouge Defendants argued that Nuremberg and its progeny provided too scant a sampling to constitute the widespread state practice and *opinio juris* required to establish JCE as a customary norm as of 1975.<sup>68</sup> In response, the Prosecution brief maintained that Nuremberg constituted an instance in which there is such a fundamental change to the international system that a new principle of customary international law can arise with exceptional velocity. Despite the dearth of State practice, the Cambodia Tribunal ultimately found JCE applicable to its trials based on the Nuremberg precedent and UN General Assembly endorsement of the Nuremberg Principles.<sup>69</sup>

While the Nuremberg trials were not without criticism, there can be no question that Nuremberg represented a paradigm-shifting development in international law. The International Law Commission (ILC) has recognized that the Nuremberg Charter and Judgment gave birth to the entire international law paradigm of individual criminal

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67. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

68. For the definition of "customary international law," see *North Sea Continental Shelf*, 1969 I.C.J. ¶ 77.

69. Decision on the Appeals Against the Co-Investigative Judges' Order on Joint Criminal Enterprise (JCE), Ieng et al. (002/10-09-2007-ECCC/TC), Trial Chamber (June 17, 2011) (discussing how in Case 002, the ECCC Pre-Trial Chamber later confirmed that JCE I and JCE II reflected customary international law as of 1976, but questioned whether JCE III was actually applied at Nuremberg, and therefore was not applicable to the ECCC trial).

responsibility.<sup>70</sup> Prior to Nuremberg, the only subjects of international law were States, and what a State did to its own citizens within its own borders was its own business. Nuremberg fundamentally altered that conception. As Anne-Marie Slaughter and William Burke-White observed, “[i]nternational law now protects individual citizens against abuses of power by their governments [and] imposes individual liability on government officials who commit grave war crimes, genocide, and crimes against humanity.”<sup>71</sup> The ILC has described the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg as the “cornerstone of international criminal law” and the “enduring legacy of the Charter and Judgment of the Nuremberg Tribunal.”<sup>72</sup>

Importantly, on December 11, 1946, in one of the first actions of the newly formed United Nations, the UN General Assembly unanimously affirmed the principles from the Nuremberg Charter and judgments in Resolution 95(I).<sup>73</sup> This General Assembly Resolution

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70. Michael P. Scharf, *Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L L. J. 439, 454 (2010), <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1765&context=cilj> [<http://perma.cc/UB8Y-7UZ8>].
71. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L. J. 1, 13 (2002).
72. See Rep. of the Int’l Law Comm’n on the Work of its Forty-Eighth Session, 51st Sess., May 6–July 26, 1996, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10 (1996), <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/236/37/img/N9623637.pdf?OpenElement> [<http://perma.cc/L6QY-BRYK>].
73. G.A. Res. 95 (I) A/236 at 1144, Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal (Dec. 11, 1946), <http://www.un-documents.net/a1r95.htm> [<http://perma.cc/3FGH-LHQ6>]; The Resolution states in whole:  
The General Assembly,  
Recognizes the obligation laid upon it by Article 13, paragraph 1, subparagraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification; Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;  
Therefore,  
Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal; Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context



had all the attributes of a resolution entitled to great weight as a declaration of customary international law: It was labeled an “affirmation” of legal principles; it dealt with inherently legal questions; it was passed by a unanimous vote; and none of the members expressed the position that it was merely a political statement.<sup>74</sup>

Despite the fact that Nuremberg and its Control Council Law #10 progeny consisted of only a dozen separate cases tried by a handful of courts over a period of just three years, the ICJ,<sup>75</sup> the International Criminal Tribunal for the Former Yugoslavia,<sup>76</sup> the European Court of Human Rights,<sup>77</sup> and several domestic courts<sup>78</sup> have cited the General Assembly Resolution affirming the principles of the Nuremberg Charter and judgments as an authoritative declaration of customary international law.

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of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal. *Id.*

74. *Id.*

75. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 172, ¶ 89 (July 9).

76. Prosecutor v. Tadic, Case No. IT-94-1-I, Opinion and Judgment, Trial Chamber, ¶ 623 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶141 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

77. The European Court of Human Rights recognized the “universal validity” of the Nuremberg principles in *Kolk and Kislyiy v. Estonia*, which stated:

Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, *inter alia*, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission.

*See Kolk & Kislyiy v. Estonia*, App. No. 23052/04, 24018/04, Eur. Ct. H.R., 8 (2006).

78. *See R. v. Finta*, [1994] 1 S.C.R. 701 (Can.) (describing how the General Assembly resolution affirming the Nuremberg Principles has been cited as evidence of customary international law in cases in Canada, Bosnia, France, and Israel); *see generally* Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT’L L. 289 (1994-1995) (summarizing the Touvier and Barbie cases in French courts).

Nuremberg, then, constitutes a prototypical Grotian Moment. The Tribunal's formation was in response to the most heinous atrocity in the history of humankind—the extermination of six million Jews and several million other “undesirables” by the Nazi regime. From a conventional view of customary international law formation, the amount of State practice was quite limited, consisting only of the negotiation of the Nuremberg Charter by four States, its accession by nineteen others, the judgment of the Tribunal, and a General Assembly Resolution endorsing (though not enumerating) its principles.<sup>79</sup> Moreover, the time period from the end of the war to the General Assembly endorsement of the Nuremberg Principles was a mere year: a drop in the bucket compared to the amount of time it ordinarily takes to crystallize customary international law. Yet, despite the limited state practice and minimal time, the ICJ, European Court of Human Rights, and four international criminal tribunals have confirmed that the Nuremberg Charter and Judgment immediately ripened into customary international law.

The Grotian Moment concept rationalizes this outcome. Nuremberg reflected a novel solution to unprecedented atrocity in the context of history's most devastating war. Beyond the Nuremberg trial, there was a great need for universal implementation of the Nuremberg Principles. Yet, on the eve of the Cold War, it was clear that a widely ratified multilateral convention would not be a practicable near term solution. In fact, it would take half a century before the international community was able to conclude a widely ratified treaty transforming the Nuremberg model into a permanent international criminal court. It is this context of fundamental change and great need for a timely response that explains how Nuremberg could so quickly and universally be accepted as customary international law.

*B. Other Examples of Grotian Moments since World War II*

As the *Max Planck Encyclopedia of Public International Law* has observed, “recent developments show that customary rules may come into existence rapidly.”<sup>80</sup> The venerable publication goes on to explain:

This can be due to the urgency of coping with new developments of technology, such as, for instance, drilling technology as regards the rules on the continental shelf, or space

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79. *Grotian Moments*, *supra* note 17, at 67-68.

80. Tullio Treves, *Customary International Law*, *Max Planck Encyclopedia of Public International Law* ¶ 24 (2006), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?rskey=Vf48S0&result=4&prd=EPIL> [<http://perma.cc/3FGH-LHQ6>].

technology as regards the rule on the freedom of extra-atmospheric space. Or it may be due to the urgency of coping with widespread sentiments of moral outrage regarding crimes committed in conflicts such as those in Rwanda and Yugoslavia that brought about the rapid formation of a set of customary rules concerning crimes committed in internal conflicts.<sup>81</sup>

Let us examine each of these examples in turn, beginning with the rapid formation of the law of the continental shelf. In 1945, U.S. President Truman issued a proclamation that the resources on the continental shelf off the coast of the United States belonged to the United States.<sup>82</sup> This represented a major departure from the existing customary international law of the sea, under which the seabed outside of 12 nautical miles was considered free for exploitation by any State.<sup>83</sup> The Proclamation was driven by technological developments enabling exploitation of offshore oil and gas supplies and the intense post-war demand for such resources for a rebuilding world.<sup>84</sup> Though the United States recognized that it was acting as a custom pioneer,<sup>85</sup> it was careful to couch its justification in legal terms that would render the action easier to accept and replicate by other States. Despite the far-reaching change it represented, the Truman Proclamation was met with no protest;<sup>86</sup> rather, within five years, half of the world's coastal States had made similar claims to the resources of their continental shelves,<sup>87</sup> leading commentators to declare that the continental shelf concept had become virtually instant customary international law.<sup>88</sup> By 1969, the ICJ had confirmed that the Truman Declaration quickly generated customary international law binding on States that had not ratified the 1958 Law of the Sea Convention.<sup>89</sup>

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81. *Id.*

82. Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945), *available at* [http://www.gc.noaa.gov/documents/gcil\\_proc\\_2667.pdf](http://www.gc.noaa.gov/documents/gcil_proc_2667.pdf) [<http://perma.cc/T7QL-K6Q2>].

83. BARRY BUZAN, *SEABED POLITICS* 8 (Praeger Publishers, 1976).

84. JAMES B. MORELL, *THE LAW OF THE SEA: AN HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES* 4 (McFarland & Co., 1992); *id.* at 7.

85. *Cf.* ANN L. HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 30 (Princeton Univ. Press, 1981) (citing Unpublished, National Archives Record Group 48) (analogizing President Truman's ingenuity).

86. BUZAN, *supra* note 83.

87. MORELL, *supra* note 84, at 2.

88. Hersch Lauterpacht, *Sovereignty Over Submarine Areas*, 27 *Brit. Y.B. Int'l* 376, 393 (1950).

89. *North Sea Continental Shelf*, 1969 I.C.J. 3, 33-34, ¶ 47.

Next, let us examine the formation of outer space law, which rapidly emerged from the great leaps in rocket technology in the 1960s, led by the Soviet Union and the United States, inaugurating the era of space flight. Rather than treat outer space like the high seas (open to unregulated exploitation), the international community embraced a unique set of rules to govern this new area as codified in the General Assembly Declaration on Outer Space, which was unanimously approved in 1963.<sup>90</sup> Though the amount of State practice was limited to a few dozen space flights launched by two States and the lack of protest by the States over which these rockets passed, States and scholars have concluded that the 1963 Declaration represented an authoritative statement of customary international law that rapidly formed in response to new technologies requiring a new international law paradigm.<sup>91</sup>

Finally, let us turn to the customary international law that rapidly emerged from the Yugoslavia Tribunal in the 1990s. The establishment of the Yugoslavia Tribunal was made possible because of a unique constellation of events at the end of the Cold War, which included the break-up of the Soviet Union, Russia's assumption of the Soviet seat in the Security Council, and the return of genocide to Europe for the first time since Nazi Germany. In its inaugural case, the Appeals Chamber of the Yugoslavia Tribunal rendered a revolutionary decision that for the first time held that individuals could be held criminally liable for violations of Common Article 3 and Additional Protocol II of the Geneva Conventions for war crimes committed in internal conflict.<sup>92</sup> This decision closed a gaping gap in the coverage of international humanitarian law and was soon thereafter affirmed by the Rwanda Tribunal<sup>93</sup> and Special Court for

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90. G.A. Res. 18 (XVIII) A, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Dec. 13, 1962), <http://www.un-documents.net/a18r1962.htm> [<http://perma.cc/EC7T-LQTN>].

91. MANFRED LACHS, THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING 138 (A.W. Sijthoff Int'l Publ'g Co. 1972).

92. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

93. U.N. Secretary-General, *Report of the Secretary General Pursuant to Paragraph 5 of Security Council Resolution 955*, ¶ 12, U.N. Doc. S/1995/134 (Feb. 13, 1995).

Sierra Leone.<sup>94</sup> It was codified in the 1998 Statute of the International Criminal Court, which has been ratified by 123 States.<sup>95</sup>

These case studies suggest that the Grotian Moment concept has several practical applications. It can explain the rapid formation of customary rules in times of rapid flux, thereby imbuing those rules with greater repute. It can counsel governments when to seek the path of a UN General Assembly resolution or non-binding Security Council resolution as a means of facilitating the formation of customary international law, and how to craft such a resolution to ensure that it is viewed as a capstone in the formation of such customary rules. It can, in apt circumstances, strengthen the case for litigants arguing the existence of a new customary international rule. It can also furnish international courts with the confidence to recognize new rules of customary international law in appropriate cases despite a relative paucity and short duration of State practice.

At the same time, one must approach the Grotian Moment concept with caution. As one author warns, “[i]t is always easy, at times of great international turmoil, to spot a turning point that is not there.”<sup>96</sup> With this admonition in mind, the next section examines whether the customary international law governing use of force against non-state actors in self-defense has undergone rapid transformation since the terrorist attacks of September 11, 2001.

#### IV. THE CHANGING LAW OF SELF-DEFENSE AGAINST NON-STATE ACTORS

The United States’ legal rationale for its military actions in Syria is encapsulated in the September 23, 2014 letter to the United Nations from the Permanent Representative of the United States. The letter states:

Iraq has made clear that it is facing a serious threat of continuing attacks from ISIL coming out of safe havens in Syria. These safe havens are used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraq’s people. For these reasons, the Government of Iraq

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94. Statute of the Special Court for Sierra Leone 2002 Art. 3, <http://www.rscsl.org/Documents/scsl-statute.pdf> [<http://perma.cc/Q77F-49RK>].

95. Rome Statute of the International Criminal Court art. 8 ¶ 2(b)-(f) (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002 (distinguishing between “international armed conflict” in paragraph 2(b) and “armed conflict not of an international character” in paragraphs 2(c)-(f)).

96. Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT’L L. REV. 1, 30 (2004).

has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.

ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders.<sup>97</sup>

As outlined in this communication, the United States has argued that it can attack ISIS targets in Syria without Syria's consent because (i) ISIS threatens Iraq, (ii) Iraq has requested the United States' assistance, (iii) ISIS has obtained safe havens in Syria, and (iv) the government of Syria has been unable to confront ISIS effectively.

Notably, the United States has not argued that Syria effectively controls ISIS, and as such its argument is a departure from the traditional view proclaimed by the International Court of Justice in the 1986 *Nicaragua Case* that victim States may not resort to force in response to attacks by non-State actors unless those actors were effectively controlled by the territorial State.<sup>98</sup> This section examines whether the systematic al-Qaeda terrorist attacks against the World Trade Center and Pentagon on September 11, 2001, the subsequent attacks by ISIS against the Russian airliner and Paris concert hall and stadium in October and November 2015, and the international community's political and tactical reactions to those attacks, generated a Grotian Moment, leading to a new rule of customary international law concerning use of force against non-state actors including ISIS.

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97. Letter from Samantha J. Power, *supra* note 7.

98. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27), <http://www.icj-cij.org/docket/files/70/6503.pdf> [<https://perma.cc/N6MW-WZ5K>].

*A. Use of Force against Non-State Actors Prior to 9/11*

Since the 1648 Peace of Westphalia, State sovereignty has been regarded as the fundamental paradigm of international law. Leading scholars have described the prohibition of the threat or use of force in Article 2(4) of the UN Charter as “the corner-stone of the Charter system.”<sup>99</sup> The customary international law right to use force in self-defense as an exception to Article 2(4) is codified in Article 51 of the UN Charter. The Charter recognizes an important limit to that right, however, permitting use of force in self-defense only “if an armed attack occurs.”<sup>100</sup> The UN Charter does not define “armed attack,” but the International Court of Justice in the *Nicaragua Case* held that only the “most grave forms of the use of force” constitute an armed attack.<sup>101</sup> According to the ICJ, to qualify as an armed attack triggering the right of self-defense, the assault must reach a certain significant scale of violence above “mere frontier incidents.”<sup>102</sup> However, the ICJ has also suggested that a string of small-scale attacks can in aggregate constitute an armed attack.<sup>103</sup> Assuming that the attack threshold is reached either by a particularly serious terrorist attack or by a series of attacks, two questions arise: first, whether the armed attack must be attributable to the State against whom the force will be used; and second, whether targeting terrorists before they launch a new attack is lawful.

1. State Attribution

The International Court of Justice has repeatedly held that unless the acts of non-state actors are attributable to the territorial State, use of force against non-state actors in that State is unlawful.<sup>104</sup> This is because when a rebel group or terrorist organization is physically located within the territory of another State that is not in effective control of its operations, the right of self-defense collides with two

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99. JAMES L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 414 (Oxford Univ. Press, 6th ed. 1963); IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 732 (Oxford Univ. Press, 7th ed. 2008).

100. U.N. Charter, art. 51.

101. *Nicar. v. U.S.*, 1986 I.C.J. 14, at ¶ 191.

102. *Id.* at ¶ 195.

103. *See generally Id.* at ¶¶ 119-120, 130-132; *see also Armed Activities, supra* note 8, at ¶ 146 (“[E]ven if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC”).

104. *See generally Nicar. V. U.S.*, 1986 I.C.J. 14 (holding that the United States unlawfully used force against another state); *Armed Activities, supra* note 8, at ¶¶ 28-166 (holding unlawful use of force and violation of territorial sovereignty).

other fundamental principles of international law: the sovereign equality of States and the renunciation of force in international relations.<sup>105</sup> The rationale behind the attribution requirement is that a state cannot be held responsible for the acts of all whose activities originate in its territory.<sup>106</sup> “If it were otherwise, Colombia, for example, might be liable for the acts of international drug traffickers working from Colombia, or Russia might be held responsible for the international activities of the ‘Russian Mafia.’”<sup>107</sup> Thus, under the ICJ’s holdings in *Nicaragua*,<sup>108</sup> *Oil Platforms*,<sup>109</sup> *The Wall Advisory Opinion*,<sup>110</sup> and the *Congo* case,<sup>111</sup> to use force against a terrorist organization whose conduct is not imputable to the territorial State would itself constitute an unlawful armed attack, warranting justified use of force in response by the territorial State.

Under the International Court of Justice’s jurisprudence, attribution requires that the territorial State have “effective control” of the non-state actors.<sup>112</sup> This standard comes from the *Nicaragua Case*, where the Court was presented with the question of whether the actions of Nicaragua in supporting rebels in El Salvador through the provision of weapons was sufficient to justify military action by the United States in collective self-defense with El Salvador.<sup>113</sup> The Court stated that sending “armed bands” into the territory of another State would be sufficient to constitute an armed attack, but “the supply of arms and other support to such bands cannot be equated with an armed attack.”<sup>114</sup> In the same case, the ICJ found that the acts of the U.S.-assisted Nicaraguan rebel group called the “Contras” could not be attributed to the United States because there was no

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105. U.N. Charter art. 2, at paras. 1, 4.

106. *Grotian Moments*, *supra* note 17, at 185.

107. Greg Travalio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHL. J. INT’L L. 97, 104 (2003).

108. *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 195.

109. *Oil Platforms*, *supra* note 8.

110. *The Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) (“Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State....[T]herefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence”).

111. *Armed Activities*, *supra* note 8, at ¶ 162-165.

112. *Grotian Moments*, *supra* note 17, at 185.

113. *Nicar. v. U.S.*, 1986 I.C.J. at ¶ 229.

114. *Id.* at ¶ 247.



clear evidence that the United States had “exercised such a degree of control in all fields as to justify treating the Contras as acting on its behalf.”<sup>115</sup> It is important to note here that the *Nicaragua* attribution requirement was not designed to answer the question of whether an attack by an independent non-state actor could trigger the right to use force in self-defense against that non-state actor, but rather the question of whether an attack by the non-state actor could be considered an armed attack by the State that sent the armed groups and therefore justify force in self-defense against that State.

## 2. Anticipatory Self-Defense under Customary International Law

Anticipatory self-defense is the use of force to stop an attack that has not actually commenced but which is reasonably believed to be imminent. The concept recognizes that “no State can be expected to await an initial attack which, in the present state of armaments, may well destroy the State’s capacity for further resistance and so jeopardize its very existence.”<sup>116</sup> Anticipatory self-defense has its customary international law origins in the notorious *Caroline* incident of 1837.<sup>117</sup>

During the *Caroline* incident, Canada (then part of the United Kingdom) faced an armed insurrection mounted from U.S. territory led by non-state actors.<sup>118</sup> The United Kingdom responded to the armed insurrection by attacking the insurgent’s supply ship, the *Caroline*, while it was docked on the U.S. side of the Niagara River. In an exchange of diplomatic notes between the United States Secretary of State, Daniel Webster, and the British Foreign Minister, Lord Ashburton, the two sides agreed that a State would be justified in using force against non-state actors in another State where the “necessity for self defense” was “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>119</sup> While courts and commentators often substitute the term “imminent” for the longer formulation, the *Caroline* definition is widely recognized as reflecting customary international law.

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115. *Id.* at ¶ 109.

116. D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 191-92 (1958).

117. Anthony Clark Arend, *International Law and Preemptive Use of Military Force*, WASH. Q. 89, 90 (2003).

118. Hunter Miller, *British-American Diplomacy: The Caroline Case*, AVALON PROJECT (Sep. 26, 2015, 10:00 AM), [http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp) [<https://perma.cc/X44G-Q7KR>].

119. Letter from Daniel Webster, US Secretary of State, to Mr. Fox (April 24, 1841), 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (James Rigway & Sons 1857).

*B. Did the 9/11 Attacks Alter the Paradigm?*

When the rules governing use of force in self-defense were promulgated, most international conflicts were conducted by States utilizing large movements of military personnel and munitions.<sup>120</sup> In the past, non-state actors (pirates, guerrillas, drug traffickers, and terrorists) appeared less threatening to state security than the well-funded, well organized, and potent armed forces of an enemy State. To the extent that terrorists were a concern, it was because they were financed by State supporters, such as Iran, Sudan, and Syria.<sup>121</sup> The terrorist attacks of September 11, 2001, changed that perception by starkly illustrating that small groups of non-state actors, acting from failed States without direct government support, “can exploit relatively inexpensive and commercially available technology to conduct very destructive attacks over great distances.”<sup>122</sup>

1. A Different Kind of Threat

In August 1996, Osama bin Laden, the multi-millionaire leader of a then little known group called al-Qaeda, issued a statement entitled “Ladenese Epistle: Declaration of War,” in which he called for all Muslims to make holy war (jihad) against American forces in Saudi Arabia, and specifically advocated the use of terrorist with the goal of “great losses induced on the enemy side (that would shaken and destroy its foundations and infrastructures).”<sup>123</sup> In February 1998, bin Laden followed the Declaration of War by issuing a religious edict (fatwa) to all Muslims, declaring that “to kill the Americans and their

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120. At the time of the adoption of the U.N. Charter, there had been only a handful of instances in which States pursued ongoing military operations against non-state actors in the territory of other States. A survey of such actions would include the American military expedition into Mexico in 1916, which was provoked by attacks on American territory by the armed bands of Francisco (Poncho) Villa; the American military attack on pirates using Spanish-held Amelia Island off the Florida coast as a base of operations in 1817; and the 1838 Caroline incident, in which Britain attacked a steamer in order to prevent an attack by non-State actors on Canada. See Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT’L L. & POL. 1, 2 n. 6 (2004).

121. *State Sponsors of Terrorism*, U.S. DEP’T ST., <http://www.state.gov/j/ct/list/c14151.htm> [ <https://perma.cc/Y4HZ-597S>].

122. Olumide K. Obayemi, *Legal Standards Governing Pre-Emptive Strikes and Forcible Measures of Anticipatory Self-Defense under the U.N. Charter and General International Law*, 12 ANN. SURV. INT’L & COMP. L. 19, 24 (2006).

123. Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT’L & COMP. L. 1, 26 (2003).

allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it.”<sup>124</sup> The fatwa further called on “every Muslim who believes in God and wishes to be rewarded to comply with God’s order to kill the Americans and plunder their money wherever and whenever they find it.”<sup>125</sup>

Subsequent events proved that bin Laden’s al-Qaeda was not a mere group of crackpots, making grandiose proclamations of war, but a well-funded, well-organized, and deadly new terrorist organization with franchise cells across the globe.<sup>126</sup> The targets of al-Qaeda attacks have included U.S. forces in Yemen in 1992, the U.S. embassies in Kenya and Tanzania in 1998, the U.S.S. Cole in Yemen in 2000, and the simultaneous attacks on the World Trade Center and Pentagon on September 11, 2001.<sup>127</sup> The death toll from September 11<sup>th</sup> was over 3,000, which is higher than that of the American casualties in the War of 1812, the U.S.-Mexican War, or the Japanese attack on Pearl Harbor in 1941.<sup>128</sup> Aside from the human casualties, the economic damage to the United States has been estimated at over \$630 billion.<sup>129</sup> Al-Qaeda attacks after 9/11 have included the November 2003 truck bombings in Istanbul which injured 700 and killed 74 people, the March 2004 train bombings in Madrid which injured 1,800 and killed 191 people, and the July 2005 train and bus bombings in London which injured 700 and killed 56 people.<sup>130</sup>

The 9/11 attacks forced States to reevaluate the long-standing notion that only a State has the capacity to commit an armed attack against another State giving rise to the right to respond with force in self-defense. Post-9/11, terrorist threats come from stateless entities that possess many of the attributes of a state: wealth, willing forces, training, organization, and potential access to weapons of mass destruction. If such a non-state actor commits a series of attacks against a State, and the acts are of sufficient scale and effect to

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124. *Id.*

125. *Id.*

126. Joshua Bennett, *Exploring the Legal and Moral Bases for Conducting Targeted Strikes outside of the Defined Combat Zone*, 26 NOTRE DAME J. L., ETHICS & PUB. POL’Y 549, 551 (2012).

127. Brown, *supra* note 123, at 26-27.

128. Brown, *supra* note 123, at 27.

129. Norman G. Printer, Jr., *The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT’L L. & FOREIGN AFF. 331, 353 (2003).

130. Paul Carsten, *Al-Qaeda attacks in Europe since September 11*, TELEGRAPH (Mar. 21, 2012, 1:30 PM), <http://www.telegraph.co.uk/news/worldnews/al-qaeda/9157929/Al-Qaeda-attacks-in-Europe-since-September-11.html> [https://perma.cc/JCK2-CXQT].

amount to an armed attack, then arguably force in self-defense should be permitted against the non-state actor that presents a continuing threat where the host State has manifested an inability or unwillingness to respond effectively to the threat.

## 2. The International Response to 9/11

The day after the 9/11 attacks, the United States informed the UN Security Council that it had been the victim of an armed attack and declared its intent to respond under Article 51 of the UN Charter.<sup>131</sup> The North Atlantic Treaty Organization (NATO) for the first time in its history invoked Article 5 of the North Atlantic Treaty, which treats an armed attack on one member as an armed attack on all of them.<sup>132</sup> The Organization of American States (OAS) took a similar stance in OAS Resolution 797. Invoking the 1947 Inter-American Treaty of Reciprocal Assistance, which provides that in the event of an armed attack on an American State, the Parties agreed that “each one of [them] undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense,”<sup>133</sup> the OAS called upon “the government of the member States and all other governments to use all necessary means at their disposal to pursue, capture, and punish those responsible for the attacks, and to prevent additional attacks.”<sup>134</sup> Meanwhile the United States and Australia jointly invoked the collective defense article of the ANZUS Treaty, which provides for the parties to collectively “resist armed attack” and “act to meet the common danger.”<sup>135</sup> In addition, the Japanese government took the position that the September 11<sup>th</sup> attack was an attack on the United States, and soon thereafter enacted legislation to enable Japan to deploy its forces in support of U.S. operations against al-Qaeda.<sup>136</sup>

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131. U.N. SCOR, 56th Sess., 4730 mtg. at 7-8, U.N. Doc. S.PV. 4370 (September 12, 2001) (Statement of Ambassador James B. Cunningham, U.S. Deputy Representative to the United Nations on September 12, 2001).

132. Brown, *supra* note 123, at 28.

133. Inter-American Treaty for Reciprocal Assistance, Sept. 2, 1947, T.I.A.S. No. 1,838.

134. OEA/SER.G CP/RES. 797 1293/01(Sept. 19, 2001).

135. Security Treaty Between Australia, New Zealand and the United States of America, arts. II and IV, Sept. 1, 1951, T.I.A.S. 2493.

136. Brown, *supra* note 123, at 29 (citing Government of Japan, Ministerial Meeting Concerning Measures Against Terrorism and Press Conference of the Prime Minister (Sept. 19, 2001); Government of Japan, Basic Plan regarding Response Measures Based on the Anti-Terrorism Special Measures Law, Cabinet Decision of Nov. 16, 2001 (Provisional Translation)).

Consistent with these developments, the Security Council adopted Resolution 1368, which condemned the 9/11 attacks and “recognize[ed] the inherent right of individual or collective self-defense in accordance with the Charter.”<sup>137</sup> This action was not a Chapter VII authorization to use force, but rather a confirmation that the United States could invoke its right to respond with force under Article 51 of the UN Charter, despite the fact that al-Qaeda was a non-state actor. Consistent with that right, on October 7, 2001, the United States informed the Council that it had launched Operation Enduring Freedom.<sup>138</sup> Air strikes were directed at camps allegedly belonging to al-Qaeda and other Taliban military targets throughout Afghanistan. There was no international protest or condemnation of the operation;<sup>139</sup> rather, through word and actions, a long list of States expressed support for the operation.<sup>140</sup>

Had al-Qaeda been a State, its attacks (both in the aggregate but also some of the most spectacular individual attacks) would have passed the “scale and effect” test of the *Nicaragua Case*. But as a non-state actor based in Afghanistan, under the *Nicaragua* precedent, use of force against al-Qaeda in Afghanistan would only be permissible if the Taliban government of Afghanistan had “effective control” of the terrorist organization.<sup>141</sup>

Many commentators believe that Afghanistan met the *Nicaragua* test of effective control because the Taliban and al-Qaeda were in effect partners.<sup>142</sup> Yet, the facts do not establish that al-Qaeda acted as an agent or instrumentality of the Afghan State, but rather that al-Qaeda pursued an independent agenda and acted autonomously

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137. S.C. Res. 1368, ¶ 3 pmb. (Sept. 12, 2001).

138. Permanent Rep. of the United States of America to the U.N., Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/UN/2001/946 (Oct. 7, 2001).

139. Rebecca Kahan, *Building a Protective Wall Around Terrorists – How the International Court of Justice’s Ruling in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations*, 28 FORDHAM INT’L L. J. 827, 844-845 (2005).

140. Benjamin Langille, *It’s Instant Custom: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT’L & COMP. L. REV. 145, 155 (2003).

141. *Nicar. v. U.S.*, 1986 I.C.J. 14, at ¶ 115.

142. See Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 35-36 (2002).

within Afghanistan.<sup>143</sup> Neither did the Taliban government of Afghanistan endorse the September 11th attacks.<sup>144</sup> Rather, Taliban officials denied that bin Laden had anything to do with the attack, asserting that “bin Laden lacked the capability to pull off large-scale attacks,” and proclaiming their confidence that a U.S. investigation would find him innocent.<sup>145</sup>

On the other hand, the Taliban government knowingly harbored al-Qaeda, providing its members a place of refuge and allowing the organization to use Afghanistan as a base from which to plan, sponsor, and launch international terrorist operations.<sup>146</sup> The Taliban government repeatedly ignored the Security Council’s demands to close down the terrorist training facilities in Afghanistan and extradite bin Laden, thereby enabling al-Qaeda to represent a continuing threat to the United States.<sup>147</sup>

### 3. The Bush Doctrine

A week after the terrorist attacks of 9/11, the United States announced the “Bush Doctrine” when President George Bush declared: “Our war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. . . . Either you are with us or you are with the terrorists.”<sup>148</sup> The most important aspect of the Doctrine was encapsulated in Bush’s statement that “we will make no distinction between the terrorists who committed these acts and those who harbor them.”<sup>149</sup> In a speech before a joint session of Congress on

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143. ALEX STRICK VAN LINSCHOTON & FELIX KUEHN, AN ENEMY WE CREATED: THE MYTH OF THE TALIBAN-AL QAEDA MERGER IN AFGHANISTAN 1990-2010 (C. Hurst & Co., 2012).

144. See Bill Roggio, *Afghan Taliban claims it ‘had no hand in the 9/11 incident’*, LONG WAR J. (SEPTEMBER 11, 2012), [http://www.longwarjournal.org/archives/2012/09/afghan\\_taliban\\_claim.php](http://www.longwarjournal.org/archives/2012/09/afghan_taliban_claim.php) [https://perma.cc/5NTW-F4CC] (writing that “The Afghan Taliban released a statement denying responsibility for the Sept. 11, 2001 attacks on the US and claimed the group would not allow Afghanistan to be “be used to harm anyone.”).

145. Brown, *supra* note 123, at 11.

146. See generally Roggio, *supra* note 144.

147. S.C. Res. 1214, ¶ 13 (Dec. 8, 1998); S.C. Res. 1267, ¶ 1-2 (Oct. 15, 1999); S.C. Res. 1333 ¶ 1-3 (Dec. 19, 2000).

148. *Transcript of President Bush’s address to a joint session of Congress on Thursday night, September 20, 2001*, CNN (Sept. 21, 2001, 2:27 AM), <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/> [https://perma.cc/HLF9-WT3M].

149. Brown, *supra* note 123, at 17 (quoting George W. Bush, *Address to the Nation on the Terrorist Attacks*, available at <http://www.presidency.ucsb.edu/ws/?pid=58057> [https://perma.cc/3E9E-RPPV]).

September 20, 2001, President Bush said, “[f]rom this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”<sup>150</sup>

In the words of White House spokesman Ari Fleisher, the Bush Doctrine represented “a dramatic change in American policy.”<sup>151</sup> Yet, in a five-day debate in the United Nations General Assembly, where State after State condemned the 9/11 attacks, not one objection was voiced to the newly announced U.S. policy.<sup>152</sup>

Although it represented a clear departure from the *Nicaragua Case*, the Bush Doctrine was rooted in historic provenance. The general affirmative obligation that every State not knowingly allow “its territory to be used for acts contrary to the rights of other States” was first articulated by the International Court of Justice in the 1949 *Corfu Channel Case*.<sup>153</sup> There, the ICJ held Albania liable for damage to British warships that struck mines in Albanian territorial waters.<sup>154</sup> Although Great Britain could not prove that Albania had laid the mines or had engaged another State to do so, the ICJ found that Albania must have known of the existence of the mines because Albania was known to have jealously guarded its side of the Corfu Strait, and this was enough to establish Albania’s liability.<sup>155</sup>

This principle is analogous to the rules relating to neutrality adopted in the Hague Convention (V) some one hundred years ago.<sup>156</sup> According to the Hague Convention, “neutral powers” may not permit belligerents to move troops, munitions, or supplies across their territory, nor may they allow their territory to be used to form “corps of combatants” nor “recruiting agencies.”<sup>157</sup> Should the neutral State prove unwilling or unable to uphold these proscriptions, the other belligerent State is justified in attacking the enemy forces in the territory of the neutral State.<sup>158</sup>

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150. Travalio & Altenburg, *supra* note 107, at 108 (quoting *Address to a Joint Session of Congress and the American People* (Sept. 20, 2001)).

151. *Id.* (quoting Statement of Ari Fleisher (Sept. 21, 2001)).

152. Travalio & Altenburg, *supra* note 107, at 109.

153. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, at ¶ 22 (April 9).

154. *Id.* at ¶ 26.

155. *Id.* at ¶ 19.

156. Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 5, Oct. 18, 1907, 36 Stat 2310.

157. *Id.* at arts. 2, 4, 5.

158. Deeks, *supra* note 9, at 497-501.

The application of this concept to terrorism was arguably confirmed by Security Council Resolution 1373, adopted shortly after September 11, 2001.<sup>159</sup> In reaffirming the right of self-defense in the context of the September 11 attacks while at the same time stating that States are prohibited from allowing their territory from being used as a safe haven for terrorist groups, the resolution suggests that allowing known terrorists to operate freely in their territory triggers the right to self-defense against the non-State actors located within the host State's territory.

Summing up what he considered to be the current state of international law, UN Special Rapporteur Philip Alston stated: "A targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty [where] the first, targeting State has a right under international law to use force in self-defense under Article 51 of the UN Charter, [and] the second State is unwilling or unable to stop armed attacks against the first State launched from its territory."<sup>160</sup> The fact that the "unwilling or unable" test has its roots in the customary law of neutrality anchors the test's legitimacy as applied to use of force in self-defense against non-state actors present in a foreign country.<sup>161</sup>

The extent of permissible military action used to combat terrorists in a country unwilling or unable to control them depends on the level of support provided by the harboring State. Consistent with the Hague Convention (V) discussed above, with its precept of proportionality, "[i]f a State does nothing but allow terrorists to operate from its territory, providing no meaningful support, the extent of the permissible military force is only that which is necessary to deal with the terrorist threat itself. Neither the military of the harboring State nor its infrastructure is a permissible target."<sup>162</sup> In such case, there is a distinction between using force in a State and using force against the state itself.<sup>163</sup> A swift, precision strike against terrorists or their training facilities in the territorial State (a so-called "in and out operation") represents a reasonably limited interference with the territorial integrity or political independence of the territorial

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159. S.C.Res. 1373, U.N. Doc. (Sept. 28, 2001).

160. Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on Targeted Killings*, Human Rights Council, ¶ 35, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter *Study on Targeted Killings*].

161. See Deeks, *supra* note 9, at 497.

162. Travalio & Altenburg, *supra* note 107, at 112.

163. NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 36 (Vaughan Lowe, Dan Sarooshi & Stefan Talmon eds., 2010).



State under these circumstances.<sup>164</sup> The use of force against the non-state actor taken in self-defense is a lawful use of force, and the territorial State cannot therefore mount a forcible resistance in the name of its own self-defense.<sup>165</sup> If, on the other hand, the territorial State is implicated in the terrorist attack, then the victim State may have the right to use force against the territorial State and its agents, in addition to using it against the non-state actor.<sup>166</sup>

A more controversial aspect of the Bush Doctrine was its assertion of an expanded right of anticipatory self-defense against terrorist threats. In the National Security Strategy issued in the aftermath of 9/11, President Bush explained:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue States and terrorists do not seek to attack us using conventional means ... Instead, they rely on acts of terror and, potentially, the use of weapons of mass destructions – weapons that can easily be concealed, delivered covertly and used without warning. The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if the uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world’s most

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164. In 1976, Israel conducted a raid on the Ugandan airport in Entebbe to rescue Israeli hostages held by Palestinian hijackers. The hijackers were killed. At the UN Security Council meeting, the Israeli representative argued that the operation was not against the territorial integrity or political independence of Uganda. *See* U.N. SCOR, 31st Sess., 1939th mtg. at ¶121, U.N. Doc. S/PV.1939 (July 9, 1976).

165. LUBELL, *supra* note 163, at 41.

166. LUBELL, *supra* note 163, at 40.

destructive technologies, the United States cannot remain idle while dangers gather.<sup>167</sup>

As depicted in the National Security Strategy, the Bush Doctrine did not just advocate anticipatory self-defense, (striking an enemy as it prepares an attack), but also “preventive self-defense” (striking an enemy even in the absence of specific evidence of an imminent attack). To that end, the Bush Administration implemented a policy of targeted killing of key al-Qaeda figures in Afghanistan, Pakistan, Iraq, Yemen, Somalia, and elsewhere.<sup>168</sup>

This expansion of the anticipatory self-defense concept was seen as warranted by the unique attributes of the continuing threat posed by the al-Qaeda terrorist organization.<sup>169</sup> “Al-Qaeda and its affiliates are well funded with access to deadly means, potentially including chemical, biological, and nuclear weapons. They attack without warning, target civilians indiscriminately, and employ suicide missions on a regular basis. They had committed a series of prior attacks against the United States and publicly announced an intention to continue to attack in the future.”<sup>170</sup> Arguably under these circumstances, it is reasonable to deem an attack by such organizations as “continuing” or “always imminent” for purposes of the *Caroline* standard.<sup>171</sup>

“In implementing the Bush Doctrine, the United States began to employ newly developed technology in the form of unmanned Predator drones equipped with laser-guided Hellfire missiles controlled by operators located thousands of miles away.”<sup>172</sup> Predator drones eliminate the risk to U.S. pilots. They are capable of remaining in the air ten times longer and cost about one-twentieth as much as combat

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167. National Security Council, The National Security Strategy of the United States of America, 15 (2002), <http://www.state.gov/documents/organization/63562.pdf> [<https://perma.cc/6AZP-QAAV>] [hereinafter *National Security Strategy*].

168. *Grotian Moments*, *supra* note 17, at 200.

169. *The National Defense Strategy of the United States of America*, U.S. DEP'T OF DEFENSE, 9 (2005), [http://www.acq.osd.mil/cp/cbd\\_docs/references/nds2005.pdf](http://www.acq.osd.mil/cp/cbd_docs/references/nds2005.pdf) [<https://perma.cc/T5VR-GU3Q>].

170. *Grotian Moments*, *supra* note 17, at 200.

171. Travaglio & Altenburg, *supra* note 107, at 116. *Contra Study on Targeted Killings*, *supra* note 160, at ¶ 45 (characterizing preventive self-defense as “deeply contested and lack[ing] support under international law.”).

172. *Grotian Moments*, *supra* note 17, at 200-01.

aircraft.<sup>173</sup> Because they are slow and vulnerable to signal jamming, the drones are not perceived to be a serious threat to an advanced military, but they are ideal for use against non-state actors in failed or struggling States.<sup>174</sup> The first drone strike outside Afghanistan occurred in 2002 in Yemen, killing alleged al-Qaeda leader Ali Aaed Senyan al-Harithi and four other men.<sup>175</sup>

When it came into office, the Obama Administration embraced the Bush Doctrine's "unable and unwilling" principle, and relied on it in significantly expanding the drone targeted killing program.<sup>176</sup> According to President Obama's CIA Director, Leon Panetta, due to their precision and effectiveness, drones have become "the only game in town in terms of confronting or trying to disrupt the al-Qaeda leadership."<sup>177</sup>

The Obama Administration's State Department Legal Adviser, Harold Koh, delivered a major policy speech at the Annual Meeting of the American Society of International Law on March 25, 2010, in which he provided the legal justification for the Administration's use of drones to fight terrorist groups around the world. Koh began by stressing that the attacks of 9/11 triggered the U.S. right of self-defense against al-Qaeda and other terrorist organizations. Echoing the Bush Administration's characterization of a "global war" against Al-Qaeda,<sup>178</sup> Koh asserted "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."<sup>179</sup> Some commentators have argued that the armed conflict with al-Qaeda must be limited to territory on which

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173. Michael W. Lewis, *Drones and Boundaries of the Battlefield*, 47 TEX. INT'L L.J. 293, 296-97 (2012).

174. *Id.* at 298.

175. Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT'L L. & POL'Y 661, 672 (2011).

176. *Grotian Moments*, *supra* note 17, at 201.

177. See Andrew C. Orr, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law*, 44 CORNELL INT'L L.J. 729, 735 (2011) (quoting Ken Dilanian, *Panetta says CIA Operations in Pakistan Taking 'Serious Toll' on al Qaeda's Operations*, L.A. TIMES (Oct. 19, 2010)).

178. Harold Hongju Koh, Legal Adviser, U.S. State Department, *The Obama Administration and International Law*, Remarks at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at <http://go.usa.gov/3pah5> [<https://perma.cc/MK2M-5T9N>]).

179. *Id.*

the threshold of violence for an armed conflict is currently occurring, which at the time of this writing would include Afghanistan, parts of Pakistan, Yemen, Libya, Syria, and Iraq.<sup>180</sup> Koh's broader formulation recognizes that the limited approach would effectively create sanctuaries for terrorist organizations in failed and weak States such as Somalia and Sudan.<sup>181</sup>

Next, Koh argued that the right to use force in self-defense against al-Qaeda was continuous in light of the continuous threat presented: "As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks."<sup>182</sup> But then Koh walked back somewhat from the conception of preventive war enshrined in the Bush Doctrine, saying: "Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other States involved, and the willingness and ability of those States to suppress the threat the target poses."<sup>183</sup>

Two years later, U.S. Attorney General Eric Holder provided further details about the Obama Administration's criteria for authorizing a targeted killing. According to Holder, authorization would require three findings: "First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles."<sup>184</sup>

Until now, we've been examining principles related to *jus ad bellum* (the lawfulness of the resort to force). Attorney General Holder's statement reminds us that a forcible response to terrorists must also comply with the fundamental rules of *jus in bello* (the lawfulness of the means employed and target selected). In his speech before the American Society of International Law, Harold Koh described the applicable *jus in bello* principles as "first, the principle

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180. Lewis, *supra* note 173, at 296, 309.

181. *Grotian Moments*, *supra* note 17, at 202.

182. Koh, *supra* note 178.

183. Koh, *supra* note 178.

184. *Contemporary Practice of the United States Relating to International Law*, 106 AM. J. INT'L L. 643, 675 (2012).

of distinction, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and second, the principle of proportionality, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>185</sup>

Koh’s description assumes that the high-level members of al-Qaeda themselves are lawful targets. Since they are not part of a military, the laws of war would treat al-Qaeda members presumptively as civilians who are immune from targeting unless they either “directly participate in the hostilities” or take on a “continuous combat function” within the group.<sup>186</sup> In May 29, 2009, the International Committee of the Red Cross published a study entitled “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” whose aim was in part to define when targeted killings of members of terrorist groups would be consistent with International Humanitarian Law.<sup>187</sup> The Interpretive Guidance states that “individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities assume a continuous combat function.”<sup>188</sup> The targeted killings to date appear to involve al-Qaeda figures that would meet this description.<sup>189</sup>

Meanwhile, there has been little protest as other States have begun to cite the U.S. response to al-Qaeda to justify their own acts against terrorist groups operating from neighboring States. Examples include:

- The April 2002 killing by Russian armed forces of “Chechen rebel warlord” Omar Ibn al Khattab.<sup>190</sup>

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185. Koh, *supra* note 178.

186. Lewis, *supra* note 173, at 310-11.

187. Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 641 (2010).

188. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991, 1007 (2009).

189. *Grotian Moments*, *supra* note 17, at 204.

190. See Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT’L L. 244, 257 (2011) (discussing Russia’s Pankisi Gorge crisis, saying that “the conflict indicates that other actors (for example, Russia) besides the usual suspects have begun to appropriate the United States’ “unable or unwilling” standard to justify the use of force against state harboring terrorists.”); Ian Traynor, *Russia Claims to have killed Arab warlord in*

- The February 2008 offensive by Turkish forces against PKK bases in northern Iraq.<sup>191</sup>
- The March 2008, airstrike by Colombia against a FARC terrorist camp just inside Ecuador's border, killing the FARC's second-in-command, Raul Reyes.<sup>192</sup>
- The December 2006 use of force by Ethiopian armed forces against the "Islamic Courts" terrorist group which had been conducting a series of cross-border attacks from Somalia.<sup>193</sup>
- The May 2011 mission by U.S. Navy Seals to kill Osama bin Laden at his secret compound in northern Pakistan on a mission to kill bin Laden.<sup>194</sup>
- The September 2011 Predator drone attack by the United States that killed U.S. national Anwar al-Awlaki in Yemen.<sup>195</sup>
- The October 2011 Kenyan incursion into Somalia in response to cross-border attacks by the Al-Shabaab terrorist group.<sup>196</sup>

*C. A Grotian Moment that was Still One Case Away*

Some scholars have opined that "the attack of September 11<sup>th</sup> and the American response represent a new paradigm in the international law relating to the use of force."<sup>197</sup> They base this conclusion on the statements of the United States, NATO, the OAS, and other States that 9/11 constituted an armed attack by al-Qaeda which warranted

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*Chechnya*, The Guardian (Apr. 25, 2002, 21:37 EDT), <http://www.theguardian.com/world/2002/apr/26/chechnya.iantraynor> [<https://perma.cc/CMH7-9EPA>].

191. Reinold, *supra* note 190, at 269.
192. Deeks, *supra* note 9, at 534. Unlike the other incidents listed above, in this case the OAS called the Colombian incursion "a violation of the sovereignty and territorial integrity of Ecuador," and declared that "the right of each State to protect itself ... does not authorize it to commit unjust acts against another State." Reinold, *supra* note 190, at 274.
193. Awol K. Allo, *Ethiopia's Armed Intervention in Somalia: The Legality of Self-Defense in Response to the Threat of Terrorism*, 39 DENV. J. INT'L. & POL'Y 139, 139 (2010).
194. Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of Bin Laden*, 39 DENV. J. INT'L L. & POL'Y 569, 579-580 (2011).
195. Jordan J. Paust, *Propriety of Self-Defense Targeting of Members of Al Qaeda and Applicable Principles of Distinction and Proportionality*, 18 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 565, 574 (2012).
196. *The Kenyan Military Intervention in Somalia: Africa Report No. 184*, INT'L CRISIS GROUP, pgs. 1-2 (Feb. 15, 2012).
197. See e.g., Brown, *supra* note 123, at 2.

force in self-defense; Security Council Resolutions 1368 and 1373 confirming the right to use self-defense in the context of the 9/11 attacks; the international community's positive reaction to the United States invasion of Afghanistan to dismantle al-Qaeda and topple its Taliban supporters; and finally the UN Special Rapporteur's conclusion that force in self-defense could be used against terrorist groups operating in the territory of States unwilling or unable to control them.<sup>198</sup> They argue that the reaction to 9/11 thus broke with the conception of Article 51 as a State-centered norm.

Moreover, the protracted quest of the international community to arrive at a consensus definition of terrorism got a substantial boost in 2011 when the Appeals Chamber of the Security Council-created Special Tribunal for Lebanon (STL)<sup>199</sup> concluded that "although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues, closer scrutiny reveals that in fact such a definition has gradually emerged."<sup>200</sup> Based on its extensive review of state practice and indicators of *opinio juris* (a sense of legal obligation), the Appeals Chamber declared that the customary international law definition of terrorism consists of "the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element."<sup>201</sup> The STL's definition of terrorism, together with the listing of terrorist groups and individuals by the Security Council's sanctions committee,<sup>202</sup> removed one of the

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198. *Study on Targeted Killings*, supra note 160, at ¶ 40.

199. The Special Tribunal for Lebanon ("STL"), established in 2007 by the United Nations Security Council to prosecute those responsible for the 2005 bombings that killed former Lebanese Prime Minister Rafiq Hariri and twenty-two others, is the world's first international court with jurisdiction over the crime of terrorism. See Statute of the Special Tribunal for Lebanon, *appended to* S.C. Res. 1757 (May 30, 2007).

200. Ayyash et al., Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 83, ¶ 102 (Special Tribunal for Lebanon Appeals Chamber Feb. 16, 2011), *available at* <http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/orders-and-decisions/534-f0936> [<https://perma.cc/F3MM-TUFG>].

201. *Id.* at ¶ 85.

202. The UN Security Council adopted resolution 1267 on October 15, 1999 under chapter VII of the UN Charter, authorizing the Security Council's Sanctions Committee to establish a list of sanctioned individuals,

greatest obstacles to use of force against terrorists, namely the argument that “one man’s terrorist was another man’s freedom fighter.”

As one commentator asserted, “the Bush Doctrine, first proclaimed by the U.S. in response to the terrorist attacks of September 11, 2001, became an instant custom during the days and weeks following the attacks.”<sup>203</sup> Yet, 9/11 is better characterized as a Grotian Moment that was, until the 2015 ISIS attacks, still one step away from coming to fruition. The problem is that the Bush Administration’s assertion that there is no difference between terrorists and States that harbor them,<sup>204</sup> and its assertion of a right to preventive self-defense against such States,<sup>205</sup> was unnecessarily broad and lacking nuance. A State may, for example, harbor a few terrorists or serve as the organization’s headquarters. The terrorist group may be poorly armed or possess weapons of mass destruction. The State may provide the terrorists funding, passports, training, and intelligence, or may simply be acquiescing to their presence or too weak to quash them. The Bush Doctrine provides no guidance on how these different scenarios should be treated. Concern that the imprecision of the Bush Doctrine would lead to assertions by other States to justify aggression in the name of self-defense prompted pushback which came in the form of two post-9/11 cases decided by the International Court of Justice.

In its 2004 *Advisory Opinion on the Wall*, the ICJ rejected the Israeli claim to self-defense on the reasoning that self-defense under Article 51 is not available to Israel against non-state actors operating on territories under the control of Israel.<sup>206</sup> Then, in the 2005 *Armed Activities in the Congo Case*, the ICJ required the responsibility of the Congo for the attacks of Ugandan rebels operating from the Congolese territory in order to find Uganda’s right to self-defense lawful.<sup>207</sup> These cases signaled the ICJ’s “determination to counter a

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groups, and/or entities that were found to be associated with Al-Qaida and the Taliban. S.C. Res. 1267, ¶ 6 (Oct. 15, 1999).

203. Langille, *supra* note 140, at 154.

204. *National Security Strategy*, *supra* note 167, at 4.

205. *National Security Strategy*, *supra* note 167, at 4.

206. Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9) [hereinafter *Legal Consequences*].

207. See *Armed Activities*, *supra* note 8, 2004 I.C.J. 168, 222-223 (holding that Uganda could not rely on self-defense to justify its military operation in the Congo because (1) Uganda did not immediately report to the Security Council following its use of force as required by Article 51, (2) Uganda’s actions were vastly disproportionate to the threat, and (3) there was no evidence from which to impute the attacks against



more permissive reading of Article 51” brought on by the international community’s reaction to 9/11.<sup>208</sup>

Scholars and certain members of the International Court of Justice have been highly critical of the ICJ’s continued insistence after 9/11 that self-defense is only available in cases where the attack by non-state actors can be attributed to the territorial state. Scholars point out that the ICJ holdings are inconsistent with the wellspring of the customary law on self-defense, the *Caroline* case, which confirmed that anticipatory force in self-defense was lawful against non-State actors whose conduct was not attributable to a State.<sup>209</sup> Writing separately in the *Wall* case, Judge Higgins said, “There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defense is available only when an armed attack is made by a State.”<sup>210</sup> Similarly, writing separately in the *Congo Case*, Judge Koojimans noted that in the era of al-Qaeda, it is “unreasonable to deny the attacked State the right to self-defense merely because there is no attacker State.”<sup>211</sup> Judge Simma similarly concluded in his separate opinion in the *Congo* case that “Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as ‘armed attacks’ within the meaning of Article 51.”<sup>212</sup>

While the International Court of Justice’s *Wall* and *Congo* decisions may have put breaks on the rapidly crystallizing customary international law concerning use of force against non-state actors, they did not ultimately prevent the new rule from emerging. This is in part due to the fact that the situation in the *Wall* and *Congo* cases are distinguishable from that of a State using force against terrorists operating in a foreign State. In the *Wall* case, the ICJ stressed that the right to self-defense under Article 51 of the UN Charter only applied to attacks emanating from another State and did not apply to attacks coming from within the Occupied Territories, because the area was controlled by Israel.<sup>213</sup> In *Congo*, as in *Nicaragua*, the use of force

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Ugandan villages by rebel groups operating out of the Congo to the government of Congo).

208. Reinold, *supra* note 190, at 261.

209. See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 82-89 (1938) (quoting 61 Parliamentary Papers (1843)).

210. *Legal Consequences*, 2004 I.C.J. 136, at ¶ 31 (separate opinion of Judge Higgins).

211. *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. 168, at ¶30 (separate opinion of Judge Koojimans).

212. *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. 168, at ¶ 11 (separate opinion of Judge Simma).

213. *Legal Consequences*, 2004 I.C.J. 136, at ¶ 139.

was not limited to attacking the terrorist group itself, but involved widespread attacks throughout the territorial state.

The case study of use of force against non-state actors in the aftermath of 9/11 indicates how international courts are capable of setting back (as well as catalyzing) the formation of customary international law during a potential Grotian Moment. In light of these conflicting currents, the law could not be said to have been settled on the eve of the U.S. military action against ISIS in Syria in 2014. But, as described below, events during 2015 provided the tipping point necessary to crystallize the new approach to the right of self-defense.

*D. 2014: The Initial U.S. justifications for bombing ISIS*

How a custom pioneer describes a new rule of customary international law can greatly impact its international acceptance. Before settling on collective self-defense as its primary argument, the U.S. officials tried out a variety of alternative legal arguments to justify using force in Syria. None of these were well received by the international community.

1. Humanitarian Intervention

The first U.S. argument was that airstrikes against ISIS were justified under the right of humanitarian intervention in the context of efforts to save 30,000 Yazadis trapped on Mount Sinjar.<sup>214</sup> The United States could have cited as precedent for this the NATO airstrikes against Serbia in an effort to prevent ethnic cleansing of Kosovar Albanians in 1999. But, as explained below, the United States has been reluctant to advocate a general right of humanitarian intervention, and has instead argued that the NATO airstrikes were *sui generis*. The United States described its actions to save the Yazadis in similarly narrow terms.

Kosovo was a Serbian province where the population was ninety percent ethnic Albanian Muslims and ten percent Serbian Eastern Orthodox Christians.<sup>215</sup> In 1998, purportedly in response to the threat posed by Kosovar insurgents, Serb military and security forces launched a series of attacks that appeared intended to ethnically cleanse the region. In March<sup>216</sup> and October<sup>217</sup> 1998, the UN Security Council passed resolutions condemning Serb abuses in Kosovo, but

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214. Helene Cooper & Michael D. Schear, *supra* note 35; Helene Cooper, Mark Landler & Alissa J. Rubin, *supra* note 35.

215. See Noel Cox, *Developments in the Laws of War: NATO Attacks on Yugoslavia and the Use of Force to Achieve Humanitarian Objectives*, 2002 N.Z. ARMED FORCES L. REV. 13, 17.

216. S.C. Res. 1160, ¶ 8 (Mar. 31, 1998).

217. S.C. Res. 1203, ¶¶ 1-3 (Oct. 24, 1998).

the Security Council resolutions did not authorize the use of force, and Russia made it clear that it would veto any attempt to do so.<sup>218</sup>

Nevertheless, after peace negotiations broke down in March 1999, NATO decided to launch a series of aerial attacks against military and strategic targets in Serbia with the intent to persuade the Serbian Government, headed by Slobodan Milosevic, to comply with the Security Council's Resolutions.<sup>219</sup> Following the massacres of Kosovars in Drenica, Gornje Obrinje, and Racak, the NATO States had come to the conclusion that unless action was taken a humanitarian catastrophe would unfold, potentially eclipsing that of Bosnia.<sup>220</sup> The bombing campaign, called "Operation Allied Force," involved 912 aircraft, which flew a total of 37,225 bombing missions.<sup>221</sup> A significant feature of the Kosovo incident is the purity of the actors' motives: "[t]here were no strategic or material interests of NATO nations in Kosovo."<sup>222</sup>

In explaining its decision to issue an Activation Order to use NATO force in the Kosovo crisis, the North Atlantic Council stated, "[T]he unrestrained assault by Yugoslav military, police and paramilitary forces, under the direction of President Milosevic, on Kosovar civilians has created a massive humanitarian catastrophe, which also threatens to destabilize the surrounding region ... These extreme and criminally irresponsible policies, which cannot be defended on any grounds, have made necessary and justify the military action by NATO."<sup>223</sup>

In the early days of the bombing campaign, British Prime Minister Tony Blair explained the humanitarian justification for the action. "This is not . . . a battle for NATO; this is not a battle for territory; this is a battle for humanity. This is a just cause, it is a

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218. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, EJIL 1999 at 1, 7, available at <http://www.ejil.org/pdfs/10/1/567.pdf> [<http://perma.cc/JYB8-EVVK>].

219. *NATO's role in relation to the conflict in Kosovo*, NATO (July 15, 1999), available at <http://www.nato.int/kosovo/history.htm> [<https://perma.cc/K6JY-9AFY>].

220. Steven Haines, *The Influence of Operation Allied Force on the Development of the Jus Ad Bellum*, 85 INT'L AFF. 477, 480 (2009).

221. Patrick T. Egan, *The Kosovo Intervention and Collective Self-Defense*, 8 INT'L PEACEKEEPING 39, 40 (2001).

222. Fernando R. Tesón, *Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention*, 2 AMSTERDAM L. F.42, 43 (2009).

223. Press Release, NATO, *The Situation in and around Kosovo: Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, on 12th April 1999*, Press Release M-NAC-1(99)51 (Apr. 12, 1999), <http://www.nato.int/docu/pr/1999/p99-051e.htm> [<https://perma.cc/76H2-VZME>].

rightful cause.”<sup>224</sup> When pressed in parliament for the legal rationale for the NATO bombing campaign, Blair’s Secretary for Defense, George Robertson, provided the following elucidation: “Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe. Those circumstances clearly existed in Kosovo. The use of force in such circumstances can be justified as an exceptional measure in support of purposes laid down by the Security Council, but without the Council’s express authorization, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe.”<sup>225</sup>

Similar statements were issued by the Canadian and Dutch Ambassadors. The Canadian Ambassador claimed that “[h]umanitarian considerations underpin our action. We cannot simply stand by while innocents are murdered, an entire population is displaced, [and] villages are burned.”<sup>226</sup> While, the Dutch Ambassador acknowledged:

[T]hat his government would always prefer to base action on a specific Security Council resolution when taking up arms to defend human rights, but if ‘due to one or two permanent members’ rigid interpretation of the concept of domestic jurisdiction such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur.’ Rather, he concluded, “we will act on the legal basis we have available, and what we have available in this case is more than adequate.”<sup>227</sup>

On March 25, Russia sponsored a draft resolution in the Security Council that sought to condemn the NATO action as an unlawful act in violation of the UN Charter.<sup>228</sup> According to the Russian Delegation, the vote was to be a choice between law and lawlessness.<sup>229</sup> The Independent International Commission on Kosovo, chaired by the former Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Richard Goldstone, would later

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224. Dino Kritsiotis, *The Kosovo Crisis and NATO’s Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INT’L & COMP. L.Q. 330, 341 (2000) (quoting Stephen Farrell & Philip Webster, *Blair Pledge to Double Refugee Aid*, TIMES (London), at 1 (May 4, 1999)).

225. *Id.* at 341 (quoting 328 PARL. DEB., H.C. (1999) 616-17 (U.K.)).

226. Nicholas J. Wheeler, *Reflections on the Legality and Legitimacy of NATO’s Intervention in Kosovo*, 4 INT’L J. HUM. RTS. 145, 153 (2007), <http://www.tandfonline.com/doi/pdf/10.1080/13642980008406897> [<http://perma.cc/SRT6-TC99>].

227. *Id.*

228. U.N. Doc. S/1999/328 (Mar. 26, 1999).

229. Kritsiotis, *supra* note 224, at 347.

conclude that the 1999 NATO intervention was “illegal but legitimate.”<sup>230</sup> But during the Security Council debate, the NATO States did not take the position that the airstrikes were illegal but morally justified. Rather, they argued that their action had the backing of international law.<sup>231</sup> In the end, the proposed resolution was defeated by twelve votes to three, with only China and Namibia joining Russia in support of the measure.<sup>232</sup> Voting in opposition were the five NATO members on the Security Council (the United Kingdom, Canada, France, the Netherlands, and the United States), joined by Argentina, Bahrain, Gabon, the Gambia, Malaysia, and Slovenia.<sup>233</sup> The sizable rejection of the draft resolution indicated that there was a broad base of support for the NATO action. Outside of the Council, NATO’s intervention was endorsed by the European Union, the Organization of Islamic States, and by the Organization of American States.<sup>234</sup> Moreover, key States in the area, including Romania, Slovenia, and Bulgaria, granted NATO access to their air space for Operation Allied Force, transforming their support into action.<sup>235</sup> Other than Russia, China, and India, there was virtually no State protest of the NATO action across the globe.<sup>236</sup>

After seventy-eight days, the NATO bombing campaign ultimately succeeded in driving Milosevic back to the negotiating table, where he signed an agreement providing autonomy for Kosovo under the temporary administration of the United Nations and protection of NATO forces. Subsequently, the Security Council adopted Resolution 1244 of June 10, 1999, which some have interpreted as providing a sort of after-the-fact ratification of Operation Allied Force. The resolution “put in place the foundations for the international civil and security presence in Kosovo that accompanied the end of hostilities.”<sup>237</sup>

In the 1986 *Nicaragua Case*, the International Court of Justice observed that “[r]eliance by a State on a novel right or an unprecedented exception to the principle [of non-intervention] might,

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230. Independent International Commission on Kosovo, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 4 (2000).

231. Wheeler, *supra* note 226, at 154.

232. Kritsiotis, *supra* note 224, at 347.

233. Kritsiotis, *supra* note 224, at 347.

234. Wheeler, *supra* note 226, at 158.

235. Kritsiotis, *supra* note 224, at 346.

236. Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards Legitimatization of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 28 (1999).

237. Kritsiotis, *supra* note 224, at 348.

if shared in principle by other States, tend toward a modification of customary international law.”<sup>238</sup> Prior to the 1999 NATO bombing campaign, there had been several cases where foreign intervention was employed to halt widespread atrocities without Security Council approval. Hence, India stopped the slaughter in East Pakistan in 1971, Tanzania ended Idi Amin’s mass killing in Uganda in 1978, and Vietnam’s intervention brought an end to Pol Pot’s killing fields in Cambodia in 1979.<sup>239</sup> But unlike the 1999 Kosovo intervention, in these three cases, self-defense, rather than humanitarian concern, was the primary justification asserted.<sup>240</sup> The fact that the intervening States relied on self-defense, rather than asserting a right to humanitarian intervention, undermined arguments that the law had changed. Moreover, in the cases of India and Vietnam, only a Soviet veto prevented the Security Council from condemning the actions as violations of international law.<sup>241</sup>

In contrast to these situations, in the case of the 1999 NATO intervention in Serbia, a major application of armed force had taken place for humanitarian purposes without Security Council authorization but with widespread support by the international community. According to one scholar, the NATO intervention was “a case that expanded, rather than breached, the law, similar to the Truman proclamation about the continental shelf.”<sup>242</sup> Others have described the NATO intervention as “a watershed event” and “an important transition point in the shift from one international order to the next.”<sup>243</sup> Moreover, the NATO intervention led to the articulation of the Responsibility to Protect (R2P) doctrine, a concept that has been described as the “most dramatic normative development of our time”<sup>244</sup> and a “revolution in consciousness in international affairs.”<sup>245</sup>

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238. *Nicar. v. U.S.*, 1986 I.C.J. 14, ¶ 207.

239. Simon Chesterman, *No More Rwandas No More Kosovos: Intervention and Prevention* (in Velasco & Daniel Ortega Nieto (eds.), *THE PROTECTION OF HUMAN RIGHTS: A CHALLENGE IN THE 21<sup>ST</sup> CENTURY* 175-200 (El Colegio de Mexico, 2007)).

240. *Id.*

241. *Id.*

242. Tesón, *supra* note 222, at 43 (2009).

243. Heiko Borchert & Mary N. Hampton, *The Lessons of Kosovo: Boon or Bust for Transatlantic Security?*, 46 *ORBIS* 369, 369 (2002).

244. Ramesh Thakur & Thomas G. Weis, *R2P: From Idea to Norm—and Action?*, 1 *GLOBAL RESPONSIBILITY TO PROTECT* 22, 23 (2009).

245. Jeremy Sarkin, *Is the Responsibility to Protect an Accepted Norm of International Law in the post-Libya Era?*, 1 *CRONINGEN J. INT’L L.* 11, 16 (2012).

The rapid acceptance of the R2P doctrine within a few short years of the NATO intervention renders this development a potential candidate for recognition as a Grotian Moment. The 2001 ICISS Report characterized the responsibility to protect as “an emerging principle of customary international law,”<sup>246</sup> and the 2005 High-level Panel Report described it as an “emerging norm,”<sup>247</sup> an assessment shared by the Secretary-General.<sup>248</sup> The R2P Doctrine was then unanimously endorsed at the 2005 World Summit by the Heads of State and Government of every UN Member State, and later by the United Nations Security Council.<sup>249</sup> Based on these developments, Professor Ved Nanda of Denver University School of Law argues that a government can no longer “hide behind the shield of sovereignty, claiming non-intervention by other States in its internal affairs, if it fails to protect the people under its jurisdiction from massive violations of human rights.”<sup>250</sup> Yet, two roadblocks prevented humanitarian intervention outside the framework of the United Nations from actually ripening into a norm of customary international law.

The first impediment was the ambiguity of the initial manifestation of *opinio juris* that accompanied the acts of the NATO States. The participating NATO States were not comfortable with the idea that the bombing campaign would create a new rule of customary international law justifying a broad notion of unilateral humanitarian intervention. Thus, in July 1999, U.S. Secretary of State Madeleine Albright stressed that the air strikes were a “unique situation *sui generis* in the region of the Balkans,” concluding that it

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246. *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY (Dec. 2001), at ¶¶ 2.24, 6.17.,

<http://responsibilitytoprotect.org/ICISS%20Report.pdf>  
[<https://perma.cc/2T6Y-FSDH>] [hereinafter *Responsibility to Protect*].

247. High-level Panel on Threats, Challenges & Change, Letter dated Dec. 1, 2004 from the Chair of the High-level Panel on Threats, Challenges and Change addressed to the Secretary-General, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2004).

248. United Nations Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General*, ¶ 135, U.N. Doc. A/59/2005 (May 26, 2005).

249. See Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT’L L. 469, 475-76, (2010); S.C. Res. 1674, ¶ 4, (Apr. 28, 2006).

250. Ved Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm “Responsibility to Protect” Make a Difference?*, 35 DENV. J. INT’L L. & POL’Y 353, 373 (2007).

was important “not to overdraw the various lessons that come out of it.”<sup>251</sup> UK Prime Minister Tony Blair, who had earlier suggested that humanitarian interventions might become more common,<sup>252</sup> subsequently retreated from that position, emphasizing the exceptional nature of the Kosovo operation.<sup>253</sup>

The reason for the reluctance of the United States and United Kingdom to acknowledge a precedent that could ripen into customary international law was explained by Michael Matheson, the Acting Legal Adviser of the U.S. Department of State at the time of the intervention, in the following terms:

About six months before the actual conflict, at the time when NATO was considering giving an order to threaten the use of force, the political community of NATO got together and had a discussion about what the basis of such threat of force would be. At the end of the discussion, it was clear that there was no common agreement on what might be the justification. There were some NATO members who were prepared to base it on a new doctrine of humanitarian intervention; but most members of the NATO Council were reluctant to adopt a relatively open-ended new doctrine. So at the end of that week, the NATO political community said, here is a list of all of the important reasons why it is necessary for us to threaten the use of force. And at the bottom, it said that under these unique circumstances, we think such actions would be legitimate. There was deliberate evasion of making a “legal” assertion.

And this same process occurred in the U.S. Government. There were some who wanted to articulate that humanitarian intervention in now the basis for U.S. action. There was another theory from the Department of Defense, which wanted to adopt sort of an expanded idea of self-defense based on the general interest of the United States in the region; but on reflection, nobody was really prepared to throw all the eggs into either of those baskets. So we ended up with a formulation similar to that of NATO, where we listed all of the reasons why we were taking action and, in the end, mumbled something about its being justifiable and legitimate but not a precedent. So in a sense, it was something less than a definitive legal rationale—

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251. Secretary of State Madeleine K. Albright Press Conference with Russian Foreign Minister Igor Ivanov, July 26, 1999, U.S. DEP’T ST., *available at* <http://secretary.state.gov/www/statements/1999/990726b.html> [<https://perma.cc/EGX5-GGEF>].
252. Colin Brown, *Blair’s Vision of Global Police*, INDEPENDENT, 23 April 1999.
253. 330 Parl. Deb., H.C. (1999) 30 (U.K.).



although it probably was taken by large parts of the public community as something like that.<sup>254</sup>

When the principal State actors assert that their actions are *sui generis* and not intended to constitute precedent, this does not create a favorable climate for the cultivation of a new rule of customary international law.<sup>255</sup>

The formation of the new customary rule of humanitarian intervention hit a second obstruction when the 2004 High-Level Panel Report, which was endorsed by the UN Secretary-General, and the 2005 World Summit Outcome Document, which was endorsed by the General Assembly and Security Council, were written to reflect a much narrower conception in which humanitarian intervention is only lawful when authorized by the Security Council.<sup>256</sup>

It is for these reasons that the United States likely chose not to pursue the humanitarian intervention rationale beyond the rescue of the Yazadis from Mount Sanjar, despite the fact that, according to Security Council Resolution 2170 (2014), ISIS was engaged in the commission of “continued gross, systematic and widespread abuses of human rights.”<sup>257</sup>

## 2. Failed State

A second U.S. argument was that airstrikes against ISIS “are in a part of Syria that is currently outside the authority of the Syrian government” and thus “in our eyes, a legal no-man’s land.”<sup>258</sup> The Chairman of the Joint Chiefs of Staff said ISIS has “to be addressed on both sides of what is essentially at this point a nonexistent border.”<sup>259</sup> This proposition is based on the view that limited use of

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254. MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS, THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER* 124-25 (Cambridge Univ. Press, 2010) (quoting remarks by Michael Matheson).

255. Simma, *supra* note 218, at 1.

256. U.N. Secretary-General, Report of the High-Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility, ¶¶ 203, 256 UN Doc. A/59/565 (December 2, 2004).

257. S.C. Res. 2170, ¶ 2 (Aug. 15, 2014).

258. Firman DeBrabander, *Drones and the Democracy Disconnect*, N.Y. TIMES (Apr. 9, 2014, 7:30 PM), available at [http://opinionator.blogs.nytimes.com/2014/09/14/drones-and-the-democracy-disconnect/?\\_r=0](http://opinionator.blogs.nytimes.com/2014/09/14/drones-and-the-democracy-disconnect/?_r=0) [https://perma.cc/Q329-GTG3].

259. Dan Lamothe & Karen DeYoung, *Islamic State can't be beat without addressing Syrian side of border; top general says*, WASH. POST (Aug. 21, 2014), available at <https://www.washingtonpost.com/news/checkpoint/wp/2014/08/21/pentagon-leaves-door-open-to-strikes-in-syria-to-curb-islamic-state/> [https://perma.cc/EDU7-WSNM].

force in the territory of a failed State would not violate the state's territorial integrity because a failed state by definition does not exercise meaningful control over its borders or territory.<sup>260</sup>

The U.S. argument constituted a radical departure from the traditional view that a State's legal personality, rights, and responsibilities do not evaporate when it loses control over parts of its territory, as during periods of civil war, insurgency, or governmental collapse.<sup>261</sup> The United States quickly recognized that the failed state argument would prove problematic to U.S. interests and global stability. A new rule of customary international law that would allow states to invade their neighbors whenever they deem that "state failure" has occurred would create a "legion of loopholes" in the U.N. Charter,<sup>262</sup> and create substantial potential for abuse.

This is because, according to the Fund for Peace, which publishes the annual "Fragile States Index," there are some fifteen countries in addition to Syria that could be considered failed or failing States based on extensive areas within their borders outside government control.<sup>263</sup> These include Sudan, South Sudan, Somalia, Central African Republic, Congo, Chad, Yemen, Afghanistan, Guinea, Haiti, Pakistan, Iraq, Nigeria, Ivory Coast, and Zimbabwe.<sup>264</sup> The U.S. argument would have constituted a virtual license for neighboring States to invade these countries.

### 3. Hot Pursuit

Perhaps the most ill-conceived of the U.S. arguments was put forth by Secretary of State John Kerry, who testified before the Senate that since ISIS attacks Iraq from and then retreats to Syria, a "right of hot pursuit" could provide a basis for military force against ISIS in Syria.<sup>265</sup>

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260. See Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 166 (2000).

261. Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 435 (1999) (noting that lack of effective control over territory does not imply loss of statehood).

262. Ben N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT'L & COMP. L. REV. 453 (2004), available at <http://lawdigitalcommons.bc.edu/iclr/vol27/iss2/9> [<https://perma.cc/S9FB-9CZS>] (last visited Dec. 20, 2015).

263. *Fragile State Index: Fragility in the World 2015*, FUND FOR PEACE, <http://fsi.fundforpeace.org/map/2015heatmap.png> [<https://perma.cc/HKW6-GLZL>] (last visited Dec. 18, 2015).

264. *Id.*

265. Associated Press, *Would US have right of hot pursuit in Syria?*, DAILY MAIL (Sept. 23, 2014, 7:56 AM), <http://www.dailymail.co.uk/wires/ap/article-2766592/Would-US-right-hot-pursuit-Syria.html> [<https://perma.cc/7WRA-W9ST>].

While there is a recognized right of hot pursuit to pursue ships escaping in international waters, there is no authority for application of the doctrine to forces on land.<sup>266</sup> Nevertheless, the United States has made the argument in the past, for example in relation to Maj. Gen. John Pershing's expeditionary force of 4,800 troops "to pursue Mexican revolutionary Pancho Villa in 1916 into Mexican territory," in relation to the bombing of Cambodia and Laos in 1969 to pursue Viet Cong who crossed into their territory from Vietnam, and in relation to pursuing Taliban forces from Afghanistan into Pakistan in 2007.<sup>267</sup>

Notably, these historic incidents were met with widespread protest and condemnation. In addition, the International Court of Justice implicitly rejected the hot pursuit argument in holding in the *Congo Case* that Ugandan forces acting under "Operation Safe Haven" could not lawfully cross into the Democratic Republic of the Congo to hunt down anti-Ugandan rebel groups that had taken refuge there.<sup>268</sup> Moreover, if accepted, this land-based hot pursuit rationale could create a slippery slope, leading to frequent border violations by many other states around the globe.<sup>269</sup>

Thus, the United States ultimately settled on the argument that use of force against ISIS in Syria could be justified because Syria was unable to control the threat ISIS posed to Iraq and other countries, including the United States. The argument was significantly strengthened by events in late 2015.

*E. 2015: The Grotian Moment comes to Fruition*

In the aftermath of the ISIS bombing of a Russian jetliner over the Sinai desert on October 31, 2015, and ISIS attacks on a Paris stadium and concert hall on November 13, 2015, the U.N. Security Council unanimously adopted Resolution 2249, which determined that ISIS is "a global and unprecedented threat to international peace and security," and called for "all necessary measures" to "eradicate the safe haven [ISIS] established" in Syria.<sup>270</sup>

The October 31 and November 13 ISIS attacks were a game changer, killing and injuring over 824 nationals of Russia, France, and twenty-two other countries. They showed that ISIS—the richest and

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266. *Id.*

267. *Id.*

268. *Armed Activities*, *supra* note 8, at ¶¶ 162-165.

269. Lionel Beehner, *Backgrounder, The Right of Hot Pursuit to Hunt Rebels*, COUNCIL ON FOREIGN RELATIONS (June 7, 2007), <http://www.cfr.org/iraq/can-states-invoke-hot-pursuit-hunt-rebels/p13440> [<https://perma.cc/XP8U-U3YB>] (last visited Dec. 20, 2015).

270. S.C. Res. 2249 (Nov. 20, 2015).

most technologically advanced terrorist organization in the world—was no longer confining its objectives to territorial acquisition in Syria and Iraq, but had adopted the tactics of other terrorist groups, focusing on attacking vulnerable targets outside the Levant. Moreover, Russia was now just as much a target as the West.

Resolution 2249 did not provide a new stand-alone legal basis or authorization for use of force against ISIS in Syria.<sup>271</sup> Unlike past Security Council resolutions that have authorized force, Resolution 2249 does not mention Article 42, or even Chapter VII, of the U.N. Charter, which is the Article and Chapter under which the Security Council can permit States to use force as an exception to Article 2(4) of the U.N. Charter. Nor does the Resolution use the word “authorizes” or even “decides” in relation to use of force. These textual differences led Mark Weller, Professor of International Law at the University of Cambridge, to conclude that “this language suggests that the resolution does not grant any fresh authority for states seeking to take action.”<sup>272</sup>

But the resolution does stand as a confirmation by the Security Council that use of force against ISIS in Syria is permissible. Importantly, the French Security Council Representative, who had sponsored Resolution 2249, stated in his explanation of vote on the resolution that “collective action could now be based on Article 51 [self-defense] of the United Nations Charter.”<sup>273</sup> With a unanimous confirmation, Resolution 2249 will play an important role in crystallizing the new rule of customary international law regarding use of force in self-defense against non-state actors—a phenomenon colorfully described by Professor David Koplow of Georgetown as “helping to midwife the development of new norms of customary international law.”<sup>274</sup>

Any doubt of the importance of the Security Council Resolution was dispelled when a few days after its adoption the UK parliament voted on December 2, 2015 to approve (397-223) airstrikes against

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271. Arabella Lang, *Legal Basis for UK Military Action in Syria*, House of Commons Library Briefing Paper No. 7404, Dec. 1, 2015, at 3, available at <https://www.voltairenet.org/IMG/pdf/CBP-7404.pdf> [<https://perma.cc/FH4P-NPMH>].

272. *Id.* at 8.

273. Security Council “Unequivocally” Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses “Unprecedented” Threat, U.N. Press Release, (Nov. 20, 2015), <http://www.un.org/press/en/2015/sc12132.doc.htm> [<https://perma.cc/2B2L-CJPF>] (last visited Dec. 20, 2015).

274. David Kaplow, *International Legal Standards and the Weaponization of Outer Space*, in SPACE: THE NEXT GENERATION—CONFERENCE REPORT, 31 MARCH-1 APRIL 2008, UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH 162 (2008).

ISIS in Syria despite the earlier views of many MPs that such action could not be legally justified.<sup>275</sup> Immediately thereafter, the UK joined the United States in bombing ISIS targets throughout Syria.<sup>276</sup>

## V. CONCLUSION

This article has examined whether the use of force against al-Qaeda and ISIS during the past fourteen years has given rise to a so-called Grotian Moment: an instance of rapid formation of a new rule of customary international law, in this case recognizing the right of States to attack non-state actors when the territorial State is unable or unwilling to suppress the threat they pose. Such a right would constitute a radical change from the prior-existing rule, which had required effective control of the non-state actors by the territorial State as a pre-condition to the use of force against them.

Ordinarily, customary international law takes many decades to crystallize. In this context, fourteen years would constitute almost instant custom. Historically, there has been a series of other instances of so-called Grotian Moments, where a context of fundamental change served as an accelerating agent, enabling customary international law to form much more rapidly, and with less State practice, than is normally the case. Each represented a radical legal development. In each, the development was ushered in by the urgency of dealing with fundamental change. In some cases the change was the advent of new technology, as with offshore drilling and outer space flight. In others it was in the form of pervasive moral outrage regarding shocking revelations of crimes against humanity, as preceded the establishment of the Nuremberg Tribunal and the creation of the Yugoslavia Tribunal.

Both al-Qaeda and ISIS are widely viewed as representing a new kind of threat, in which a non-state actor possesses many of the attributes of a State: massive wealth, sophisticated training and organization, and access to destructive weaponry. To respond to the fundamental change presented by these uber-terrorist groups, the United States has argued that it is now lawful to attack such non-state actors when they are present in States that are unable or unwilling to curb them. In light of the Security Council approval of the 2001 invasion of Afghanistan to dislodge al-Qaeda and the absence of significant protest of the subsequent drone strikes against al-Qaeda leaders and operatives in Pakistan, Somalia, Iraq, and

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275. Steven Erlanger & Stephen Castle, *British Jets Hit ISIS in Syria After Parliament Authorizes Airstrikes*, N. Y. TIMES, Dec. 3, 2015, A16, available at [http://www.nytimes.com/2015/12/03/world/europe/britain-parliament-syria-airstrikes-vote.html?\\_r=0](http://www.nytimes.com/2015/12/03/world/europe/britain-parliament-syria-airstrikes-vote.html?_r=0) [https://perma.cc/N472-2RB6] (last visited Dec. 18, 2015).

276. *Id.*

Yemen, international law seemed to be moving rapidly toward adoption of the “unable and unwilling” principle of self-defense. But in the 2004 *Wall* and 2005 *Congo* cases, the International Court of Justice reaffirmed that international law permits extraterritorial attacks against non-state actors only when their actions are attributable to the territorial state, utilizing an effective control standard. Despite widespread criticism of these holdings, including from some of the ICJ’s most respected members, these judicial decisions unquestionably set back the evolving customary international law of self-defense against non-state actors.

This article concludes that the international community’s response to ISIS in Syria has provided the final push necessary to bring the Grotian Moment to fruition. The initial diversity of arguments articulated by the United States to justify its airstrikes was not a good start, and UN Security Council Resolution 2249 does not clearly endorse a particular legal justification. Despite its ambiguity, Resolution 2249 will likely be viewed as confirming that use of force in self-defense is now permissible against non-state actors where the territorial state is unable to suppress the threat that they pose. In the words of the Institute of International Law, “where a rule of customary law is (merely) emerging or there is still some doubt as to its status” a unanimous non-binding resolution of the General Assembly or Security Council “can consolidate the custom and remove doubts which might have existed.”<sup>277</sup>

The implication of this newly accepted change in the international law of self-defense is that any State can now lawfully use force against non-state actors (terrorists, rebels, pirates, drug cartels, etc.) that are present in the territory of another State if the territorial State is unable or unwilling to suppress the threat posed by those non-state actors. The number of candidates for such action is quite large. The U.S. Department of State maintains a list of terrorist organizations that pose a significant threat to the United States and its allies around the world, which includes fifty-eight terrorist groups headquartered in thirty-five different countries (in addition to ISIS in Syria/Iraq).<sup>278</sup> Importantly, the right to use force against such non-state actors is subject to several limitations which will impede the possibility of abuse. First, the individual or aggregate actions of the non-state actors must amount to the equivalent of an armed attack to

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277. Committee On Formation Of Customary (General) International Law, *Conference Report London*, INT’L L. ASS’N 25 (2000), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/30> [https://perma.cc/QG73-RLMH].

278. Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, available at <http://www.state.gov/j/ct/rls/other/des/123085.htm> [https://perma.cc/U85H-7XRC] (last visited, December 24, 2015).

trigger the right to use force in self-defense. Second, the use of force must be targeted against the non-state actors and not the State or its military unless the State is found to be in effective control of the non-state actors. Third, military action must still meet the principles of necessity, proportionality, and discrimination. Further limitations are likely to develop in relation to international reaction to State invocation and application of the new rule.

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