

MODERN SELF-DEFENSE: THE USE OF
FORCE AGAINST NON-MILITARY THREATS

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INTRODUCTION

In 1971, following British withdrawal from India, West Pakistan’s army attacked East Pakistan with the objective of

exterminating or driving out of the country a large part of the Hindu East Pakistani population. One million East Pakistanis were killed and ten million refugees flowed into India over nine months. The International Commission of Jurists documented indiscriminate killing of civilians, attempts to exterminate a large part of the Hindu population, and torture and killing of opposition leaders.¹ India repeatedly requested assistance from the Security Council, but assistance was not forthcoming.² How was India to respond? Can one State intervene in another State to respond to the external effects generated by a humanitarian crisis inside that second State?³

Just a few years earlier, in the winter of 1967, the British Petroleum-chartered oil tanker *Torrey Canyon* hit a reef between the Isles of Scilly and Land's End in Cornwall, causing the worst oil spill in the history of the United Kingdom. Faced with the pressure of time, the U.K. government developed an unconventional solution to contain the oil spill: the Royal Air Force bombarded the ship to burn the remaining oil and sink the wreck while dropping napalm in an effort to burn the oil slick.⁴ What if the same oil spill had occurred in the English Channel in French territorial waters and the French government had shown reluctance to take such unorthodox measures? Would the United Kingdom have been justified in conducting a military intervention in French territory against the will of the French government?

Article 51 of the U.N. Charter recognizes the inherent right of a State to use force in the territory of another State in individual or collective self-defense, "if an armed attack occurs against a Member of the United Nations."⁵ The right of States to use force in self-defense under international law has given rise to notoriously thorny debates around questions such as the existence of a right of anticipatory self-

1. FRANCIS F. ABIEW, *THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION* 114 (1999); Frederik Harhoff, *Unauthorized Humanitarian Interventions—Armed Violence in the Name of Humanity?*, 70 *NORDIC J. INT'L L.* 65, 85–86 (2001).

2. Brian K. McCalmon, *States, Refugees, and Self-Defense*, 10 *GEO. IMMIGR. L.J.* 215, 223 (1996); Harhoff, *supra* note 1, at 85.

3. See *infra* Section II.C.2.i for a discussion of the India example.

4. Adan Vaughan, *Torrey Canyon disaster—the UK's worst-ever oil spill 50 years on*, *GUARDIAN* (Mar. 18, 2017), <https://www.theguardian.com/environment/2017/mar/18/torrey-canyon-disaster-uk-worst-ever-oil-spill-50th-anniversary> [<https://perma.cc/V2YJ-SMGX>]; see *infra* Part VI for a discussion of the *Torrey Canyon* incident.

5. U.N. Charter art. 51, para. 1.

defense,⁶ the possibility of humanitarian intervention,⁷ and the existence of a responsibility to protect.⁸

Less explored has been the question of whether and, if so, under what circumstances a State may use force in individual or collective self-defense to respond to significant threats or harms that are not military in nature and do not constitute an “armed attack” in its plain meaning, but that may be optimally tackled with some form of military intervention. This Article argues that self-defense should be interpreted to reflect the realities of modern conflicts, where intra-State conflicts can have substantial impacts on neighboring States. These conflicts do not reflect the relatively simple situation of one State’s army crossing the border to invade another State, envisaged when Article 51 was adopted in 1945. This question often arises in situations of massive humanitarian repression or inter-ethnic conflict inside a State, causing non-military impacts on its neighbors, such as refugee flows creating regional instability or chemical weapons fumes drifting across the border. The instability within such a State could also permit terrorist groups to take refuge and harm neighbors through attacks on their territories.

Modern conflicts may involve non-military threats which are environmental in nature. For example, a State may be experiencing a mortal epidemic but be unwilling to accept international help. International technical assistance teams able to prevent the epidemic from spreading may require protection from a State’s armed forces.⁹ Or one State may deliberately attack another by releasing water from a dam onto a settlement in a neighboring State or setting alight oil fields within a State’s territory.¹⁰ These environmental threats are non-military and different from “armed attacks” as traditionally understood, so what recourse does the affected State have? If Security Council authorization is not forthcoming, can international law justify the use of military force in self-defense to address such threats?

6. See, e.g., KINGA TIBORI SZABÓ, *ANTICIPATORY ACTION IN SELF-DEFENCE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW* 123 (2011) (examining whether post-Charter State practice has altered the status and limitations of anticipatory action).

7. See Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 *ETHICS & INT’L AFF.* 293, 293 (2011).

8. See *RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY* 1–14 (Richard Cooper & Juliette Kohler eds., 2009).

9. The authors give credit to Sir Daniel Bethlehem for sharing this suggestion.

10. See *infra* Section II.C, dealing with some of these scenarios.

As conventionally understood, a State cannot use self-defense to justify the response to non-military threats because they do not constitute “armed attacks.” Humanitarian intervention conceives the use of force to respond to humanitarian suffering, but it is not an independent legal basis for the use of force without Security Council authorization. However, a State cannot be expected to stand by in the face of an overwhelming danger, whether military or not, threatening to storm into its territory and destroy its population or property. This would seem inconsistent with fundamental norms of sovereignty and integrity.¹¹ Thus, this Article explores whether a use of force in such cases could be justified on the basis of a—cautiously—broad interpretation of Article 51 of the U.N. Charter, the doctrine of humanitarian intervention or other “strands of legal argument,”¹² such as international obligations outlawing genocide, torture, and the use of chemical weapons, or the doctrine of necessity.

This Article argues that the use of military force in self-defense could be justified in response to a threat that is non-military in nature if (i) the Security Council has failed to act; (ii) the potential scale and effects of the non-military threat are equivalent to those of an “armed attack” in the traditional sense; (iii) the territorial State from which the threat emanates is unwilling or unable to eliminate the threat; (iv) the territorial State has a specific obligation vis-à-vis the State in jeopardy to eliminate the threat; and (v) the use of force is subject to the parameters of necessity, proportionality, and immediacy.

However, humanitarian intervention is a better “fit” than self-defense in justifying the use of force to address a humanitarian situation produced by a non-military threat. A military intervention can be better explained as a State intervening to address humanitarian suffering than by attempting to characterize a non-military occurrence as an armed attack justifying the use of force in self-defense. Humanitarian intervention is not currently accepted by States as an independent legal basis for using force, but this Article outlines State practice and arguments that could support its use. International law

11. Achieving the policies of human dignity as each situation allows is, arguably, a fundamental goal underlying the U.N. Charter and international law as a whole. See W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 83 (2003).

12. See Daniel Bethlehem, *Stepping Back a Moment—The Legal Basis in Favor of a Principle of Humanitarian Intervention*, EUR. J. INT'L L. BLOG (Sept. 12, 2013), <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/> [<https://perma.cc/W7HU-DJ59>] (addressing “strands of legal argument” in the context of international humanitarian intervention).

prohibits genocide and torture, as well as crimes against humanity and hostilities directed at civilians. The international community has accepted these crimes as *jus cogens* norms owed *erga omnes*.¹³ Violations of these provisions do not provide an authorization to use force in another State, but an intervening State could cite violations of these norms, together with self-defense and/or humanitarian intervention in making its argument, since justifications for using force often rely on a range of rationales. Finally, the laws of State Responsibility and, in particular, the doctrine of necessity, provide an additional safety net that may excuse low-level uses of force to prevent a major catastrophe.

I. METHODOLOGY

The U.N. Charter prohibits the use of force unless authorized by the Security Council, consented to by the State where the use of force is envisioned, or used in self-defense to respond to an armed attack.¹⁴ The prohibition on the use of force is a cornerstone of the modern international legal order,¹⁵ put in place to “save succeeding generations from the scourge of war.”¹⁶ Unlike its immediate predecessor, Article I of the 1928 Kellogg-Briand Pact,¹⁷ Article 2(4) of the U.N. Charter articulates an overarching prohibition on all forms of military armed force, not just war.¹⁸ The prohibition is a *jus cogens*

13. Report of the Study Group of the Int'l Law Comm'n Finalised by Martii Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 374, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter Report of the Study Group of the ILC]; see also LORI FISLER DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW, CASES AND MATERIALS* 101 (2014).

14. U.N. Charter Chapter VII.

15. Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 200, 203 (Bruno Simma et al. eds., 3rd ed. 2012); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgement, 2005 I.C.J. 68, ¶ 148 (Dec. 12).

16. U.N. Charter pmbl.

17. Kellogg-Briand Pact, *opened for signature* Aug. 27, 1928, art. I, 46 Stat. 2343, 94 U.N.T.S. 57, 62 (entered into force July 29, 1929) (“The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations from one another.”).

18. The prevailing view is that the prohibition laid down in Article 2(4) of the U.N. Charter is limited to *armed* force. The policy reason behind this dictate is that extending the prohibition to all forms of force would leave States “with no means of exerting pressure on other States that violate international law.” See

norm.¹⁹ It can also be seen as an application of broader fundamental international law principles of sovereignty and non-intervention.²⁰ Testing the limits of the laws constraining the use of force is an exercise notoriously open to abuse.²¹ Thus, any attempt to expand the boundaries of the right to resort to force must be solidly based on the norms of international law. Under these norms, the laws on the use of force can be interpreted, re-interpreted, or even superseded by subsequent State practice pointing to emerging customary international law.²²

The U.N. Charter is also subject to the norms of treaty interpretation embodied in the Vienna Convention on the Law of Treaties (VCLT),²³ under which the terms of a treaty must be given their ordinary meaning in their context and, importantly, in light of the treaty's object and purpose.

A third, less technical way of broadening the scope of the application of international law is "balancing values": identifying the values underpinning pre-existing rules, identifying emerging values or interests, and finally crafting a new legal regime that accommodates the various interests and values at stake.²⁴

The International Court of Justice (ICJ) has used this balancing-of-values approach to identify emerging principles of customary international law.²⁵ For instance, in the *Corfu Channel* case, the ICJ found that Albania was under an obligation to give notice of a minefield in its territorial waters to approaching ships.²⁶ The Court did not rely on any written or customary rule to make this finding, but rather referred to "certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in

JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 362 (2012); Randelzhofer & Dörr, *supra* note 15, at 208.

19. Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L L. 345, 358 (2009).

20. U.N. Charter arts. 2(1), 2(7); Randelzhofer & Dörr, *supra* note 15, at 284.

21. See Reisman, *supra* note 11, at 83.

22. Albrecht Randelzhofer & Georg Nolte, *Article 51*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 15.

23. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 32, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980).

24. Enzo Cannizzaro, *Customary International Law on the Use of Force: Inductive Approach vs. Value-Oriented Approach*, in *CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE: A METHODOLOGICAL APPROACH* 245, 245 (Enzo Cannizzaro & Paolo Palchetti eds., 2005).

25. *Id.* at 251–53.

26. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9).

peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States."²⁷ This balancing-of-values approach is evident in justifications for the use of force in self-defense against non-State actors made by some States.²⁸ While understanding the need to "prohibit excess and the egregious pursuit of national interest," intervening States have argued the compulsion to be "sensitive to the practical realities of the circumstances" that the laws of force address in terms of safeguarding State sovereignty."²⁹

The balancing-of-values approach is most apparent in the context of humanitarian interventions. In the face of certain conflicts, such as the Rwandan genocide, the Security Council has not acted quickly enough, effectively, or at all.³⁰ States have nonetheless shown a preparedness to respond to extreme humanitarian suffering in such situations. Examples include NATO's 1999 Kosovo intervention, India's 1971 Pakistan intervention, and Tanzania's 1979 Uganda intervention.³¹ However, such action faces the same difficulty and danger of balancing an international order, which prohibits the use of force, against the need to intervene to address the most extreme situations of humanitarian suffering. U.N. Secretary-General Kofi Annan expressed this paradox eloquently in a speech before the U.N. General Assembly:

To those for whom the greatest threat to the future of the international order is the use of force in the absence of a Security Council mandate, one might ask, not in the context of Kosovo but in the context of Rwanda, if, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: is there not a danger of such interventions undermining the

27. *Id.* at 22.

28. Daniel Bethlehem, *Self-defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769, 773 (2012).

29. *Id.*

30. SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 509 (2d ed., 2012) (citing the views of critics of the Security Council).

31. *See infra* Section II.C.

imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?³²

This Article will examine self-defense and humanitarian intervention. In practice, States may advance both self-defense and humanitarian intervention rationales, not clearly differentiate between the two, or even not articulate a particular rationale at all. Humanitarian intervention and self-defense may focus on different aspects of the same situation: Humanitarian intervention focuses on the situation of humanitarian suffering *inside* another State, while self-defense focuses on the *external impacts* of the situation inside this State on other States in terms of refugee flows, chemical weapons fumes, attacks from non-State actors, or the risk of the conflict “spilling over.” An intervening State could seek to characterize these cumulative impacts as having physical effects akin to an “armed attack.” Part V will analyze a combination of rationales used by the United States and Western States in justifying their interventions in Iraq in 1991 and in Syria in 2017 and 2018.

II. SELF-DEFENSE

The right to resort to force in self-defense emanates from two sources. First, Article 51 of the U.N. Charter states that “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an *armed attack* occurs against a Member of the United Nations.”³³ Second, customary international law sets out three parameters regulating the use of force in self-defense: necessity, immediacy, and proportionality. Their origin is traced back to the *Caroline* case.³⁴

32. THOMAS M. FRANK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 16 (2002) (citing U.N. GAOR, 54th Sess., 4th plen. mtg. at 2, U.N. Doc. A/54/PV.4 (Sept. 20, 1999)).

33. U.N. Charter art. 51 (emphasis added).

34. The *Caroline* case concerned a British attack of an American ship at Niagara Falls on the grounds that it was being used to supply rebel leaders in the Canadian rebellion of 1837. The U.S. Secretary of State, Daniel Webster, wrote to a representative of the British Government in protest arguing that it was for Britain to show both “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation” and that their troops “did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.” Many scholars read these statements as embodying only the requirements of necessity, immediacy, and

This Article will focus only on the self-defense elements of an “armed attack” and for “necessity.” It will not examine the parameters of immediacy and proportionality in detail as there is no reason to believe they will operate differently depending on whether a threat is military or non-military in nature. The question is then whether the requirement of an “armed attack” or “necessity” can be flexible enough to accommodate the use of force against a non-military threat.

A. Armed Attack

The term “armed attack” is notoriously undefined in the U.N. Charter.³⁵ An “armed attack” is generally seen as the gravest “use of force,” which includes invasion, bombardment, and an attack on another State’s armed forces.³⁶ Measures falling short of the use of force include political interference, propaganda, or economic coercion.³⁷ A State that takes these measures could violate the principle of “non-intervention.” Non-intervention prohibits intervention in a coercive manner into the internal affairs of another State in “matters which each State is permitted, by the principle of State sovereignty, to decide freely.”³⁸

The principle of non-intervention is broader in scope than the prohibition on the use of force. This means that some military measures may breach the principle of non-intervention, but not be of sufficient gravity to violate the prohibition of the use of force.³⁹ For example, in the *Nicaragua* case, the ICJ held that directing overflights of Nicaraguan territory, including low-altitude flights causing “sonic

proportionality because there is no mention of “armed attack” as a precondition for the use of force. See Matthew Allen Fitzgerald, Note, *Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas Under Article 51 of the UN Charter*, 49 VA. J. INT’L L. 473, 477–79 (2009).

35. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 14, ¶ 176 (June 27) (“Moreover, a definition of the ‘armed attack’ which, if found to exist, authorizes the exercise of the ‘inherent right’ of self-defence, is not provided in the Charter, and is not part of treaty law.”).

36. MURPHY, *supra* note 30, at 495 (citing G.A. Res. 3314 (XXIX) (Dec. 14, 1974) (Definition of Aggression)).

37. See generally Jamnejad & Wood, *supra* note 19, at 368–71, 374 (explaining how political interventions, economic measures, and broadcasting are tactics to force policy changes in other States).

38. See Int’l Law Ass’n, *Report on Aggression and the Use of Force*, 76 INT’L L. ASS’N REP. CONF. 648, 661, 650 (2014) [hereinafter ILA]; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 14, ¶ 241 (June 27); JAMES GREEN, THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW 32 n.36 (2009).

39. ILA, *supra* note 38, at 650; GREEN, *supra* note 38, at 32.

booms” to intimidate the population, was not a use of force, but did breach the principle of non-intervention.⁴⁰ Similarly, in the *Corfu Channel* case, the ICJ ruled that the United Kingdom had “violated the sovereignty” of Albania by conducting a mining clearance operation in Albanian territorial waters without advance permission.⁴¹

Therefore, there are three levels at play when considering cross-border actions: intervention in the internal affairs of another State, for example conducting low-altitude flights; the use of force, for example bombing another State or attacking its armed forces; and an “armed attack,” which is the gravest use of force. Only an “armed attack,” and not a mere use of force or a mere intervention, justifies a use of force in self-defense.

1. Armed Attack as a Precondition to the Use of Force

First, is it uncontested that an “armed attack” is the only instance in which a State may resort to force? Article 51 of the U.N. Charter permits the use force in the territory of another State “if an *armed attack* occurs.”⁴² Under this provision, an “armed attack” is the

40. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 14, ¶¶ 87–91 (June 27); see also GREEN, *supra* note 38, at 13 (stating that “by supporting the *contra* forces, the United States had violated the principle of non-intervention and in some circumstances the prohibition of the use of force”) (emphasis added). The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States may help clarify the distinction the ICJ draws when stating that “[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, *when the acts referred to in the present paragraph involve a threat or use of force.*” G.A. Res. 2625 (XXV), ¶ 1.9 (Oct. 24, 1970) (emphasis added). This is referred to as an indirect use of force and it does fall within the prohibition of Article 2(4) of the U.N. Charter. See ILA, *supra* note 38, at 650.

41. *Corfu Channel* (U.K. v. Alb.), Judgement, 1949 I.C.J. 4, at 36 (Apr. 9). This choice of language, which avoids any reference to Article 2(4) of the U.N. Charter, would seem motivated by an abundance of caution from the court as it mirrors the terms of Albania’s counterclaim. The wording was the subject of some controversy at the time: Judge ad hoc Ečer stressed in his Dissenting Opinion that the Court should have specifically mentioned Article 2(4) and Article 42 of the U.N. Charter in making this finding. *Id.* at 130. But the text of the *dispositif* makes clear that the ICJ did not find that the United Kingdom had breached Article 2(4) of the U.N. Charter or the customary prohibition of the use of force. Christine Gray, *The ICJ and the Use of Force*, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 240 (Christian J. Tams & James Sloan eds., 2013).

42. U.N. Charter art. 51, para. 1 (emphasis added).

precondition that triggers the right to use force. The ICJ held in its *Nicaragua* judgment that the exercise of the right of self-defense is “subject to the State having been the victim of an armed attack.”⁴³ This dictate, referred to as the “*Nicaragua* gap,”⁴⁴ has been confirmed by the ICJ in its *Oil Platforms*⁴⁵ and *Armed Activities in Congo*⁴⁶ decisions, as well as in the *Wall* Advisory Opinion.⁴⁷

A “counterrestrictionist view”⁴⁸ contests the idea that an armed attack is a prerequisite for the use of force in self-defense. This view argues that the pre-Charter customary right of self-defense survived after the enactment of the U.N. Charter because Article 2(4) “contains no prohibition of the exercise of self-defense as permitted under the general law.”⁴⁹ Therefore, according to this view, Article 51 does not overrule pre-existing customary norms of self-defense, which can be traced back to the *Caroline* incident. Customary international law requires only necessity, immediacy, and proportionality and makes no mention of an “armed attack” being a precondition for the use of force. Thus, the counterrestrictionist view argues that an “armed attack,” as such, is not required. According to this interpretation, Article 51 of the U.N. Charter identifies just one of many instances in which force may be used in self-defense.⁵⁰

However, the counterrestrictionist view does not accord with current ICJ jurisprudence. Because the *Nicaragua* court applied only customary international law in defining the *Nicaragua* gap and not Article 51 of the U.N. Charter, it clearly stated that the “armed attack”

43. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 14, ¶ 195 (June 27).

44. NIKOLAS STÜRCHER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* 266 (James Crawford & John S. Bell eds., 2007).

45. Case Concerning Oil Platforms (Iran v. U.S.), Judgement, 2003 I.C.J. 161, ¶ 51 (Nov. 6).

46. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgement, 2005 I.C.J. 168, ¶¶ 143–47, 165 (Dec. 12).

47. Legal Consequences of 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.”).

48. McCalmon, *supra* note 2, at 227; Michael K. Murphy, *Achieving Economic Security with Swords as Ploughshares: The Modern Use of Force to Combat Environmental Degradation*, 39 VA. J. INT’L L. 1181, 1201 (1999).

49. Murphy, *supra* note 48, at 1201–02 (citing DEREK W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 188 (1958)).

50. DEREK W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 188 (1958); see also Fitzgerald, *supra* note 34, at 477–79 (outlining the historical development of the *Caroline* self-defense doctrine).

requirement was a customary international law principle, as well as an authoritative interpretation of Article 51 of the U.N. Charter.⁵¹ The *Oil Platforms* ruling also indicated that an “armed attack” is a prerequisite for the exercise of the right of self-defense under modern customary international law.⁵² Hence, the counterrestrictionist view rests on an uncertain legal basis.

There are also good policy reasons not to adopt the counterrestrictionist interpretation. The notion of excluding self-defense other than in response to an armed attack is consistent with the purpose of the U.N. Charter to restrict as far as possible the use of force by individual States.⁵³ The counterrestrictionist view suggests there is an open-ended number of events that could trigger a right to use force. If these events are not clearly set out in the text of the Article 51 of the U.N. Charter, then self-serving interpretations by States could create the possibility of a *carte blanche* for the use of force, which the U.N. Charter intended to comprehensively prohibit.

If accepted that an “armed attack” is required, how broadly can the concept of an “armed attack” be interpreted? The content of this term turns on three concepts: the *perpetrator* behind the attack, the *gravity* of the attack, and the “attack” being “armed.”

2. Perpetrator of an Armed Attack

Implicit in the notion of “armed attack” is the idea of a perpetrator. As traditionally understood, self-defense envisages a victim State using force against a perpetrator State in response to an

51. Randelzhofer & Nolte, *supra* note 22, at 1405, 1428. The United States entered a reservation upon acceptance of the jurisdiction of the ICJ under Article 36(2) of its Statute, pursuant to which the United States declined the jurisdiction of the Court over “disputes arising under a multilateral treaty, unless . . . all Parties to the treaty affected by the decision are also Parties to the case before the Court.” SHABTAI ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 415 (1979). The ICJ concluded that its decision would inevitably affect El Salvador. The ICJ thus found that it was barred from applying the U.N. Charter in the case, and it resorted to customary law exclusively. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgement, 1986 I.C.J. 14, ¶¶ 42–56 (June 27).

52. *Case Concerning Oil Platforms (Iran v. U.S.)*, Judgement, 2003 I.C.J. 161, ¶ 51 (Nov. 6) (stating that, in order to demonstrate a legal justification for the attack, “the United States has to show that” it had been attacked by Iran in such a manner that “qualified as ‘armed attacks’ within the meaning of that expression in Article 51 . . . and as understood in customary law on the use of force”) (emphasis added).

53. Randelzhofer & Nolte, *supra* note 22, at 1403.

“armed attack” involving military forces invading the victim State.⁵⁴ Is there any flexibility to this implicit requirement of a perpetrator State? In the types of scenarios that this Article examines, such as a situation of humanitarian suffering or inter-ethnic conflict, there may not be a clear actor behind the curtain. In some instances, such as an environmental threat, there may not even be a perpetrator at all.

The best-known attempt to expand the notion of a perpetrator relates to the perpetrator’s *identity*. The September 11, 2001 terrorist attacks perpetrated by Al Qaeda began a heated debate as to whether non-State actors may carry out an “armed attack” for the purposes of Article 51 of the U.N. Charter.⁵⁵ This is also an unsettled question within the ICJ. In *Nicaragua*, the Court held that actions carried out by non-State actors could constitute armed attacks, but only insofar as they were equivalent in nature to an “actual armed attack conducted by regular forces, or its substantial involvement therein.”⁵⁶ In contrast, in the *Wall* Advisory Opinion, the Court declared unambiguously that the Charter recognizes “the existence of an inherent right of self-defence in the case of armed attack by *one State* against another State.”⁵⁷ In a final twist, the Court declined to rule in *Armed Activities* on “whether . . . contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces.”⁵⁸ However, Justices Kooijmans and Simma said in separate judgments that if the ICJ still viewed Article 51 as limiting the right of self-defense only in

54. MURPHY, *supra* note 30, at 497.

55. See, e.g., Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT’L L.J. 7 (2003) (concluding that the response to 9/11 shows an acceptance by the international community that armed attacks can be committed by non-State actors); Thomas Franck, *Editorial Comments: Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839 (2001) (presenting arguments of German scholars who found armed attacks can only be permitted by States, self-defense cannot occur after an attack, and the U.S. actions following 9/11 were unlawful under the U.N. Charter); NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 45–47 (2010) (stating that in order for the use of force in self-defense to be lawful, the victim State must attempt to work with the territorial State to take measures against the non-State actor).

56. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgement, 1986 I.C.J. 14, ¶ 195 (June 27).

57. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) (emphasis added).

58. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgement, 2005 I.C.J. 168, ¶ 147, 165 (Dec. 19). Arguably, declining to rule on this matter is tantamount to acknowledging that the non-State actor question is still open.

response to an “armed attack” committed by another State, and not by non-State actors, this would be out of step with U.N. Security Council and State practice.⁵⁹

This uncertainty as to whether attacks by non-State actors can be “armed attacks” reflects a tension between competing values. On the one hand, the sovereignty of the State in which the attacking non-State actor is located will likely be violated if the victim State launches an attack into it. On the other hand, the victim State wishes to protect its own sovereignty and integrity—“[t]he source of attack does not change the fact that the State must be able to stop it from causing harm.”⁶⁰ Therefore, the focus should be on the level of harm caused to a State, rather than the type of actor who caused it.

This same tension is apparent when a State seeks to use force to address non-military threats of the sort envisioned in this Article, such as the rapid spread of a mortal epidemic across borders or a dam located in one State threatening to spill onto a settlement in a neighboring State. The affected State will want to take action to preserve its integrity, which may require the use of force or intervention into the State from which the harm is emanating. Addressing the source of an attack is likely to be the key concern for a victim State.

A balance can be reached by requiring that any use of force must be directed not towards the perpetrator of an attack or threat, but towards and limited to the threat itself, whether a non-State actor or a non-military threat. Focusing on addressing the source of the attack seems better aligned with the focus of Article 51, which is on repelling the “armed attack” itself⁶¹ and does not state that there must be a perpetrator. Limiting any response to addressing only the threat posed to the intervening State is also consistent with the parameter of proportionality, which also governs the use of force in self-defense.

3. Gravity of an “Armed Attack”

Attempts to define the term “armed attack” rarely deal directly with its content. Instead, they focus on identifying some of its

59. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgement, 2005 I.C.J. 306, ¶ 28 (Dec. 19) (separate opinion by Kooijmans, J.); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgement, 2005 I.C.J. 334, ¶ 11 (Dec. 19) (separate opinion by Simma, J.).

60. ILA, *supra* note 38, at 661.

61. Randelzhofer & Nolte, *supra* note 22, at 1426.

dimensions—most notably, the amount of force that must be used to reach the level of an armed attack. They also endeavor to elucidate its contextual significance, typically focusing on its relationship with other provisions of the Charter, including the term “use of force.”⁶²

In the *Nicaragua* judgment, the ICJ focused on gravity as the distinguishing feature of an armed attack. It stated that it is “necessary to distinguish the gravest forms of the use of force (those constituting an armed attack) from other less grave forms.”⁶³ This suggests it is possible to regard the term “armed attack” not as having self-standing meaning, but rather as setting a threshold of intensity. Under this definition, an “armed attack” could be defined by its scale and its harmful effects alone.⁶⁴

Where then to set the bar of gravity? It is generally acknowledged that the threshold of gravity for an “armed attack,” which justifies the use of force in self-defense in response, is—and should always be—particularly high.⁶⁵ Judge Simma championed an attempt to relax the level of gravity required for an “armed attack” in his Separate Opinion in *Oil Platforms*.⁶⁶ In Judge Simma’s view, an individual State should be allowed to use a small amount of force in self-defense to counter hostile military action that does not reach the level of an armed attack.⁶⁷ This use of force would be a form of forcible countermeasures.⁶⁸ Supporting Simma’s argument, State practice demonstrates examples of the use of small amounts of force in response to low-level attacks, particularly by non-State actors, as shown in Section II.B.2 below.

Many contest Judge Simma’s position on the basis that it contradicts the *Nicaragua* gap.⁶⁹ Under this view, no right to use force

62. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 191 (June 27); see also Case Concerning Oil Platforms (Iran v. U.S.), Judgement, 2003 I.C.J. Rep. 161, ¶¶ 51, 62 (Nov. 6) (confirming the “*Nicaragua* Gap” dicta in a later case).

63. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 191 (June 27). The notion that not all uses of force qualify as armed attacks is another facet of the “*Nicaragua* gap” described above. See PHILIPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 114, 116 (2013).

64. See AVRA CONSTANTINOU, THE RIGHT OF SELF-DEFENCE UNDER CUSTOMARY INTERNATIONAL LAW AND ARTICLE 51 OF THE U.N. CHARTER 64 (2000).

65. See *id.*

66. Case Concerning Oil Platforms (Iran v. U.S.), Judgement, 2003 I.C.J. Rep. 161, ¶¶ 12–13 (Nov. 6) (separate opinion by Simma, J.).

67. *Id.*

68. *Id.*

69. Randelzhofer & Nolte, *supra* note 22, at 1405 n.43.

in self-defense exists beyond that set out in Article 51 of the U.N. Charter, which requires an “armed attack.”⁷⁰ However, this is actually immaterial to Judge Simma’s position. Judge Simma’s argument still requires that some form of force, even a small amount, be used against a victim State to justify the use of force in response.⁷¹ Judge Simma’s argument therefore does not eliminate the requirement of an “armed attack” as a precondition for exercising the right of self-defense altogether. He simply suggests that, under certain circumstances, the notion that an armed attack is defined by its gravity can be interpreted loosely, and a lower level of intensity may be acceptable. He does not argue that the whole requirement of an “armed attack” can be ignored.

This Article argues that an “armed attack” can be seen as not having self-standing meaning, but is rather defined by a certain level of gravity and that the content of the notion of “armed attack” may prove flexible enough to accommodate the use of force against non-military threats.

4. Armed Attack

This Article’s attempt to frame an “armed attack” as a mere question of gravity cannot sidestep a definitional element explicit in this notion. In its plain meaning, an “armed attack” refers to an attack that is military or kinetic in nature, using traditional military weapons such as bombs or artillery.⁷² Ignoring the word “armed” in “armed attack” would run contrary to Article 31 of the Vienna Convention on the Law of Treaties, which requires that a treaty be interpreted in light of its express terms and that no term be deemed completely void of meaning (*effet utile*).⁷³ One reason for the prohibition on the use of force being limited only to armed force is that, if this prohibition were extended “to other forms of force, States would be left with no means of exerting pressure on other States which act in violation of international law.”⁷⁴ This would include, for instance, lawful measures of economic coercion, such as sanctions or embargos.

The ICJ has taken an expansive interpretation of the word “armed,” stating that Article 51 applies to “any use of force, regardless

70. See *id.* at 1405; see also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 195 (June 27). For an explanation of the *Nicaragua* Gap, see Section I.A.1.

71. *Case Concerning Oil Platforms* (Iran v. U.S.), Judgement, 2003 I.C.J. Rep. 161, ¶ 13 (Nov. 6) (separate opinion by Simma, J.).

72. Randelzhofer & Dörr, *supra* note 15, at 209.

73. Vienna Convention on the Law of Treaties, *supra* note 23, art. 31.

74. Randelzhofer & Dörr, *supra* note 15, at 209.

of the weapons employed.”⁷⁵ Still, many of the non-military threats that constitute the object of our inquiry, such as an environmental catastrophe, do not “employ” any sort of “weapons.” Generous as it may be, the ICJ’s interpretation does not remove the basic requirement that some sort of destructive device be used for an “armed attack” to occur. The notion that Article 51 of the U.N. Charter requires that an “armed attack” involve some sort of device specifically engineered to cause destruction is not uncontested, however. One argument is that an “armed attack” is not defined by the nature of the attack but by its *destructive physical effects*.⁷⁶ For example, Ian Brownlie suggested in 1961 that bacteriological, biological, and chemical weapons were encompassed by the term “armed,” since they “are employed for the destruction of life and property.”⁷⁷

The Security Council affirmed the United States’ right to respond in self-defense after the attacks of September 11, 2000, where the weapons used to cause death and destruction were hijacked airplanes. As self-defense requires an “armed attack,” the Security Council resolution implied that Al Qaeda’s attack on the World Trade Center and Pentagon using hijacked airplanes was indeed an “armed attack.”⁷⁸ Despite the non-traditional means of the attack, its scale and physical effects were equivalent to an “armed attack” conducted by a State’s armed forces. An attack that involved releasing water in a dam onto a settlement in a neighboring State is another example of where immense harm can be caused without a traditional kinetic military weapon.⁷⁹ In such cases, the focus should be on the scale and effects of the attack: in this case, the loss of civilian life and destruction of the settlement below.

These questions have been raised in the context of cyber-attacks, which can cause massive physical damage and disruption

75. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 14, ¶ 176 (June 27); *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 37 (July 8) (applying the “armed attack” language to the use of nuclear force).

76. Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT’L L. 183, 255–56 (1961).

77. *Id.*

78. The Security Council reaffirmed the United States’ “inherent right of individual and collective self-defense.” S.C. Res. 1368 (Dec. 20, 2001). *See also* Bethlehem, *supra* note 28, at 7; YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 207–08 (2012).

79. Randelzhofer & Dörr, *supra* note 15, at 210.

without using traditional military weapons.⁸⁰ The Tallinn Manual on the International Law Applicable to Cyber Warfare (“Tallinn Manual”) considered that a cyber operation would constitute a use of force when its *scale and effects* were comparable to non-cyber operations that constitute a use of force—that is, if it has physical effects amounting to death, destruction, or injury.⁸¹

The Tallinn Manual sets out criteria to evaluate whether an operation amounts to a use of force.⁸² The most important is severity.⁸³ If a cyber operation has physical effects amounting to damage, death, destruction, or injury, the Tallinn Manual considers it highly likely to constitute a use of force.⁸⁴ Other factors include immediacy (the speed at which consequences manifest), directness (the causal relation between a cyber operation and its consequences), measurability of effects, military character, and whether the act is prohibited under international law.⁸⁵ If a cyber operation caused *serious* deaths, injury, damage, or destruction, it would most likely constitute an armed attack.⁸⁶ The Tallinn Manual cites the example of interfering with computers controlling a dam, causing massive floods and civilian casualties, as an “armed attack.”⁸⁷ Another example is manipulating a State’s nuclear weapons control systems, causing reaction meltdown, or directing of a State’s own nuclear weapons against it.⁸⁸

Some key States appear to support the idea that an “armed attack” can be defined by its effects, at least in relation to cyber-attacks. The United Kingdom has said it would consider a cyber-attack

80. See Marco Roscini, *World Wide Warfare—Jus ad bellum and the Use of Cyber Force*, 14 MAX PLANCK Y.B. U.N. L. 85, 130 (2010).

81. Michael N. Schmitt, *International Law in Cyberspace: the Koh Speech and Tallinn Manual Juxtaposed*, 54 HARV. INT’L L.J. ONLINE 13, 19 (2012); INT’L GROUP OF EXPERTS AT THE INVITATION OF THE NATO COOP. CYBER DEF. CTR. OF EXCELLENCE, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL].

82. *Id.* at 45–52.

83. *Id.* at 48.

84. *Id.* at 55.

85. *Id.* at 45–52.

86. Schmitt, *supra* note 81, at 20, 22; TALLINN MANUAL, *supra* note 81, at 55–56; KARL ZEMANEK, ARMED ATTACK, MAX PLANCK ENCYC. OF PUBLIC INTERNATIONAL LAW ¶¶ 7, 20 (2010), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241> [<https://perma.cc/Q3F9-ZSDW>].

87. Roscini, *supra* note 80, at 115 (citing Yoram Dinstein, *Computer Network Attacks and Self-Defense*, in COMPUTER NETWORK ATTACK & INTERNATIONAL LAW (Michael N. Schmitt. & Brian T. O’Donnell eds., 2012)).

88. *Id.*

that disabled a power station as an "act of war."⁸⁹ Russia has stated that information weapons can have consequences of comparable seriousness to weapons of mass destruction.⁹⁰ The United States has opined that shutting down a State's banking or financial system may constitute an "armed attack."⁹¹

A threshold of intensity of effects should also be applied in determining whether a non-military threat constitutes an "armed attack." Physical non-armed force can cause severe harm, just as armed force can. There is no policy reason to permit the use of physical non-armed force that is equivalent in its destructive effects to an armed attack committed using military means just because it is non-military.⁹² Safeguarding the safety and integrity of States against the gravest perils is arguably an underlying purpose of the U.N. Charter in addition to prohibiting the use of force.

Therefore, in the face of a physical threat that does not technically involve the use of armed force, the term "armed" should not refer to the use of weapons or other devices. Rather, it should only embody the idea of magnitude, i.e., an action that causes great "loss of life and/or extensive destruction of property."⁹³ Because the exceptions to the prohibition of the use of force must be interpreted narrowly, this extensive interpretation of "armed attack" "is acceptable only within the narrowest possible circumstances."⁹⁴

B. Necessity

While an "armed attack" is the precondition that triggers the right to resort to force, "necessity" operates as a parameter regulating the use of force.⁹⁵ Necessity responds to the question as to "whether a specific measure is necessary to achieve a legitimate purpose of self-defence."⁹⁶ The essence of necessity is the idea that force may only be

89. *Id.* at 109, 125.

90. *Id.* at 109.

91. *Id.*

92. *Id.*

93. ZEMANEK, *supra* note 86, ¶ 21; see also ILA, *supra* note 38, at 671-72 (arguing that the environmental harm could be used as a tool to directly cause significant damage on a scale equivalent to what is commonly accepted as use of force, e.g., deliberate poisoning or contamination of rivers or other sources of drinking water, and could therefore be within the scope of Article 2(4) and of the prohibition of the use of force).

94. Randelzhofer & Dörr, *supra* note 15, at 210.

95. Immediacy and proportionality also operate as parameters regulating the use of force, but will not be explored in this Article.

96. Randelzhofer & Nolte, *supra* note 22, at 1425-26.

used when there is “*no choice of means*,” therefore a State must exhaust all other avenues to resolve a situation before resorting to force.⁹⁷ These include diplomatic efforts, whether by the victim State or others in the international community, as well as non-forcible sanctions such as retorsion, economic measures, and political pressure.

Here, we envision a scenario in which a non-military threat located in one State (the “territorial State”) might cause imminent damage to a neighboring State (the “victim State”). If the territorial State takes effective action against the threat, the use of force by the victim State in the territorial State would not be necessary and an argument of self-defense would not be justified.⁹⁸ The question is, thus, how can a victim State establish necessity in circumstances where a territorial State takes no action against a non-military threat within its territory—either because it lacks capacity or the will to act—and the only way to address the threat is for the victim State to use force against this threat? This question has been explored in detail in relation to non-State actors and has resulted in the so-called “unwilling or unable doctrine.” The next Section will explore whether the rationale underlying this doctrine could apply not just to non-State actors but also to non-military threats.

1. The “Unwilling or Unable” Doctrine

Some argue that the use of force is justified under international law where a victim State is “unwilling or unable” to suppress a threat.⁹⁹ The doctrine is rooted in century-old neutrality law contained in the

97. In the *Caroline* case, it was stated that [i]t will be for [Her Majesty's] Government to show “*a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation*. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; *since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.*”

See *supra* note 34 (emphasis added).

98. See generally LUBELL, *supra* note 55, at 45 (“If the territorial state were to take effective action against the non-state actor, which thereby terminates the attacks and the continuing threat, then forcible action by the victim state would not be justifiable.”).

99. Bethlehem, *supra* note 28, at 775; Ashley Deeks, ‘Unwilling or Unable’: Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VA. J. INT’L LAW 483, 483 (2012).

1907 Hague Conventions and customary international law.¹⁰⁰ Neutrality law imposes a due diligence obligation on neutral States to ensure that their territory is not used as a safe haven for belligerents to attack another State, and to expel, even by using force, any belligerent State that makes use of its territory.¹⁰¹

What can a belligerent State do if one of its enemies is operating from the territory of a neutral State and the neutral State ignores or is unable to fulfill its duty under international law to expel it? While no treaty provides an answer, commentators and State military manuals have insisted that belligerents cannot be left without a remedy in such circumstances.¹⁰² They argue neutrality law permits a belligerent State to use force in the territory of the neutral State if the latter is *unwilling or unable* to prevent violations of its neutrality duties.¹⁰³

In its modern form, the “unwilling or unable” doctrine has been extended to justify the use of force by a victim State against non-State actors operating from another State.¹⁰⁴ Professor Ashley Deeks cites the *Caroline* case as an early example of State practice where force was used against non-State actors on the basis that the territorial State was “unwilling or unable” to address the threat they posed.¹⁰⁵ In that case, British troops in Canada used force against Canadian rebels within U.S. territory, claiming the United States was “unwilling or unable” to stop those rebels from attacking them.¹⁰⁶ The United States insisted that it was willing and able to take action against the Canadians because it had in place a domestic law outlawing the rebels’ acts.¹⁰⁷

An argument could be made in support of the “unwilling or unable” doctrine that if a State is unable to exercise its sovereignty and

100. See Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, *opened for signature* Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654 (entered into force Jan. 26, 1910); Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, *opened for signature* Oct. 18, 1907, 36 Stat. 2396, 1 Bevans 711 (entered into force Jan. 26, 1910); Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, *opened for signature* Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723 (entered into force Jan. 26, 1910).

101. Deeks, *supra* note 99, at 497; Hague Convention (V), *supra* note 100.

102. Deeks, *supra* note 99, at 499.

103. *Id.*

104. *Id.* at 501.

105. See Fitzgerald, *supra* note 34; Deeks, *supra* note 99, at 502.

106. Deeks, *supra* note 99, at 502.

107. *Id.*

control its territory, it is not entitled to the privileges of sovereignty, such as non-intervention into its territory. The Institut de Droit International recognized in 2007 that States might, “as a matter of principle” use defensive force against non-State actors if an attack is launched from an area that is “beyond the jurisdiction of any State.”¹⁰⁸ If a State is unable to control an area of its territory, its sovereignty over that area could be seen as a “legal fiction.”¹⁰⁹ U.K. and U.S. legal advisers have indicated some support for the “unwilling or unable” doctrine in general terms.¹¹⁰

2. State Practice

Some incipient State practice also supports the binding character of the “unwilling or unable” doctrine. A range of States have been prepared to use force in response to attacks perpetrated by non-

108. Monica Hakimi, *Defensive Force against Non-State Actors: The State of Play*, 91 INT’L L. STUDIES 1, 25 (2015).

109. Russia’s own intervention in Syria was with the consent of the Syrian regime. Bill Chappell, *Russia Begins Airstrikes in Syria After Assad’s Request*, NPR (Sept. 30, 2015, 8:37 AM), <https://www.npr.org/sections/thetwo-way/2015/09/30/444679327/russia-begins-conducting-airstrikes-in-syria-at-assads-request> [<https://perma.cc/E8E4-X3AJ>]; Malcolm Jorgensen, *Ungoverned Space: US Request to Join Fight in Syria carries Legal Risk*, CANBERRA TIMES (Aug. 26, 2015), <http://www.canberratimes.com.au/comment/ungoverned-space-us-request-to-join-fight-in-syria-carries-legal-risk-20150826-gj7wxm.html> [<https://perma.cc/EXY2-ESKC>].

110. A speech in January 2017 by the U.K. Attorney General indicated implicit endorsement of the “unwilling or unable” doctrine—not just in relation to intervention against ISIL in Syria, but in general. The Attorney General stated that [m]any states now hold the view, and have acted on the basis, that the inherent right of self-defense extends to the use of force against non-state actors. . . . A number of states have . . . confirmed their view that self-defense is available as a legal basis where the state from whose territory the actual or imminent armed attack emanates is unwilling or unable to prevent the attack or is not in effective control of the relevant part of its territory.

Rt. Hon. Jeremy Wright QC MP, *The Modern Law of Self-Defence*, EJIL: TALK! (Jan. 11, 2017), <http://www.ejiltalk.org/the-modern-law-of-self-defence/> [<https://perma.cc/X42S-Y5J7>]. A speech by the U.S. Department of State’s Legal Adviser in April 2016 had similarly stated the “unwilling or unable” doctrine in general terms: “there will be cases in which there is a reasonable and objective basis for concluding that the territorial State is unwilling or unable to effectively confront the non-State actor in its territory so that it is necessary to act in self-defense against the non-State actor in that State’s territory without the territorial State’s consent.” Brian Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations*, 92 INT’L L. STUD. 235, 241 (2016).

State actors. In so doing, they argued their intervention was necessary as the territorial State was unwilling or unable to act against the non-State actors.

i. 1998 U.S. Embassy Bombings

After attacks by Al Qaeda on U.S. embassies in Kenya and Tanzania in 1998, the United States conducted airstrikes against suspected Al Qaeda targets in Sudan and Afghanistan.¹¹¹ The United States justified its actions as self-defense, implying that the attacks by non-State actors, Al Qaeda, constituted an armed attack.¹¹² The United States said Sudan and Afghanistan had failed to shut down the activities of Al Qaeda in their territories.¹¹³

This intervention received a mixed international reaction, with Western States generally supportive while others were generally resistant.¹¹⁴ Iran, Iraq, Russia, and Libya condemned the strikes.¹¹⁵ The Non-Aligned Movement and Arab League States denounced the strike against Sudan, but not against Afghanistan.¹¹⁶ This may have been because of the facts of each case—faulty intelligence meant the United States actually struck a pharmaceutical factory in Sudan, rather than a chemical weapons plant as intended.¹¹⁷

ii. Turkey/Kurds Since 1999

Turkey has used force against Kurdistan Worker's Party (PKK) rebels in Iraq since 1995, sending in several thousand troops in 2008 after attacks on Turkey.¹¹⁸ Turkey said Iraq was "unwilling or unable" to prevent the use of its territory for terrorist attacks affecting Turkey and was breaching its international obligations in allowing its territory

111. *U.S. missiles pound targets in Afghanistan, Sudan*, CNN (Aug. 20, 1998, 5:53 PM), <http://www.cnn.com/US/9808/20/us.strikes.01/> [<https://perma.cc/22X9-J3XM>].

112. TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE U.N. CHARTER 426-27 (2010).

113. *Id.* at 426.

114. *Id.* at 103.

115. *Id.* at 427.

116. *Id.*

117. *Id.*

118. Elena Chachko & Ashley Deeks, *Who Is on Board with "Unwilling or Unable"?*, LAWFARE (Oct. 10, 2016), <https://www.lawfareblog.com/who-board-unwilling-or-unable> [<https://perma.cc/J57Q-XEYE>]; Sarah Rainsford, *Turkey determined to Crush PKK*, BBC NEWS (Feb. 26, 2008, 7:54 PM), <http://news.bbc.co.uk/2/hi/europe/7265677.stm> [<https://perma.cc/RU4U-BN8Z>].

to be used for terrorist attacks.¹¹⁹ International reaction was limited: the United States supported Turkey, while the Arab League and Non-Aligned Movement denounced the violation of Iraq's sovereignty.¹²⁰

Turkey also argued that Iraq was not able to exercise its sovereignty in the border region where the PKK was operating "in light of the de facto autonomy of the Iraqi Kurds resulting from the 1990–91 Gulf War." Turkey argued that, under these circumstances, its use of force against them did not violate Iraqi sovereignty.¹²¹

119. Chachko & Deeks, *supra* note 118. Turkey referred to the international obligation of the Declaration on the Principles of International Law concerning Friendly Relations. Today, Turkey could refer to Security Council resolutions to this effect: Resolutions 1368 and 1373. Turkey stated:

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations . . . stipulates that every State has the duty to refrain from, *inter alia*, acquiescing in organized activities within its territory directed towards the commission of terrorist attacks in another state. As of this very principle, it becomes inevitable for a country to resort to necessary and appropriate force to protect itself from attacks from a neighboring country, if the neighboring State is unwilling or unable to prevent the use of its territory for such attacks.

Id.

120. Christian J. Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT'L L. 359, 379, nn.139–41 (2009); RUYS, *supra* note 112, at 430.

121. Turkey claimed in 2008 that "Iraq has not been able to exercise its authority over the northern part of its country since 1991 . . . Turkey cannot ask the government of Iraq to fulfill its obligations, under international law, to prevent the use of its territory for the staging of terrorist acts against Turkey." Tatiana Waisberg, *Colombia's Use of Force in Ecuador Against a Terrorist Organization: International Law and the Use of Force Against Non-State Actors*, ASIL INSIGHTS (Aug. 22, 2008), <https://www.asil.org/insights/volume/12/issue/17/colombias-use-force-ecuador-against-terrorist-organization-international> [<https://perma.cc/H6QX-CBSS>] (internal quotation marks omitted). Turkey "denie[d] violations of Iraqi sovereignty [arguing that it] . . . resorted to legitimate measures to protect its own security in the face of Iraq's inability to exercise authority over the Northern part of its country to prevent the use of its territory for the staging of terrorist acts against Turkey." *Id.* In 1996, Turkey said that, because "Iraq cannot exercise its authority either on the territory or the airspace of a part of its country," it could "neither ask the Government of Iraq to fulfil [sic] its obligation nor find any legitimate authority in the north of Iraq to hold responsible under international law for terrorists acts committed or originated there." Deeks, *supra* note 99, at 526. Turkey maintained that "until Iraq is in a position to resume its responsibilities and perform its consequent duties under international law, Turkey has to take necessary and appropriate measures to eliminate the existing terrorist threat from the area." *Id.*

iii. Russia's 2002 Intervention in Georgia

Russia conducted airstrikes against Chechen rebel bases in Georgia in 2002, arguing that Georgia was “unwilling or unable” to suppress the rebels’ attacks on Russia.¹²² Most States condoned the operation, although the E.U. Parliamentary Assembly said that Article 51 did not authorize such a use of force and the United States said the action violated Georgia’s sovereignty.¹²³

However, other low-level uses of force against non-State actors have not met with general acquiescence. For example, in 2008 the Organization of American States condemned Colombia’s targeted airstrikes against a Revolutionary Armed Forces of Colombia (FARC) rebel camp less than two kilometers inside Ecuador’s border as a violation of sovereignty.¹²⁴

iv. Syria: Intervention Against ISIL Since 2014

The most significant and recent use of the “unwilling or unable” doctrine has been the international coalition’s intervention against the Islamic State of Iraq and the Levant (ISIL) in Syria. Iraq requested assistance after ISIL, operating from Syria, attacked and took control of Iraqi towns.¹²⁵ Coalition members intervened in the

122. Chachko & Deeks, *supra* note 118.

123. Hakimi, *supra* note 108, at 14 (“The most notable exception was the Council of Europe’s Parliamentary Assembly, which declared in 2002 that ‘Article 51 . . . do[es] not authorise the use of military force by the Russian Federation or any other state on Georgian territory.’”); Tams, *supra* note 120, at 380; RUY, *supra* note 112, at 466; Deeks, *supra* note 99, at 486.

124. The United States supported the operation. There did not appear to be particular reactions from outside the region. Deeks, *supra* note 99, at 535–36; Hakimi, *supra* note 108, at 7; Tams, *supra* note 120, at 380. The United States said Turkey was justified in conducting such attacks where a neighboring State was “unwilling or unable” to prevent the use of its territory for such attacks and because Iraq had not been effectively exercising its sovereignty to ensure the welfare of people in northern Iraq. Turkey also argued Iraq was not able to exercise its sovereignty in the border region where the PKK was operating “in light of the de facto autonomy of the Iraqi Kurds resulting from the 1990–91 Gulf War.” Turkey argued that in these circumstances its use of force against them was not violating Iraqi sovereignty. Waisberg, *supra* note 121, at 526.

125. In 2014, Iraq requested assistance to combat ISIL in its territory, noting that ISIL had established safe havens outside Iraq’s borders. Hoshyar Zebari, Minister for Foreign Affairs of the Republic of Iraq, *Letter dated June 25, 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General*, U.N. Doc. S/2014/440 (June 25, 2014), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_440.pdf [https://perma.cc/YL9M-26NL].

collective self-defense of Iraq, arguing that Syria had proven itself “unwilling or unable” to prevent the use of its territory for ISIL to launch attacks.¹²⁶ Germany, Belgium, and U.N. Secretary-General Ban

126. The United States had Iraq’s consent to conduct airstrikes against ISIL in Iraq. Ibrahim al-Ushayqir al-Jafari, Minister for Foreign Affairs of Iraq, *Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2014/691 (Sept. 20, 2014), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_691.pdf [<https://perma.cc/J5H9-TTM6>].

The United States, Australia, Canada, Germany, Belgium, the United Kingdom, the Netherlands, Norway, and Denmark justified their participation in Syria as collective self-defense of Iraq. The United States, Australia, and Canada argued the incursion into Syrian territory was necessary as Syria had proven itself “unwilling or unable” to prevent the use of its territory for ISIL attacks. During domestic Parliamentary approval processes, the governments of Germany, the United Kingdom, and the Netherlands also argued that Syria was “unwilling or unable” to stop ISIL’s attacks. The United States emphasized that the strikes were targeted against a terrorist group (ISIL) and not the Syrian government. See Deeks, *supra* note 99; Gov’t of the U.S., *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, U.N. Doc. S/2014/695 (Sept. 23, 2014), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_695.pdf [<https://perma.cc/M3QT-5PAT>].

Australia’s letter stated that “the Government of Syria has, by its failure to constrain attacks upon Iraqi territory originating from ISIL bases within Syria, demonstrated that it is unwilling or unable to prevent those attacks.” Gov’t of Austl., *Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2015/693 (Sept. 9, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_693.pdf [<https://perma.cc/4U75-GRTF>]; Canada’s letter stated “States must be able to act in self-defence when the Government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory.” Gov’t of Can., *Letter dated 31 March 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2015/221 (Mar. 31, 2015) <https://www.justsecurity.org/wp-content/uploads/2015/12/Canada-Article-51-Letter-Syria-03312015.pdf> [<https://perma.cc/GMZZ-64R8>]. In its application for Parliamentary approval, the German government stated that military action was needed because the Syrian government was unwilling or unable to stop ISIL’s attacks on Iraq, and referred to other members of the coalition exercising collective self-defense of Iraq in accordance with Article 51. Gov’t of Ger., *Letter dated 10 December 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2015/946 (Dec. 10 2015) http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_946.pdf [<https://perma.cc/E4X4-QV7X>]. In seeking approval from Parliament in 2014, U.K. Prime Minister David Cameron argued that Syria’s Assad regime was unwilling and/or unable to take action necessary to prevent ISIL continuing to attack Iraq. Cameron also argued there was a direct link

Ki-moon said the strikes took place in parts of Syrian territory in which the Syrian government no longer exercised “effective control.”¹²⁷ Russia, Iran, Ecuador, Venezuela and Cuba opposed the intervention.¹²⁸

between ISIL’s activities in Syria and attacks in Iraq. Chachko & Deeks, *supra* note 118. The Dutch government stated before the Dutch Parliament’s Permanent Committee on Foreign Affairs in July 2015 that the use of force against a non-State actor in a third State could be justified if the non-State actor had used the third State’s territory to carry out an armed attack and the third State was unwilling or unable to end its activities on its territory. *Id.* Turkey intervened in Syria against ISIL in exercise of its right of (individual) self-defense in 2015, after cross-border attacks by ISIL killed Turkish civilians. Turkey said the Syrian regime was “neither capable nor willing” to prevent attacks that were imperiling its security. Gov’t of Turk., *Letter dated 24 July 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2015/563 (July 24, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_563.pdf [<https://perma.cc/U542-DNS9>].

127. Germany’s Article 51 letter to the Security Council said the Syrian government did not exercise effective control over parts of its territory and that it was exercising the right of collective self-defense of States that had been subject to attacks by ISIL. Belgium’s letter to the Security Council noted the Syrian government did not exercise effective control over the part of its territory occupied by ISIL. Germany and Belgium’s letters are discussed in Marko Milanovic, *Belgium’s Article 51 Letter to the Security Council*, EJIL TALK! (June 17, 2016), <http://www.ejiltalk.org/belgiums-article-51-letter-to-the-security-council/> [<https://perma.cc/5SQA-QAZJ>]; Chachko & Deeks, *supra* note 118; U.N. Sec’y Gen. Ban Ki-moon, *Remarks at the Climate Summit press conference (including comments on Syria)* (Sept. 23, 2014), <https://www.un.org/sg/en/content/sg/speeches/2014-09-23/remarks-climate-summit-press-conference-including-comments-syria> [<https://perma.cc/KNG2-4P3V>]; Hakimi, *supra* note 108, at 27.

128. Claus Kress, *The Fine Line between Collective Self-Defense and Intervention by Invitation: Reflections of the Use of the Force against ‘IS’ in Syria*, JUST SECURITY (Feb. 17, 2015), <https://www.justsecurity.org/20118/claus-kress-force-isil-syria/> [<https://perma.cc/85T4-V2BH>]. Russia described it as an “act of aggression.” Ecuador, Venezuela, and Cuba expressed support for Syria’s sovereignty and territorial integrity. Russia and Ecuador said international law only permitted the use of force with Security Council authorization or with the consent of the territorial State. See Chachko & Deeks, *supra* note 118. The Syrian regime opposes ISIL and, after the strikes began, expressed its support for international efforts that contributed to the fight against terrorists. This was despite having warned prior to the strikes that it would view any strikes as an attack on Syria. Russia’s intervention in Syria was with the consent of the Syrian regime. China merely urged respect for State sovereignty and expressed support for international counter-terrorism efforts. China’s Foreign Ministry spokesperson Hua Chunying’s first comment on the air strikes was that China hoped there were no civilian casualties. Hua then reiterated China’s support for international anti-terrorism efforts but said such actions should respect the principles of the U.N. Charter. Otherwise, Hua warned, an already tense situation could become even

The United States also cited an individual self-defense rationale: to “address the terrorist threats” that the Al Qaeda-linked Khorasan group “posed to the United States.”¹²⁹ The United States appeared to be relying on the September 11 terrorist attack. Relying on an “armed attack” which occurred fourteen years ago stretches the concept of self-defense, although it was an attack of an exceptional scale.¹³⁰ The United States could also have drawn on an anticipatory self-defense rationale, on the basis that Khorasan was planning a future attack on the United States. The Pentagon hinted at this when it stated that strikes against Khorasan were undertaken to “disrupt imminent attack plotting against the United States and western targets,” which was in its final stages.¹³¹

The “unwilling or unable” argument has also been applied to justify a low-level use of force in the context of self-defense of nationals. Some States, notably the United States and Israel, have asserted a right to use a very limited amount of force to rescue their own nationals at risk from attack abroad. They argue this right existed in customary international law before the drafting of the U.N. Charter.¹³² In 1976, Israeli commandos rescued 248 passengers from the plane in a

more complicated. Shanon Tiezzi, *US Air Strikes in Syria: China's Conundrum*, DIPLOMAT (Sept. 24, 2014), <http://thediplomat.com/2014/09/us-air-strikes-in-syria-chinas-conundrum/> [<https://perma.cc/MZ5C-QNGF>]; Hakimi, *supra* note 108, at 24–25.

129. Permanent Rep. of the U.S. to the U.N., *Letter dated Sep. 23, 2014 from the Permanent Rep. of the U.S. to the United Nations addressed to the Secretary-General*, U.N. Doc. S/2014/695.

130. Jennifer Daskal et al., *Strikes in Syria: The International Law Framework*, JUST SECURITY (Sept. 24, 2014, 2:25AM), <https://www.justsecurity.org/15479/strikes-syria-international-law-framework-daskal-deeks-goodman/> [<https://perma.cc/8CQ7-TQBJ>].

131. The U.S. Department of Defense stated:

In terms of the Khorasan group, which is a network of seasoned Al Qaida veterans, these strikes were undertaken to disrupt imminent attack plotting against the United States and western targets. These targets have established a safe haven in Syria to plan external attacks, construct and test improvised explosive devices, and recruit westerners to conduct operations. The United States took action to protect our interests and to remove their capability to act. . . . The intelligence reports indicated that the Khorasan Group was in the final stages of plans to execute major attacks against Western targets and potentially the U.S. homeland.

Louise Arimatsu & Michael N. Schmitt, *Attacking “Islamic State” and the Khorasan Group: Surveying the International Law Landscape*, 53 COLUM. J. TRANSNAT’L L. BULL. 1, 17 (2014).

132. DAMROSCH & MURPHY, *supra* note 13, at 1140.

targeted, ninety-minute rescue operation.¹³³ This was after Palestinian militants hijacked the plane and threatened to kill Jewish passengers if Israel did not meet their prisoner release demands.¹³⁴ Israel justified its actions as self-defense of its nationals, necessary because Uganda was “unwilling” to combat the threat posed by the hijackers.¹³⁵ Despite the targeted nature of the operation, it was not generally accepted.¹³⁶

Despite the incipient State practice outlined above, the requirements of the “unwilling or unable” test have never been fully developed¹³⁷ and the concept has detractors.¹³⁸ This Article’s aim is not to test the viability of the “unwilling or unable” doctrine or to analyze it in detail, but to assess whether and how it may be adapted when the use of force is envisioned not against a non-State actor but rather against a non-military threat.

3. The “Unwilling or Unable” Doctrine Should Extend to Non-Military Threats

The above examples involve the use of force in response to military attacks perpetrated by non-State actors. Can a State extend the “unwilling or unable” doctrine to non-military threats? Extending this doctrine to non-military threats encounters two significant hurdles. First, neutrality law creates a due diligence obligation on neutral States vis-à-vis belligerent States to expel belligerent troops from their territory. Neutrality law does not seem expansive enough to

133. The operation involved the actual use of force, with 45 Ugandan soldiers and one Israeli soldier killed. The Ugandan government welcomed the terrorists, so there was no State consent to Israel’s intervention. CBS/AP, *Israel, Uganda Commemorate Infamous Entebbe Hostage Crisis*, CBS NEWS (July 4, 2016, 9:11 AM), <https://www.cbsnews.com/news/israel-netanyahu-entebbe-hijacking-40th-anniversary-uganda/> [<https://perma.cc/B3JB-NVD9>].

134. *Id.*

135. ANTHONY C. AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 99 (1993).

136. *Id.*; MURRAY C. ALDER, *THE INHERENT RIGHT OF SELF-DEFENSE IN INTERNATIONAL LAW* 139–40 (2013). The action was not condemned by the Security Council as the United States, one of the few States which supported Israel’s decision, would have vetoed the Resolution.

137. Deeks, *supra* note 99, at 503–06.

138. See Kevin Jon Heller, *Ashley Deeks’ Problematic Defense of the ‘Unwilling or Unable’ Test*, *OPINIO JURIS* (Dec. 15, 2011, 8:11 PM), <http://opiniojuris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/> [<https://perma.cc/B7RU-AHTM>]; Dawood I. Ahmed, *Defending Weak States Against the ‘Unwilling or Unable’ Doctrine of Self-Defense*, 9 J. INT’L L. & INT’L REL. 1, 12–20 (2013).

be extended to every form of threat to the victim State, whether military or not, located inside the borders of the territorial State.

Second, there is no formal remedy in international law to address breaches of an obligation of neutrality. The idea that the victim State may respond, which underlies the “unwilling or unable” doctrine, arises simply from the moral notion that belligerents “should not be left without remedy if a neutral power did not fulfill its neutral duties effectively.”¹³⁹ In other words, the only reason why a victim State may *legitimately* use force within the territory of a State where enemy troops are located is because the territorial State has failed to fulfill an obligation under international neutrality law to repel those troops.

However, territorial States will rarely, if ever, have a specific duty to counter all forms of threats that could put another State in peril. The “unwilling or unable” doctrine is not rooted in the idea that a territorial State is simply unwilling or unable to eliminate a threat to another State; the nuance is that the territorial State is unwilling or unable to fulfill an obligation under international law vis-a-vis the victim State to eliminate the threat. This violation provides the justification for the victim State to disregard the sovereignty of the territorial State and use force within its borders and against its will.

However, the “unwilling or unable” doctrine could be transposed to the field of non-military threats where international law¹⁴⁰ imposes a specific duty on the territorial State to eliminate the particular danger that threatens the victim State. One need not look far beyond neutrality law to find obligations imposed on States to eliminate threats other than belligerent troops. For instance, Security Council Resolutions 1368 and 1373 impose an *erga omnes* prohibition against harboring terrorists.¹⁴¹ The 1948 Convention on the Prevention and Punishment of the Crime of Genocide also creates an *erga omnes* obligation for States to prevent and punish the crime of genocide.¹⁴²

139. Deeks, *supra* note 99, at 499.

140. Arguably, domestic law may also impose an analogous obligation on a territorial State to tackle certain non-military threats, e.g. an obligation to contain oil spills. However, any such obligation would only justify a military intervention into the territorial State if the domestic obligation somehow constituted a unilateral declaration under international law. The victim State may only demand that a State enforce an obligation to eliminate a non-military threat if that specific obligation is actually due toward the victim State.

141. See S.C. Res. 1368, ¶ 3 (Sept. 12, 2001); S.C. Res. 1373, ¶ 2 (Sept. 28, 2001); Kalliopi Chainoglou, *Reconceptualising the Law of Self-Defence* 115 (2007).

142. See *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 1996 I.C.J. 595, ¶¶ 425–50 (July 11).

Human rights treaties impose positive obligations on States to protect the rights of their own citizens.¹⁴³

International obligations to eliminate threats are particularly abundant in relation to environmental issues and could be drawn on by a victim State responding to an environmental catastrophe. The ICJ referred in its *Nuclear Weapons* Advisory Opinion to "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control," which was "now part of the corpus of international law relating to the environment."¹⁴⁴ The *Trail Smelter* case held that under international law "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another."¹⁴⁵ The case involved transboundary pollution between Canada and the United States. Moreover, the U.N. Convention on the Law of the Sea sets out a detailed regime requiring States to protect and preserve the marine environment, including obligations to stop any form of pollution from spreading.¹⁴⁶

The idea that States have some form of obligation not to cause environmental harm to other States is supported by the commitments made by States in "soft law" texts such as the 1972 Stockholm Declaration and the 1992 Rio Declaration.¹⁴⁷ These declarations qualify the right of States to exploit their own natural resources by noting the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."¹⁴⁸ The elaboration of

143. These rights are included in the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

144. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8).

145. *Trail Smelter* (U.S. v. Can.), 3 R.I.A.A 1938, 1965 (Arb. Trib. 1941).

146. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, arts. 192-94, 1833 U.N.T.S. 397, 477-79 (entered into force Nov. 16, 1994).

147. U.N. Conference on the Human Environment, *Stockholm Declaration*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (June 14, 1992).

148. U.N. Conference on the Human Environment, *Stockholm Declaration*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

this “no harm” principle represents customary international law and is the basis of modern international environmental law.¹⁴⁹

This does not mean that a failure by a territorial State to eliminate a threat covered by any of these specific obligations automatically enables a victim State to resort to force: the prohibition on the use of force in Article 2(4) is strong. Rather, if a territorial State fails to fulfill obligations of this kind and the victim State is put in jeopardy as a result, this should at least merit an “unwilling or unable” analysis. To justify any use of force, the remaining requirements for self-defense—an armed attack, immediacy, and proportionality—would also need to be fulfilled. The non-military threat would need to meet the very high threshold of gravity, as discussed above.¹⁵⁰ If these requirements are not met, the intervention would be an act of aggression or forcible reprisal, which are illegal under international law.¹⁵¹ The non-military threat would also need to meet the very high threshold of gravity, as discussed above.”

C. Real-life Uses of Force in Self-Defense Against Non-military Threats

No ICJ decisions have explored whether a non-military threat can be countered with force under Article 51 of the U.N. Charter. However, examples of State practice suggest that a broad definition of “armed attack” could be applied vis-à-vis two types of non-military threats: (1) environmental catastrophes and (2) humanitarian catastrophes.

1. Environmental Catastrophe

Could a massive environmental harm such as the burning of oil fields, the release of water from a dam onto a settlement below, the rapid spread of a mortal epidemic, fumes from chemical weapons attacks wafting across a border,¹⁵² or a nuclear reactor near a border

149. See Murphy, *supra* note 48, at 1187–88.

150. See *supra* Section II.A.3.

151. See DAMROSCH & MURPHY, *supra* note 13, at 1091–95 (containing and discussing the *Caroline* case and the *Covenant of the League of Nations* which offer early bases for how these interventions are viewed in international law).

152. See Ashley Deeks, *Syria, Chemical Weapons and Possible US Military Action*, LAWFARE (Dec. 10, 2012), <https://www.lawfareblog.com/syria-chemical-weapons-and-possible-us-military-action> [<https://perma.cc/8K4K-YLJN>] (stating that the U.S. government may believe that Syrian use of “chemical weapons could drift across national boundaries—and be deemed an armed attack on that neighboring state”).

lacking sufficient safeguards suffering a Chernobyl-like meltdown¹⁵³ constitute an “armed attack”? Such threats could be deliberately created by another State or a State may lack the capacity to address the threat and refuse international help. Although such environmental threats do not fit into the traditional conception of an “armed attack” involving military weapons, they could be seen as such if they have consequences equivalent to a traditional “armed attack” in terms of property damage or loss of life.¹⁵⁴ To generate any right of self-defense, the environmental threat would also need to be imminent, leaving no other response than to use force. Any non-imminent environmental threat could be addressed nonviolently through negotiation, mediation, or arbitration would not count.¹⁵⁵

Examples of such “attacks” include the British destroying two major dams in the Ruhr Valley during World War II, killing 1,300 people,¹⁵⁶ the Chinese dynamiting the Huayuankow dyke on the Yellow River during the Second Sino-Japanese War in 1938, killing several hundred thousand people,¹⁵⁷ and Iraqi forces setting fire to Kuwaiti oil wells during the 1991 Gulf War, which took 10,000 workers eight months to extinguish.¹⁵⁸ These attacks using the environment did not start a conflict, but rather occurred in the context of a conflict that was already underway. Had they occurred in isolation, the loss of life and property destruction caused would likely have reached the scale of an “armed attack” even though they did not use traditional military weapons.¹⁵⁹

153. Murphy, *supra* note 48, at 1182.

154. *Id.* at 1218–19.

155. *Id.* at 1218.

156. Margaret T. Okorodudu-Fubara, *Oil in the Persian Gulf War: Legal Appraisal of an Environmental Warfare*, 23 ST. MARY'S L.J. 123, 152 (1991).

157. Ryan J. Parsons, *The Right to Save the Planet: U.S. Armed Forces, “Greenkeeping” and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict*, 10 GEO. INT'L ENVTL. L. REV. 441, 441 (1998).

158. Martin Wolk, *Dousing the Flames of an Iraqi War*, OIL & ENERGY ON NBCNEWS.COM (Mar. 5, 2013) http://www.nbcnews.com/id/3073275/ns/business-oil_and_energy/t/dousing-flames-iraqi-war/#.WoOaAJM-eYU [<https://perma.cc/CSE6-H2QB>].

159. If the Iraqi burning of oil wells had begun the conflict with Kuwait, this action could have been characterized as a use of force or even an “armed attack.” See Murphy, *supra* note 48, at 1185 n.16 (citing Parsons, *supra* note 157, at 498). This use of force in real life was governed by the *jus in bello* rather than the *jus ad bellum*.

2. Humanitarian Catastrophe

Could the external consequences of a humanitarian catastrophe, such as refugee flows, be seen as having impacts on external States of a sufficient gravity to constitute an “armed attack?” India’s 1971 intervention into Pakistan, Tanzania’s 1979 intervention in Uganda and Vietnam’s 1978 intervention in Kampuchea/Cambodia involved responses to situations of humanitarian need. However, there were also military factors at play, with small-scale cross-border attacks. These interventions overthrew repressive regimes and went far beyond what was needed to address the border attacks. The external, non-military impacts of a humanitarian crisis, such as refugee flows, are relevant in assessing whether the overall scale and effects of a threat posed to a victim State are of the gravity of an “armed attack.”

i. India/Pakistan 1971

After the British withdrew, the West Pakistan army attacked East Pakistan, with the objective of exterminating or driving out of the country a large part of the Hindu East Pakistani population.¹⁶⁰ At least one million people were killed.¹⁶¹ This conflict within Pakistan had impacts on India, with ten million refugees flowing into India over nine months in 1971.¹⁶² The economic cost of the refugees was enormous, with the World Bank estimating that their remaining in India for another three months would cost \$700 million.¹⁶³ India also claimed the refugees were exacerbating intercommunal tensions between Hindus and Muslims in India.¹⁶⁴

Pakistan had also conducted airstrikes on India’s border villages. India characterized the airstrikes as an “armed attack” and

160. ABIEW, *supra* note 1, at 113.

161. *Id.* at 113–14; Harhoff, *supra* note 1, at 85; see also Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT’L L. 275, 276–77 (1973) (discussing India’s assertion of new humanitarian principles during the Bangladesh crisis).

162. ABIEW, *supra* note 1, at 114.

163. Sydney H. Schanberg, *World Bank Says Refugee Cost May Stunt Indian Development*, N.Y. TIMES (Sept. 16, 1971), <https://www.nytimes.com/1971/09/16/archives/world-bank-says-refugee-cost-may-stunt-indian-development.html> (on file with the *Columbia Human Rights Law Review*).

164. ABIEW, *supra* note 1, at 113–14; Harhoff, *supra* note 1, at 85; see also Franck & Rodley, *supra* note 161 (discussing India’s assertion of new humanitarian principles during the Bangladesh crisis).

self-defense was its primary rationale for intervening in Pakistan.¹⁶⁵ India intervened in support of East Pakistani guerilla forces seeking autonomy, resulting in "open war" over a twelve-day period and the creation of the new State of Bangladesh.¹⁶⁶ In justifying its intervention to the General Assembly and Security Council, India also emphasized its humanitarian motivations, noting the risk of "genocide" and "massive killing of unarmed people by military force," which was a "shock to the conscience."¹⁶⁷ India also referred to indiscriminate killing of civilians, an attempt to exterminate a large part of the Hindu population, and the torture and killing of opposition leaders, as documented in a report by the International Commission of Jurists.¹⁶⁸

India characterized the massive refugee flows it was experiencing as an act of "aggression" by Pakistan.¹⁶⁹ India also advanced a self-determination-like argument, arguing that international law recognized that "where a mother State has irrevocably lost the allegiance of such a large section of its people, conditions for the separate existence of . . . a State come into being."¹⁷⁰ India had repeatedly requested U.N. assistance, which was not forthcoming.¹⁷¹ The creation of a new State of Bangladesh was in line with India's self-interest. But the intervention was brief and India did not take any territory.

Few condemned India's actions. A U.N. General Assembly resolution called for an end to the violence and most countries simply called for respect for East Pakistan's sovereignty.¹⁷² Cold War politics influenced reactions, with the Soviet Union and Eastern bloc countries¹⁷³ supporting India and highlighting the security risk posed to India by the refugees.¹⁷⁴ The United States, in contrast, called for a

165. ABIEW, *supra* note 1, at 116.

166. *Id.* at 114; Harhoff, *supra* note 1, at 85; *The South Asia Crisis and the Founding of Bangladesh, 1971*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1969-1976/south-asia> [<https://perma.cc/S3YF-947L>].

167. ABIEW, *supra* note 1, at 115; Harhoff, *supra* note 1, at 85.

168. See ABIEW, *supra* note 1, at 114.

169. Aggression normally refers to the use of armed force contrary to Art 2(4). See G.A. Res. 3314 (XXIX), *supra* note 36, art. 1; McCalmon, *supra* note 2, at 18; NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY 96 (1985).

170. Franck & Rodley, *supra* note 161, at 276.

171. See McCalmon, *supra* note 2, at 219; Harhoff, *supra* note 1, at 85.

172. See G.A. Res. 2790 (XXVI) (Dec. 6, 1971), U.N. GAOR, 26th Sess. (Dec. 6, 1971). The Security Council did not pass a resolution.

173. RONZITTI, *supra* note 169, at 96-97

174. *Id.* at 96.

political solution and warned that intervening in the affairs of another State created a dangerous precedent.¹⁷⁵ China and Albania were the only States that condemned the intervention.¹⁷⁶

ii. Tanzania/Uganda 1979

Tanzania's 1979 intervention in Uganda was similar to the intervention in India in its method, outcome, and justifications. Uganda occupied the Kagera salient, a small part of Tanzania's border territory, for fifteen days in October 1978, carrying out the "15 days of plunder."¹⁷⁷ Ugandan dictator Idi Amin claimed that the purpose of the occupation was to stop Tanzanian rebels from launching attacks into Uganda.¹⁷⁸ The Ugandan troops withdrew, but small-scale border clashes and "harassment of the Tanzanians along the border" continued.¹⁷⁹ In Uganda, Amin's regime had killed around 300,000 people and engaged in torture.¹⁸⁰

In response, the Tanzanian army, together with Ugandan rebels, launched a "full-scale invasion," proceeding all the way to the capital to overthrow Amin's regime.¹⁸¹ Tanzania fought together with Ugandan rebels and did not install a puppet government or take any territory.¹⁸² Tanzania's primary justification for its use of force was self-defense in response to Uganda's "aggression" in the Kagera salient.¹⁸³ After overthrowing Amin, the Tanzanian government also justified its action by citing humanitarian reasons, referring to the many atrocities committed by Amin's regime.¹⁸⁴ Tanzania described the fall of Amin's regime as a "victory for the people of Uganda" and a "triumph for freedom, justice and human dignity."¹⁸⁵ Although not

175. *Id.* at 97.

176. *Id.*

177. ABIEW, *supra* note 1, at 121.

178. Harhoff, *supra* note 1, at 87; ABIEW, *supra* note 1, at 121.

179. ABIEW, *supra* note 1, at 121.

180. RONZITTI, *supra* note 169, at 102.

181. ABIEW, *supra* note 1, at 121-22.

182. *Id.* at 122-23.

183. Uganda had actually withdrawn its troops by the time Tanzania responded, but Amin had threatened to invade the salient again. RONZITTI, *supra* note 169, at 97. Tanzania seemed to be advancing an anticipatory self-defense rationale, saying that it acted to deter further attacks. AREND & BECK, *supra* note 135, at 124.

184. In justifying its intervention to the African Union. AREND & BECK, *supra* note 135, at 123-24.

185. *Id.* at 124.

explicitly cited as a reason for acting, Tanzania had received 20,000 refugees from Uganda as a result of the repression occurring there.¹⁸⁶

The intervention garnered little international reaction, suggesting that other countries had acquiesced.¹⁸⁷ In fact, the international community largely expressed relief at Amin's removal and quickly recognized the new government.¹⁸⁸ Only Sudan and Nigeria condemned it.¹⁸⁹ The general acquiescence to these interventions by India and Tanzania suggests that severe humanitarian repression caused by a repressive dictator which impacts neighboring States by creating refugee flows could be viewed as one factor, in addition to traditional military attacks, in establishing a situation reaching the gravity and scale of an "armed attack."

iii. Vietnam/Cambodia

Vietnam's intervention in Cambodia was very similar to India and Tanzania's interventions, but met with a less favorable international reaction. The Pol Pot regime forcibly seized power in Kampuchea/Cambodia in 1975.¹⁹⁰ Its human rights violations were "of genocidal proportions," the "most serious since Nazism," according to the U.N. Human Rights subcommission.¹⁹¹ As many as one million people were killed,¹⁹² and the regime's forces had made several border incursions into Vietnam.¹⁹³

Vietnam responded with force, citing self-defense as its primary justification and characterizing Kampuchea's border incursions as "aggression."¹⁹⁴ However, Vietnamese forces fought their way to the capital with exiled Kampuchean forces and overthrew Pol

186. Henry Lubega, *The Untold Story of the Kagera War by TX, Uganda Top Soldiers*, CITIZEN (June 2, 2014), <http://www.thecitizen.co.tz/News/national/The-untold-story-of-Kagera-War-by-TZ--Uganda-top-soldiers/1840392-2334498-ef678t/index.html> [https://perma.cc/GU6Y-3W5T].

187. ABIEW, *supra* note 1, at 123.

188. *Id.* The intervention received strong support from the United Kingdom, Zambia, Ethiopia, Angola, Botswana, Gambia, and Mozambique. The new regime was quickly recognized by Rwanda, Guinea, Malawi, Canada, and Australia.

189. Sudan and Nigeria condemned the action at a subsequent Organization of African Unity (OAU) meeting, at which the other African States remained silent. AREND & BECK, *supra* note 135, at 124.

190. ABIEW, *supra* note 1, at 127.

191. *Id.*

192. Harhoff, *supra* note 1, at 86; AREND & BECK, *supra* note 135, at 112.

193. Harhoff, *supra* note 1, at 86.

194. *Id.*

Pot—a use of force that was disproportionate to border incursions.¹⁹⁵ Vietnam also cited other reasons for acting, including supporting self-determination, the “moral and humanitarian duty” to end the “brutal conditions which Pol Pot’s government imposed on its people.”¹⁹⁶ Vietnam also emphasized that it was supporting, not leading, the Kampuchean people in their own fight against the government.¹⁹⁷ However, the result of the intervention was a new government loyal to Vietnam and Vietnam’s troops remained in Kampuchea for ten years.¹⁹⁸

International reaction was mixed and generally unfavorable, viewing Vietnam’s intervention as motivated by self-interest. The General Assembly passed resolutions that censured the intervention and called for the withdrawal of foreign troops.¹⁹⁹ The Soviet Union and Eastern bloc supported the intervention’s humanitarian objectives,²⁰⁰ but other communist governments sympathetic to the Khmer Rouge regime, such as China and Albania, described Vietnam’s intervention as “aggression.”²⁰¹ The United States, Kenya, Libya, and Sudan also criticized it.²⁰² However most States simply described the intervention as an interference with Kampuchea’s sovereignty.²⁰³ Western and some non-aligned States recognized the need to address the human rights violations, but said the intervention was not justified for this purpose and was disproportionate.²⁰⁴ This intervention demonstrates that State action, even in response to the most serious situations of human

195. *Id.* at 87.

196. *Id.* at 86.

197. ABIEW, *supra* note 1, at 128.

198. *Id.* at 127.

199. A Security Council resolution also calling for withdrawal of foreign troops received thirteen votes but was vetoed by the Soviet Union. *Id.* at 129.

200. Cuba, Czechoslovakia, East Germany, Hungary, Mongolia, Poland, and Bulgaria supported the intervention’s humanitarian objectives. *Id.* at 128.

201. Harhoff, *supra* note 1, at 86.

202. The United States criticized the intervention but did not pronounce itself directly against the use of force for humanitarian purposes. ABIEW, *supra* note 1, at 128; RONZITTI, *supra* note 169, at 99.

203. These included: ASEAN, Bangladesh, some Arab nations (e.g., Kuwait), some African nations (Gabon, Nigeria, and Zambia), some Latin American nations (Bolivia, Jamaica), some Western nations (Portugal, Australia, France, the United Kingdom, and the United States). The United States said the intervention violated Kampuchea’s territorial integrity, but again did not express opposition to the use of force when the government in power was responsible for grave human rights violations. RONZITTI, *supra* note 169, at 99–101.

204. ABIEW, *supra* note 1, at 128; RONZITTI, *supra* note 169, at 99.

suffering, may not be widely accepted if the intervening State's self-interest is seen as the driving factor.

D. Tailoring Self-Defense to Non-Military Threats

Overall, the term "armed attack" sets a threshold of gravity that an imminent threat²⁰⁵ must have to trigger a right to act in self-defense. Where a threat does not involve the use of weapons or other devices, i.e. when the "attack" is not "armed" or "military" in nature, the gravity of the threat, in terms of its scale and effects, must be particularly high.

This Article's analysis points to two basic principles. First, resorting to force to counter a non-military threat can only be allowed in circumstances of extreme gravity and must always be subject to considerations of necessity, proportionality, and immediacy. Second, if the non-military threat is located in a foreign State that has not intentionally created or does not control the threat, a victim State may only resort to force if the territorial State has a specific obligation under international law to eliminate the threat which it fails to meet.²⁰⁶ This achieves an appropriate balance between interpreting the right of self-defense restrictively in order to minimize the use of force in the international arena and preventing States from being powerless to respond to a particularly egregious threat. This conception of the use of force in response to a non-military threat can be summarized as follows:

1. Armed attack: The potential scale and effects of the non-military threat must be equivalent to those of an "armed attack" in the traditional sense. Whether the non-military threat involves the use of weaponry or any other destructive "device" is irrelevant. However, the non-military threat must be physical in nature, i.e. it must have the effect of producing a loss of lives and/or extensive destruction of property, and the threat must be imminent.

2. Necessity: To establish the necessity of a military intervention, the territorial State from which the threat comes must (a) be unwilling or unable to eliminate the threat and (b) have a specific obligation under international law vis-à-vis the victim State to eliminate that threat.

205. Or potential threat, if the doctrine of anticipatory self-defense is regarded as valid.

206. This conclusion is subject to the overall viability of the "unwilling or unable" doctrine, which we have presumed.

3. Proportionality: The use of force by the victim State must be limited to targeting only the non-military threat, not the government, property, or citizens of the territorial State.

III. HUMANITARIAN INTERVENTION

Humanitarian intervention involves a right to use force to address “extreme humanitarian distress on a large scale, requiring immediate and urgent relief;” where there is no practicable alternative to the use of force; and force is strictly limited to that necessary and proportionate to relieve humanitarian need, according to the United Kingdom.²⁰⁷ Humanitarian intervention is a better “fit” than self-defense in justifying the use of force to address a non-military humanitarian situation. A military intervention can be better explained as a State intervening to address humanitarian suffering than by attempting to characterize a non-military event, such as refugee flows or an environmental catastrophe, as an “armed attack” and justifying the use of force in self-defense. For example, while it could be argued that the exceptional refugee flows emanating from Pakistan in 1971²⁰⁸ could be characterized an “armed attack” on the basis of their scale and physical effects, it is more natural to argue that, following the killing of one million civilians, the use of force was a humanitarian intervention to address extreme humanitarian suffering.

However, humanitarian intervention is not set out as a basis for the use of force in the U.N. Charter. The U.N. Charter prohibits intervention into sovereign States and the use of force in Articles 2(7) and 2(4). The only three exceptions are the use of force in self-defense, with Security Council authorization, or with the consent of the territorial State.²⁰⁹ Thus, the use of force for humanitarian reasons is not generally accepted unless it is authorized by the Security Council.²¹⁰

The strongest argument against the legality of humanitarian intervention rests on the plain language of the U.N. Charter.²¹¹ As Michael Byers points out, “[t]he U.N. Charter provides a clear answer,” unless a State is responding in self-defense to an armed attack, only

207. Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41.3 SURVIVAL 102 (1999) (citing a U.K. Government note of October 1998).

208. See *supra* Section II.C.2.

209. U.N. Charter art. 51; MURPHY, *supra* note 30, at 492.

210. MURPHY, *supra* note 30, at 494.

211. U.N. Charter art. 39.

the Security Council can authorize the use of force.²¹² This means States are more likely to attempt to characterize a non-military threat as an “armed attack” and use a self-defense justification. Nevertheless, the doctrine of humanitarian intervention is not without support. A State that wishes to intervene to address humanitarian suffering that produces external impacts in terms of refugee flows—a non-military threat—can draw on compelling examples of State practice in support of its action.

A. State Practice in Support of Humanitarian Intervention

1. NATO’s 1999 Kosovo Intervention

The most notable example of a humanitarian intervention is NATO’s Kosovo intervention, conducted in response to “excessive and indiscriminate use of force” by security forces²¹³ against a separatist movement that posed the risk of ethnic cleansing of the Kosovar Albanian population.²¹⁴ NATO launched the intervention after several warnings of an armed operation, even without a formal Security Council authorization, if President Milosevic failed to comply with Security Council Resolutions calling for an immediate cessation of atrocities.²¹⁵

Several NATO States justified their participation as a humanitarian intervention.²¹⁶ The United Kingdom asserted a right of humanitarian intervention as outlined above, resting “upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe” and justified “on grounds of overwhelming humanitarian necessity” without a Security Council resolution.²¹⁷ Belgium pointed to the existence of a humanitarian

212. Michael Byers, *Jumping the Gun: Against Pre-Emption*, 24 LONDON REV. BOOKS 5 (2002).

213. See DAMROSCH & MURPHY, *supra* note 13, at 1154 (explaining the Security Council’s description of “excessive and indiscriminate use of force by Serbian security forces and the Yugoslav army”).

214. Roberts, *supra* note 207, at 104.

215. See DAMROSCH & MURPHY, *supra* note 13, at 1154.

216. Most NATO States provided little detail of their legal rationale, but justifications generally concentrated on the need to address humanitarian suffering and human rights violations. See Roberts, *supra* note 207, at 107; see also NATO, *The Kosovo Air Campaign (Archived)* (Apr. 7, 2016), https://www.nato.int/cps/en/natohq/topics_49602.htm [<https://perma.cc/4XY9-N362>] (describing NATO’s intervention as an effort to prevent a “humanitarian catastrophe” in Kosovo).

217. See DAMROSCH & MURPHY, *supra* note 13, at 1155 (citing a statement by U.K. Defense Secretary George Robertson).

catastrophe acknowledged in Security Council resolutions and the need to safeguard essential *jus cogens* rights such as the right to life, physical integrity, and the prohibition of torture.²¹⁸ It noted that international human rights instruments do not permit derogation from these fundamental rights, even in times of public emergency.²¹⁹ Belgium also made an argument based on “necessity,” which will be discussed below.²²⁰

In contrast, the United States did not assert any overarching legal rationale, but rather cited a list of factors justifying the intervention. These included humanitarian reasons such as widespread violations of international law, the use of excessive and indiscriminate force, and human rights violations by Yugoslav security forces, as well as the Federal Republic of Yugoslavia’s failure to comply with Security Council resolutions demanding that parties cease hostilities and that security forces cease all action affecting the civilian population.²²¹ The Security Council adopted these resolutions under Chapter VII, but did not provide a specific authorization to use force if they were not followed.²²² In referring to facts and resolutions specific to the facts of Kosovo, the United States may have been seeking to avoid creating a broader precedent for the use of force.

In justifying their intervention, NATO members did not focus only on the situation inside Kosovo but also cited the external impacts of the situation on surrounding States. Italy highlighted the potentially destabilizing impact on other States from human rights violations in Kosovo and subsequent flow of 230,000 Kosovar Albanian

218. Legality of Use of Force (Serb. & Montenegro v. Bel.), Verbatim Record, 99/15 (May 10, 1999, 3 p.m.), <http://www.icj-cij.org/files/case-related/105/105-19990510-ORA-02-01-BI.pdf> [<https://perma.cc/WD2T-EHLQ>].

219. *Id.* For example, the International Covenant on Civil and Political Rights does not permit derogation from rights to life and freedom even in times of public emergency. See ICCPR, *supra* note 143. The European Convention on Human Rights is similar. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, arts. 2, 3, 15, 213 U.N.T.S. 221, 224, 233 (entered into force Sept. 3, 1953).

220. See *infra* Section VI.

221. MURPHY, *supra* note 30, at 512.

222. In Security Council Resolution 1199, the Security Council, acting under Chapter VII, demanded that all parties cease hostilities and maintain a ceasefire and enter into dialogue. The Security Council also demanded that security forces cease all action affecting the civilian population. See S.C. Res. 1199, ¶¶ 1, 2, 4 (Sept. 23, 1998). In Resolution 1203, the Security Council, again acting under Chapter VII, demanded the full implementation of agreements into which the Federal Republic of Yugoslavia had entered with the OSCE and NATO and compliance with Resolution 1199. S.C. Res. 1203, ¶¶ 3, 4 (Oct. 24, 1998).

refugees.²²³ It said the flows were a "direct threat," suggesting refugee flows can have security impacts on neighboring States.²²⁴

The United States and United Kingdom noted the risk of the conflict spilling over and destabilizing Europe, as had already been seen in previous World Wars.²²⁵ The United States stated,

We act to prevent a wider war, to defuse a powder keg at the heart of Europe, that has exploded twice before in this century with catastrophic results...let a fire burn here in this area and the flames will spread. Eventually key U.S. allies could be drawn into a wider conflict, or we would be forced to confront it later only at far greater risk and greater cost.²²⁶

The United States also stated:

[...] with Belgrade giving every indication that it will prepare a new offensive against Kosovar Albanians, we face the prospect of a new explosion of violence if the international community does not take preventative action. Serb actions also constitute a threat to the region, particularly Albania and Macedonia and potentially NATO allies. On the basis of such considerations, we and our NATO allies believe there are legitimate grounds to threaten and, if necessary, use military force.²²⁷

The intervention was not widely condemned. Russia introduced a Security Council resolution to condemn NATO's action as

223. Clinton W. Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403, 446 (2000).

224. *Id.*

225. Roberts, *supra* note 207, at 107.

226. *Conflict in the Balkans; In the President's Words: 'We Act to Prevent a Wider War'*, N.Y. TIMES (Mar. 25, 1999) <http://www.nytimes.com/1999/03/25/world/conflict-in-the-balkans-in-the-president-s-words-we-act-to-prevent-a-wider-war.html> (on file with the *Columbia Human Rights Law Review*); see Roberts, *supra* note 207, at 107. U.K. Prime Minister Blair stated in a speech on April 22, 1999, at the Chicago Economic Club that "[a]cts of genocide can never be a purely internal matter. When oppression produces massive flows of refugees which unsettle neighbouring countries they can properly be described as 'threats to international peace and security'. . . [I]t does make a difference that this is taking place in such a combustible part of Europe." *Id.* at 119.

227. President Clinton was referring to the 1990s, when what began as an internal squabble between Bosnian factions in Sarajevo eventually spread throughout the Balkans, with Kosovo at the heart of this conflict. U.S. Dep't of State, Daily Press Briefing (Mar. 6, 1999), <https://1997-2001.state.gov/briefings/9903/990316db.html> [<https://perma.cc/4RXD-HVBS>].

an unlawful use of force violating the U.N. Charter.²²⁸ However, it failed, with only Russia, India, and Belarus voting in favor.²²⁹ The subsequent establishment of a U.N. interim administration for Kosovo suggested implicit acceptance of NATO's actions.²³⁰ Members of the Non-Aligned Movement did not condemn the intervention, but did state shortly afterwards their opposition to any general principle of "humanitarian intervention."²³¹

This intervention provides some State support for the principle that international law permits humanitarian intervention. An Independent International Commission concluded that NATO's campaign was "illegal" and that "the right of humanitarian intervention is not consistent with the U.N. Charter as conceived as a legal text."²³² However, the commission also considered the intervention "legitimate" and noted that it may "nevertheless reflect the spirit of the Charter as it relates to the overall protection of people against gross abuses."²³³

2. France's 1979 Central African Republic Intervention

Another example of State practice, not justified as a "humanitarian intervention" but in which humanitarian rationales were prominent, is France's 1979 intervention in the Central African Republic (C.A.R.). 1,800 French forces flew directly into the C.A.R. to overthrow the brutal regime of Jean-Bédél Bokassa in a quick and bloodless intervention.²³⁴

France initially denied involvement, then later emphasized its humanitarian motives, citing human rights violations including Bokassa's ordering of the torture and killing of 200 school children.²³⁵ Some, such as Professors Anthony C. Arend and Robert J. Beck, have queried whether the human rights violations were egregious enough to justify the use of force.²³⁶ Arend and Beck also noted France's economic and mineral interests and the possibility that France was trying to

228. Roberts, *supra* note 207, at 105.

229. *Id.*

230. G.A. Res. 1244, ¶ 9 (June 10, 1999); Harhoff, *supra* note 1, at 93.

231. Nicholas Wheeler, *Legitimizing Humanitarian Intervention: Principles and Procedures*, 2 MELB. J. INT'L L. 550, 550–51 (2001).

232. INDEP. INT'L COMM'N ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 186 (2000).

233. *Id.*

234. AREND & BECK, *supra* note 135, at 125.

235. *Id.* at 125–26.

236. *Id.*

preempt rival coups planned by the Soviet Union.²³⁷ Other scholars have praised the intervention or given the event little to no analysis, perhaps signaling broader acceptance of this intervention.²³⁸

Kosovo and the C.A.R. are examples of State practice in support of the idea that a highly-targeted and limited intervention to address significant humanitarian suffering—a non-military situation—may be met with acquiescence. There are some similarities with the use of force in response to repressive regimes in Pakistan and Uganda outlined above in Section II.C.2. The difference is that India and Tanzania primarily justified their interventions as self-defense, although they also cited humanitarian reasons for acting. In contrast, interventions in Kosovo and the C.A.R. were based primarily on humanitarian grounds. France's reluctance to admit involvement in the C.A.R. may have indicated recognition that intervention for humanitarian reasons is not a recognized or established basis for the use of force.

The United Kingdom has also asserted a narrow right of humanitarian intervention in response to the humanitarian suffering caused by chemical weapons attacks. This will be discussed in Part V below.

B. Arguments in Favor of Humanitarian Intervention

States can advance several different arguments when seeking to use force for humanitarian reasons without Security Council authorization. First, it could be argued that Article 2(4) of the U.N. Charter only prohibits uses of force which alter or affect the territorial integrity or political independence of a State. A use of force that is strictly limited to humanitarian goals under conditions of necessity and proportionality does not seek to change territorial boundaries by annexing territory or to change political regimes.²³⁹

This argument was made by the United Kingdom in the *Corfu Channel* case.²⁴⁰ The United Kingdom argued that its limited action in

237. Arend & Beck argued the scope of human rights violations may not have been sufficiently widespread to justify intervention on humanitarian grounds. They state "the torture and murder of two hundred people, however appalling, should by itself probably not be considered 'a widespread loss of life' justifying intervention." *Id.* at 126.

238. *Id.* at 125.

239. MURPHY, *supra* note 30, at 493; Jordan Paust, *R2P and Protective Intervention*, 31 TEMP. INT'L & COMP. L.J. 109, 115 (2017); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 118 (1991).

240. *Corfu Channel (U.K. v. Alb.)*, Judgement, 1949 I.C.J. 4, 35 (Apr. 9).

clearing mines endangering shipping did not rise to the level of violating the territorial integrity of another State.²⁴¹ However, the ICJ strictly interpreted U.N. Charter provisions prohibiting intervention.²⁴² It did not find the United Kingdom's argument to have a basis in the text or *travaux préparatoires* of the Charter and cautioned that, were intervention permitted, it would risk setting a precedent that powerful States would abuse.²⁴³

Second, while the U.N. Charter prohibits the use of force, Professor Marc Weller argues that those drafting the Charter in the aftermath of the Holocaust could not have intended that the United Nations not respond to the most extreme human rights violations.²⁴⁴ Rather, the drafters envisaged a collective security architecture where "armed force shall not be used, save in the common interest."²⁴⁵ The drafters created a Security Council and envisaged States entering into agreements so armed forces could be quickly called upon by that Security Council.²⁴⁶ However, in some circumstances, such as the Rwandan genocide, the Security Council has failed to act in the face of the most shocking human suffering and loss of life. The Council has not acted quickly enough, effectively, or at all.²⁴⁷

In line with this view, many States have endorsed the view that the Security Council must perform its role in the collective security architecture and respond to the most shocking mass atrocity crimes. One hundred States pledged in the Accountability, Coherence and Transparency ("ACT") Group's Security Council Code of Conduct to support timely and decisive Security Council action aimed at ending

241. Hurd, *supra* note 7, at 299

242. Corfu Channel (U.K. v. Alb.), Judgement, 1949 I.C.J. 4, 35 (Apr. 9).

243. Hurd, *supra* note 7, at 299; DAMROSCH & MURPHY, *supra* note 13, at 1165; MURPHY, *supra* note 30, at 494. In *Corfu Channel*, the Court stated, "[t]he Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law." Corfu Channel (U.K. v. Alb.), Judgement, 1949 I.C.J. 4, 35 (Apr. 9).

244. Marc Weller, *Forcible Humanitarian Action in International Law Part II*, EJIL TALK! (May 18, 2017), <https://www.ejiltalk.org/forcible-humanitarian-action-in-international-law-part-ii/> [<https://perma.cc/8CT6-7K89>].

245. U.N. Charter pmbl.

246. *Id.* arts. 43–47.

247. MURPHY, *supra* note 30, at 509 (noting the views of critics of the Security Council); see also U.N. GAOR, 50th Sess., 4th plen. mtg. at 2–4, U.N. Doc. A/54/PV.4 (Sept. 20, 1999) (emphasizing the tragic consequences of inaction after the Rwandan genocide).

the commission of mass atrocity crimes.²⁴⁸ They also pledged not to vote against credible draft resolutions before the Security Council that propose timely and decisive action to end such crimes.²⁴⁹ Of the Security Council's five permanent members, the United Kingdom and France have signed this pledge.²⁵⁰

Similarly, in 2015, France and Mexico issued a "Political Statement on the Suspension of the Veto in Case of Mass Atrocities."²⁵¹ It states that "[w]e consider that situations of mass atrocities, when crimes of genocide, crimes against humanity and war crimes on a large scale are committed, may constitute a threat to international peace and security and require action by the international community."²⁵² The statement proposes a "collective and voluntary agreement" among the permanent members of the Security Council to refrain from using the veto in cases of mass atrocities.²⁵³ With support from ninety-six States,

248. *Explanatory Note on a Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes*, CTR. FOR U.N. REFORM (Sept. 1, 2015), <http://www.centerforunreform.org/sites/default/files/Final%202015-09-01%20SC%20Code%20of%20Conduct%20Atrocity.pdf> [<https://perma.cc/7TWN-EUJV>]; Jessica Kroenert, *ACT Group Formally Launches Security Council Code of Conduct*, CTR. FOR U.N. REFORM (Oct. 26, 2015), <http://centerforunreform.org/?q=node/679> [<https://perma.cc/A898-WX3F>]; Christian Wenaweser, H.E. Ambassador, Principality of Liech. to the U.N., Intergovernmental Negotiations on Security Council Reform: Question of the Veto (Mar. 9, 2016), http://www.regierung.li/files/medienarchiv/unoallgemein/2016-03-09_LIE-IR_IGN_Question_of_the_veto_final.pdf?t=635994712896242238 [<https://perma.cc/VB3C-UNVK>] [hereinafter Liechtenstein Statement] ("The Code of Conduct and its application in practice are among the measures required to bring about the change of political culture in the Security Council which can bring the membership closer together on the question of the veto.").

249. Liechtenstein Statement, *supra* note 248, at 2.

250. *List of Supporters of the Code of Conduct regarding Security Council action against genocide, crimes against humanity or war crimes, as elaborated by ACT*, PERMANENT MISSION OF THE PRINCIPALITY OF LIECH. (Feb. 9, 2018), <http://www.globalr2p.org/media/files/2018-02-09-coc-list-of-supporters.pdf> [<https://perma.cc/Z4YZ-4N3Z>].

251. 70th Gen. Assembly of the U.N., *Political statement on the suspension of the veto in case of mass atrocities presented by France and Mexico*, https://onu.delegfrance.org/IMG/pdf/2015_08_07_veto_political_declaration_en.pdf [<https://perma.cc/AJ5B-8JNL>] (last visited Feb. 17, 2018).

252. *Id.*

253. *Id.* (recalling the international commitment "to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter when national authorities fail to protect their population from genocide, crimes against humanity, or war crimes," known as R2P) (internal quotation marks omitted); *UN Security Council Code of Conduct*, GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, http://www.globalr2p.org/our_work/

the Declaration indicates acceptance by many States that situations of humanitarian suffering should not be left unaddressed by the Security Council.²⁵⁴

There has been recognition at the highest levels of the United Nations that situations of mass atrocities must be addressed by the Security Council. A U.N. “Group of Elders” stated in February 2015 that the Security Council’s five permanent members should pledge not to use or threaten to use their vetoes in cases of mass atrocity crimes without explaining publicly what alternative course of action they propose to effectively protect threatened populations.²⁵⁵ The U.N. Secretary-General, in his 2009 report on the Responsibility to Protect, discussed below, urged the five permanent members not to employ or threaten to employ the veto in situations of manifest failure to meet obligations relating to Responsibility to Protect.²⁵⁶

Similarly, at a regional level, in the African Union’s 2002 Constitutive Act, fifty-four States agreed that the African Union may intervene forcefully within a member State’s territory to prevent genocide, crimes against humanity, or war crimes.²⁵⁷ However, this is caveated by potentially inconsistent commitments regarding non-intervention and respect for sovereignty²⁵⁸ and the Security Council

un_security_council_code_of_conduct [https://perma.cc/B2A3-J44V] (last visited Feb. 10, 2018).

254. *UN Security Council Code of Conduct*, *supra* note 253.

255. *Strengthening the United Nations*, ELDERS (Feb. 7, 2015), <http://theelders.org/un-fit-purpose> [https://perma.cc/4X6E-Q8XA]. The Group of Elders is comprised of Nelson Mandela, Martti Ahtisaari, Kofi Annan, Lakhdar Brahimi, Gro Harlem Brundtland, and Desmond Tutu—voices with significant moral authority. See *About*, ELDERS, <https://theelders.org/about> [https://perma.cc/8VG8-29PZ] (last visited Feb. 10, 2018).

256. Monique Law, *R2P: Activating the International Community’s Responsibility to Protect by Shifting Focus Away from Collective Action by the Security Council Towards Early Warning and Prevention*, 8 KINGS STUDENT L. REV. 88, 101 (2017).

257. Org. of African Unity (OAU), *Constitutive Act of the African Union*, art. 4 (July 11, 2000), <http://www.refworld.org/docid/4937e0142.html> (on file with the *Columbia Human Rights Law Review*).

258. The Constitutive Act of the African Union states the following principles:

(f) *Prohibition of the use of force or threat to use force among Member States of the Union*; (g) *Non-interference by any Member State in the internal affairs of another*; (h) *The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity*; (i) *Peaceful co-existence of Member States and their right to live in peace and security*;

would still need to authorize any regional interventions according to Article 53 of the U.N. Charter.²⁵⁹

These examples indicate a belief by many States that the Security Council must respond to situations of mass atrocities and that these crimes offend the most basic considerations of humanity. They do not address the question of what action is permitted if the Security Council fails to act or authorize force in response to mass atrocity crimes, yet they strongly imply the international community believes it cannot stand by and do nothing in the face of the most egregious humanitarian catastrophes.

Humanitarian intervention can be seen as an expression of general international law principles, such as elementary considerations of humanity.²⁶⁰ Such values are expressed in the U.N. Charter's objective to "reaffirm faith in fundamental human rights" and "in the dignity and worth of the human person."²⁶¹ Prohibitions on the use of force and intervention into sovereignty must be balanced against the need to address the most extreme violations of human rights.

The wisdom of "sovereignty" as a barrier to humanitarian intervention has been questioned in recent times. For example, after NATO's Kosovo intervention, Kofi Annan argued that sovereignty was redefined and States are now understood to be "instruments at the service of their peoples."²⁶² Similarly, Gareth Evans and Mohamed Sahnoun have argued that

even the strongest supporters of state sovereignty will admit today that no state holds unlimited power to do what it wants to its own people. It is now commonly acknowledged that sovereignty implies a dual responsibility In international human rights covenants, in UN practice, and in state practice itself,

(j) The right of Member States to request intervention from the Union in order to restore peace and security.

Id. (emphasis added).

259. U.N. Charter art. 53 (requiring the Security Council to authorize enforcement action undertaken by regional organizations).

260. SCHACHTER, *supra* note 239, at 123–26; DAMROSCH & MURPHY, *supra* note 13, at 1152.

261. U.N. Charter pmb1.

262. See Marc Weller, *Forcible Humanitarian Action in International Law Part I*, EJIL TALK! (May 17, 2017), <https://www.ejiltalk.org/forcible-humanitarian-action-in-international-law-part-i/> [<https://perma.cc/BEB8-9AA7>].

sovereignty is now understood as embracing this dual responsibility.²⁶³

Similarly, Weller argues that sovereignty should be seen as protecting people, not repressive governments.²⁶⁴

After the Kosovo intervention, States were searching for a legal framework that could justify the use of force to avert humanitarian suffering. An Independent International Commission argued that with State sovereignty comes responsibility to protect populations from the most serious international crimes.²⁶⁵ Where a population is suffering serious harm as a result of internal war, insurgency, or State failure, and the State in question is unwilling or unable to halt or avert it, the principle of non-intervention must yield to the international "responsibility to protect."²⁶⁶ States provided some endorsement for this proposition at the U.N. General Assembly's 2005 World Summit of Leaders by passing a resolution recognizing that each State has the Responsibility to Protect ("R2P") its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity (Resolution 60/1).²⁶⁷ A year later, the Security Council reaffirmed R2P, as set out in Resolution 60/1.²⁶⁸

However, R2P as accepted by States in Resolution 60/1 only endorses collective action authorized by the Security Council.²⁶⁹ R2P

263. Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 102 (2002).

264. See Weller, *supra* note 262.

265. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT XI (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [https://perma.cc/9KJH-LA7F] [hereinafter ICISS Report].

266. *Id.*

267. G.A. Res. 60/1, ¶¶ 138–39 (Sept. 16, 2005).

268. S.C. Res. 1674, ¶ 4 (Apr. 28, 2006).

269. G.A. Res. 60/1, *supra* note 267, ¶¶ 138–39.

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity 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 to 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

has been cited in more than fifty Security Council resolutions since 2006,²⁷⁰ but has not been drawn on as the basis for a use of force without Security Council authorization.

As accepted by States, R2P again does not address the situation in which the Security Council fails to act.²⁷¹ It indicates a recognition by States that action should be taken in the face of mass atrocity crimes, but only in accordance with the existing international legal framework. This framework prohibits the use of force unless authorized by the Security Council, in self-defense, or with the consent of the territorial State. The Independent International Commission recognized that the Security Council is the most appropriate body to authorize intervention to protect a population.²⁷² If the Council failed to act in the most “conscience-shocking” situations such as genocide, ethnic cleansing, or other large-scale killing, it noted “concerned states may not rule out other means to meet the gravity and urgency of that situation.”²⁷³ One option may be for a regional organization to act and seek authorization from the Security Council after-the-fact. The Commission said that use of force in response to such “conscience-shocking” situations must be a last resort—where all non-military options have been explored and found unavailing, and the use is proportional, has reasonable prospects of success, and is genuinely motivated to address a humanitarian threat.²⁷⁴

Can these ideas be drawn on in justifying the use of force for humanitarian reasons without Security Council authorization? Related to the idea of R2P that sovereignty entails a responsibility to ensure at least minimum standards of human rights, Professor Marc Weller argues that the population of a country is the “true sovereign”—before a nation exists, it is first a people with a right to self-determination.²⁷⁵ The opening of the U.N. Charter states “we the

are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

Id.

270. *About R2P*, GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, http://www.globalr2p.org/about_r2p [https://perma.cc/LA8A-JN4N].

271. U.K. PARLIAMENT COMMONS SELECT COMM. ON DEF., AFGHANISTAN INQUIRY (Jan. 14, 2014), <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmdfence/582/58205.htm> [https://perma.cc/X97W-XZNK]; Milena Sterio, *Humanitarian Intervention Post-Syria: Legitimate and Legal?*, 40 BROOK. J. INT’L L. 109, 134 (2014).

272. ICISS Report, *supra* note 265, at XII, Principle 3A.

273. *Id.* at XIII, Principle 3F.

274. *Id.* at XII, Principles 3E and 3F.

275. Weller, *supra* note 262.

peoples of the U.N.” and sets out the principle of self-determination.²⁷⁶ Self-determination—the right of peoples to freely pursue their economic, social, and cultural development—is a general principle of international law, also recognized in the U.N. General Assembly’s *Friendly Relations Declaration*,²⁷⁷ the *International Covenant on Civil and Political Rights*,²⁷⁸ and the *International Covenant on Economic, Social and Cultural Rights*.²⁷⁹

In support of the idea that sovereignty requires a government to provide to its population at least a minimum standard of human rights, the international community has not recognized new States whose establishment has been considered a means to violate basic human rights. When Southern Rhodesia unilaterally declared itself independent in 1965 under a white-dominated government, the Security Council condemned the “usurpation of power by a racist settler minority,” regarded its declaration of independence as having no legal validity, and called upon States not to recognize it.²⁸⁰ When South Africa sought to establish a new country, Transkei, as a homeland for part of the South African black population, the General Assembly condemned it as a “sham,” designed to “perpetuate white minority domination and dispossess the African people of South Africa

276. U.N. Charter pmbl.

277. G.A. Res 2625 (XXV), at 124 (Oct. 24, 1970). The declaration notes that self-determination must be balanced against sovereignty. It states:

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. . . .

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Id.

278. ICCPR, *supra* note 143, art. 1(1).

279. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16 1966, art. 1(1), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. Self-determination is a right *erga omnes*, according to Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 88 (July 9).

280. DAMROSCH & MURPHY, *supra* note 13, at 303–04.

of their inalienable rights.” It declared Transkei invalid and called on governments to deny it recognition.²⁸¹

The Canadian Supreme Court has noted academic commentary to the effect that if a people were blocked from exercising its right to self-determination internally, it might be entitled to exercise it by secession.²⁸² This case could be viewed as further recognition that statehood entails a requirement that the rights of people be recognized in order to claim the privileges of sovereignty, such as non-intervention.²⁸³

Professor Fernando Tesón argues that, if the concept of sovereignty is viewed as emanating from the people, the failure of a government to meet a minimum standard of human rights to its people would nullify its claim to non-interference—the protection of a State’s sovereignty would vanish with the infringement of its people’s human rights.²⁸⁴ Hugo Grotius noted as early as the 1600s that “rulers who have abandoned all the laws of nature through the inhumane treatment of their own people lose the rights of independent sovereigns and can no longer claim the privilege [of freedom from foreign intervention] under the law of nations.”²⁸⁵ Weller argues it is “manifestly reasonable” to imply that a population would wish for action to preserve it from destruction in the face of human atrocities. Therefore, Weller states, forcible humanitarian action should be seen as having the actual or implied consent of the population—the true sovereign—rather than as an unlawful use of force.²⁸⁶

281. G.A. Res. 31/6 (Oct. 26, 1976).

282. See DAMROSCH & MURPHY, *supra* note 13, at 317 (mentioning Reference re Secession of Quebec [1998] 2 S.C.R. 217 (Can.), 37 I.L.M. 1340).

283. *Id.* The Court held that in the case of Quebec, Canada’s internal arrangements respected the principles of self determination.

284. See generally Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS (J.L. Holzgref & Roberts O. Keohane eds., 2003) (arguing that humanitarian intervention is morally justified in cases where a State violates its citizens’ human rights because they then lose the only justification for a State’s political power—the protection of its people’s human rights).

285. Evan J. Criddle, *Three Grotian Theories of Humanitarian Intervention*, 16 THEORETICAL INQUIRIES L. 473, 482–83 (2015) (internal quotation marks omitted).

286. Weller, *supra* note 244.

C. Interventions in Support of Democracy and Humanitarian Objectives

Have these ideas been used by States to justify the use of force? When intervening in Pakistan, India argued that international law recognized that “where a mother State has irrevocably lost the allegiance of such a large section of its people, conditions for the separate existence of . . . a State come into being.”²⁸⁷ Tanzania emphasized that it conducted its intervention for the Ugandan people, describing the fall of Amin’s regime as a “victory for the people of Uganda” and a “triumph for freedom, justice and human dignity.”²⁸⁸ As discussed above, the primary rationale for both interventions was self-defense.²⁸⁹

The Economic Community of West African States (ECOWAS)²⁹⁰ has conducted three interventions to overthrow military governments and install or re-install democratically-elected heads of State. Each met general acquiescence. These three interventions, discussed below, support the idea that sovereignty may be intervened upon in order to uphold the will of the people, as expressed in democratic elections, and that sovereignty is not absolute. ECOWAS States have agreed under the Lomé Protocol to intervene if a democratically-elected government is overthrown.²⁹¹

1. Liberia 1989

ECOWAS intervened in response to an internal conflict involving Liberian rebels attempting to overthrow the military government of Samuel Doe, which had disbanded Liberia’s constitution and perpetrated significant human rights violations.²⁹² ECOWAS said the intervention was to “stop the senseless killing of innocent

287. Franck & Rodley, *supra* note 161, at 276.

288. AREND & BECK, *supra* note 135, at 124.

289. See Section II.C.2 *supra*.

290. A sub-regional grouping comprising fifteen West African countries.

291. ECOWAS, *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security*, A/P.1/12, art. 25(e) (Dec. 10, 1999), http://documentation.ecowas.int/download/en/legal_documents/protocols/Protocol%20Relating%20to%20the%20Mechanism%20for%20Conflict%20Prevention,%20Management,%20Resolution,%20Peacekeeping%20and%20Security.pdf [<https://perma.cc/3V5K-EQQ8>]; Antenor Hallo de Wolf, *Rattling Sabers to Save Democracy in the Gambia*, EJIL TALK! (Feb. 1, 2017), <http://www.ejiltalk.org/rattling-sabers-to-save-democracy-in-the-gambia/> [<https://perma.cc/NNN5-JL7U>].

292. Comfort Ero, *ECOWAS and the Subregional Peacekeeping in Liberia*, J. HUMANITARIAN ASSISTANCE (Sept. 25, 1995), <https://sites.tufts.edu/jha/archives/66> [<https://perma.cc/X6PK-GQ5E>]; Harhoff, *supra* note 1, at 90.

civilians . . . and to help the Liberian people to restore their democratic institutions.”²⁹³ The intervention was to ensure a ceasefire was upheld in order to allow free and fair elections to take place.²⁹⁴ However, the conflict had created 700,000 refugees and elements of the Liberian rebel group were also said to be creating instability in Sierra Leone, which also influenced the decision to intervene. ECOWAS’ General Erskine stated that “with the crisis in Liberia creating unbearable refugee problems for Sierra Leone, Ghana, the Gambia, Guinea, Nigeria and Ivory Coast, it is obvious that the situation in Liberia has gone beyond the boundaries of the country and ceases to be an exclusive[ly] Liberian question.”²⁹⁵

After the intervention, the Security Council commended ECOWAS’ efforts and imposed an arms embargo to assist.²⁹⁶ This was an ex-post facto expression of approval rather than a prior authorization to use force, however the U.N. Secretary General even said ECOWAS had not needed the Security Council’s authorization to intervene.²⁹⁷

2. Sierra Leone 1998

ECOWAS forces also intervened to reinstate democratically-elected President Ahmad Tejan Kabbah, who had been overthrown in a military coup.²⁹⁸ The military regime was accused, including by the Security Council, of humanitarian repression.²⁹⁹ Before intervening, ECOWAS issued a statement saying it was prepared to reinstate the legitimate government by a use of force if dialogue and sanctions failed.³⁰⁰

293. Ero, *supra* note 292.

294. *Id.*

295. *Id.*

296. S.C. Res. 788, ¶¶ 1, 8–9 (Nov. 19, 1992). Additionally, the Security Council cited Chapter 8 of the U.N. Charter in its preamble. Article 53 in Chapter 8 permits the Security Council to authorize regional organizations to use force.

297. Harhoff, *supra* note 1, at 90. This was surprising as Art. 53 of the U.N. Charter requires that the Security Council authorize enforcement action undertaken by regional organizations.

298. Harhoff, *supra* note 1, at 92.

299. S.C. Res. 1132 (Oct. 8, 1997).

300. Karsten Nowrot & Emily Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT’L L. REV. 321, 361 (1998); Permanent Rep. of Nigeria, *Letter dated June 27, 1997 from the Permanent Rep. of Nigeria addressed to the President of the U.N.’s Security Council*, U.N. Doc. S/1997/499 (June 27, 1997).

The Security Council gave the intervention some political cover, although not specific authorization, by issuing Resolution 1132. The Resolution said the situation in Sierra Leone constituted a threat to international peace and security, and that the Council was acting under Chapter 7 of the Charter.³⁰¹ The Council “took note” of ECOWAS’ statement saying that it was prepared to use force to reinstate the legitimate government in a preambular paragraph.³⁰² However the Resolution itself only explicitly asked ECOWAS forces to implement sanctions.³⁰³ After the intervention, the President of the Security Council welcomed the end of the military junta’s rule.³⁰⁴ While President Kabbah invited the intervention, it is questionable whether his consent was entirely valid because he was in exile in neighboring Guinea at the time.³⁰⁵

3. Gambia 2017

Most recently, ECOWAS threatened to “take all necessary measures” if President Yahya Jammeh did not respect the result of an

301. S.C. Res. 1132 (Oct. 8, 1997).

302. *Id.*

303. *Id.* ¶ 6. Article 42, in Chapter VII of the U.N. Charter, permits the Security Council to authorize the use of force to restore international peace and security. U.N. Charter art. 42.

304. Nowrot & Schabacker, *supra* note 300, at 362.

305. *Id.* at 388. Nigeria justified its participation in the intervention as self-defense after military junta forces attacked a military camp for ECOWAS forces (which was already in the country before the coup). This appears to be a reference to “unit self-defense”—a concept set out in the Rules of Engagement of armed forces. *Id.* at 362, 365–67. Henderson & Cavanagh write that “unit self-defence can be thought of as: a) a form of delegated authority from the national command chain of a State to exercise a State’s right of national self-defence [under Article 51] in certain circumstances” or “b) a reminder of the criminal law authority to act in self-defence to protect oneself and protect others.” Ian Henderson & Bryan Cavanagh, *Guest Post: Unit Self Defense, July 11, 2014*, OPINIO JURIS (July 11, 2014, 8:00 AM), <http://opiniojuris.org/2014/07/11/guest-post-unit-self-defence/> [<https://perma.cc/UQW6-YY2A>]. Trumbull argues that unit self-defense should be seen as separate and distinct from self-defense under Article 51, as the use of self-defense under Article 51 requires an “armed attack,” so if all unit self-defense is seen as an exercise of national self-defense, one must logically conclude that every isolated frontier incident constitutes an “armed attack” in order to justify the military unit’s inherent right to defend itself. He considers it more likely that the right of unit self-defense is a separate right, “a logical extension of every soldier (or civilian’s) right to exercise individual self-defense and be excused from criminal liability under domestic law.” Charles P. Trumbull IV, *The Basis of Unit Self-Defense and Implications for the Use of Force*, 23 DUKE J. COMP. & INT’L L. 121, 128, 144, 147 (2013).

election he had lost and step down by January 20, 2017.³⁰⁶ Jammeh was also accused of significant human rights violations.³⁰⁷ As the January 20th deadline approached ECOWAS troops gathered on the border and crossed into Gambia.³⁰⁸

The Security Council appeared to provide political cover for ECOWAS' actions. In Resolution 2337, it expressed "full support" for ECOWAS "in its commitment to ensure, by political means first" respect for the election results.³⁰⁹ The Resolution was silent on what other means might be used if political means did not succeed and did not say that the Council was acting under Chapter VII.³¹⁰

After Jammeh agreed to step down as the result of ECOWAS-led mediation efforts, ECOWAS troops entered the Gambian capital Banjul, where they did not meet resistance.³¹¹ Although ECOWAS only threatened to use force, both force and the threat of force are illegal under international law.³¹²

306. De Wolf, *supra* note 291.

307. *Id.*

308. *Id.*; Ruth Maclean, *Troops Enter the Gambia After Adama Barrow is Inaugurated in Senegal*, GUARDIAN (Jan. 20, 2017), <https://www.theguardian.com/world/2017/jan/19/new-gambian-leader-adama-barrow-sworn-in-at-ceremony-in-senegal> [<https://perma.cc/FRV5-M3EW>]; Geoffrey York, *Troops Cross Gambian Border After New President Inaugurated in Senegal*, GLOBE & MAIL (Jan. 19, 2017), <http://www.theglobeandmail.com/news/world/gambia-president-elect-set-for-inauguration-in-senegal-jammeh-stays-put/article33668195/> [<https://perma.cc/5YRG-XYSP>].

309. S.C. Res. 2337, ¶ 6 (Jan. 18, 2017).

310. *Id.*

311. *Regional Security Forces Arrive in Gambian Capital Ahead of New President's Return*, VOICE AM. (Jan. 22, 2017), <http://www.voanews.com/a/gambia-barrow-truth-commissions/3686337.html> [<https://perma.cc/X9B4-4HUF>]; Michael Ike Dibie, *ECOWAS Troops Secure Presidential Palace in The Gambia*, AFR. NEWS (Jan. 23, 2017), <http://www.africanews.com/2017/01/23/ecowas-troops-secure-presidential-palace-in-gambia/> [<https://perma.cc/D947-NSMU>]; *President Barrow Mobbed as He Returns to The Gambia, ECOWAS Salutes with Flypasts*, AFR. NEWS (Jan. 26 2017), <http://www.africanews.com/2017/01/26/president-barrow-mobbed-as-he-returns-to-the-gambia-ecowas-salutes-with-flypasts/> [<https://perma.cc/8NT5-3H7D>]; *The Gambia 'Missing Millions' After Jammeh Flies into Exile*, BBC (Jan. 23, 2017), <http://www.bbc.com/news/world-africa-38714007> [<https://perma.cc/7VHQ-YL28>].

312. The threat of force, like actual use of force, is prohibited under international law in the absence of Security Council authorization, consent, or a self-defense justification. Mohamed Helal, *Crisis in the Gambia: How Africa is Rewriting Jus ad Bellum*, OPINIO JURIS (Jan. 24 2017, 3:01AM EDT), <http://opiniojuris.org/2017/01/24/crisis-in-the-gambia-how-africa-is-rewriting-jus-ad-bellum> [<https://perma.cc/54AB-37NZ>]. The ICJ stated in its Nuclear Weapons Advisory opinion "if the use of force itself in a given case is illegal . . . the threat to

The intervention could alternatively have been justified on the basis of consent by President-elect Adama Barrow, as he had won the election.³¹³ ECOWAS had stated that it no longer recognized Jammeh as President.³¹⁴ Barrow was sworn into office in Senegal and requested international assistance to install his democratically elected government.³¹⁵ However, whether Barrow could give valid consent is not clear as he did not exercise effective control over the Gambian government at the time.³¹⁶

Taken together, these three ECOWAS interventions demonstrate that the use of force to install or re-install a democratic regime—an objective which is non-military in nature—may meet with acquiescence. They also support the idea that force may be used to uphold the will of a population as expressed in elections and to prevent serious human rights violations.

4. Some International Humanitarian and Democratic Interventions Have Not Been Accepted

However, States have rejected other similar interventions, deeming them a pretext for engineering regime change. The Security Council unanimously rejected South Africa's "humanitarian" justification for intervening in Angola in 1975, which was seen as primarily motivated by a desire to prevent the Soviet-backed group from gaining power.³¹⁷ The General Assembly—fifty in favor, eight against, fifteen abstaining—called on the Soviet Union to end its 1956 intervention in Hungary against what Franck and Rodley describe as a "popular socialist regime" under the "pretext" of "ending counter-revolutionary intervention and riots."³¹⁸ States also objected to

use such force will likewise be illegal." *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 79 (July 8).

313. Helal, *supra* note 312.

314. *Id.*

315. *Id.*

316. *Id.*; de Wolf, *supra* note 291.

317. South Africa intervened during a civil war ahead of independence that pitted local tribal groups against a Soviet-backed group. Arend and Beck quote Verwey as querying how genuinely concerned an apartheid government was about the fate of black Angolans. AREND & BECK, *supra* note 135, at 120; S.C. Res. 387 (Mar. 31, 1976).

318. Harhoff, *supra* note 1, at 83; Franck & Rodley, *supra* note 161, at 286; G.A. Res. 1131 (XI) (Dec 12, 1956); *Hungarian Revolution of 1956*, NEW WORLD ENCYC., http://www.newworldencyclopedia.org/entry/Hungarian_Revolution_of_1956 [https://perma.cc/3KQ9-3EZ6] (last visited Feb. 17, 2018) (citing RICHARD

interventions by the United States in Panama and Grenada during the Cold War.³¹⁹

Interventions also set precedent that others may draw on. In justifying its 2014 annexation of Crimea, Russia analogized Crimea, as a region seeking autonomy, to Kosovo.³²⁰ Russia also said it was acting in response to human rights violations of Ukrainians of Russian ethnicity.³²¹ However Russia's justification was not generally accepted. A General Assembly Resolution underscoring the invalidity of the disputed referendum and commitment to Ukraine's territorial integrity received 100 votes in favor and eleven against.³²² A desire to avoid setting a precedent may have been the reason the United States cited a list of specific factors for acting in Kosovo rather than claiming a general overarching right of humanitarian intervention.³²³ These examples demonstrate that any expanded justification for the use of force must be weighed against the risk of creating an exception that undermines the general prohibition on the use of force which States may abuse for their own geopolitical objectives.

LETTIS & WILLIAM E. MORRIS, THE HUNGARIAN REVOLT: OCTOBER 23 – NOVEMBER 4 (1961)).

319. The General Assembly condemned the interventions as a "flagrant violation of international law" (70 votes to 20 votes in the case of Panama, 108 to 9 votes in the case of Grenada). See Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 312 n.76 (1991); AREND & BECK, *supra* note 135, at 101–02, 126; Harhoff, *supra* note 1, at 88–89.

320. Robert McCorquodale, *Ukraine Insta-Symposium: Crimea, Ukraine and Russia: Self-Determination, Intervention and International Law*, OPINIO JURIS (Mar. 10, 2014, 12:00 PM EDT), <http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-crimea-ukraine-russia-self-determination-intervention-international-law/> [https://perma.cc/SWD8-G8EC]; Anne Peters, *Crimea: Does "The West" Now Pay the Price for Kosovo?*, EJIL: TALK! (Apr. 22, 2014), <http://www.ejiltalk.org/crimea-does-the-west-now-pay-the-price-for-kosovo/#more-10745> [https://perma.cc/QW7B-Q6HH].

321. Peters, *supra* note 320.

322. There were also fifty-eight abstentions. G.A. Res. 68/262 (Mar. 27, 2014); Press Release, General Assembly, General Assembly Adopts Resolution Calling Upon States Not to Recognize Changes in Status of Crimea Region, U.N. Press Release GA/11493 (Mar. 27, 2014). Russia blocked action in the Security Council with its veto.

323. INDEP. INT'L COMM'N ON KOSOVO, *supra* note 232 (cited in DAMROSCH & MURPHY, *supra* note 13, at 1156).

IV. OBLIGATIONS RELATING TO CHEMICAL WEAPONS, TORTURE, AND GENOCIDE

Arguments in favor of humanitarian intervention are strengthened by the existence of prohibitions on the use of chemical weapons, torture, and genocide. These norms have been almost universally accepted by States in treaties and norms against torture and genocide are often accepted as *jus cogens* norms owed *erga omnes*.³²⁴ International criminal law provides for individual accountability for violations of these norms. If individuals can be held accountable after the fact for these most serious crimes and punished, is it logical for international law to prevent States from taking action to prevent their occurring in the first place?

Violating these prohibitions does not authorize a use of force in response, but their widely accepted nature nevertheless indicates at least some recognition in international law that the most egregious human rights violations, such as the use of chemical weapons, genocide, and torture, should not go unaddressed. As expressed by Professor Harold Koh, the legality of a humanitarian intervention would be strengthened if it would “prevent the use of a *per se* illegal means” by the territorial State, such as the use of banned chemical weapons, or if it would help to “avoid a *per se* illegal end,” such as mass atrocity crimes.³²⁵

A. Convention Against Torture

In *Belgium v. Senegal*, the ICJ recognized that all 162 States party to the Convention Against Torture may insist on performance of obligations under the Convention even if the torturer or victims do not have a connection with the State taking action.³²⁶ The ICJ was referring to States taking legal action such as prosecution and extradition rather than using force. The case does, however, indicate some additional recognition in international law that States have a

324. Report of the Study Group of the ILC, *supra* note 13.

325. See Harold Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013), <https://www.justsecurity.org/1506/koh-syria-part2> [https://perma.cc/HKW2-HK9C].

326. Cindy G. Buys, *Belgium v. Senegal: The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture*, 16 ASIL INSIGHTS 29 (Sept. 11, 2012), <https://www.asil.org/insights/volume/16/issue/29/belgium-v-senegal-international-court-justice-affirms-obligation> [https://perma.cc/EWU3-6B6V].

positive obligation to uphold fundamental international legal norms owed *erga omnes* such as the prohibition on torture.

B. Genocide Convention

Parties to the Genocide Convention undertake to “prevent and to punish” genocide.³²⁷ Could the Convention provide a basis to intervene and use force against a genocidal regime operating in the territory of another State? Or does it refer only to the specific obligations set out in the Convention, such as prosecuting, punishing, or extraditing suspects found in a State’s own territory? The latter interpretation seems more likely, as the U.N. Charter clearly sets out in Article 2(4) a prohibition on the use of force.³²⁸ Additionally, according to Article 103, in the event of a conflict between the Charter and another treaty, the obligations under the Charter prevail.³²⁹ In one example of State practice in favor of the former interpretation, the United States argued that, by intervening in Iraq in August 2014, it was protecting tens of thousands of Yazidis fleeing ISIL from the risk of genocide. However, this was only a secondary justification as the United States already had Iraq’s consent to intervene.³³⁰

327. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, art. 1, S. Exec. Doc. O, 81-1, 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951).

328. U.N. Charter art. 2, para. 4.

329. *Id.*

330. President Obama noted that ISIL had called for the systematic destruction of the entire Yazidi people, which would constitute genocide. Reports of mass executions and sexual violence had proven ISIL’s cruelty towards the Yazidis and other minorities. President Obama also invoked general humanitarian reasons for acting, as the Yazidis were without food or water, starving, and facing almost certain death. “At the request of the Iraqi government—we’ve begun operations to help save Iraqi civilians stranded on the mountain. As ISIL has marched across Iraq, it has waged a ruthless campaign against innocent Iraqis” . . . “these terrorists have been especially barbaric towards religious minorities, including Christian and Yazidis[sic], a small and ancient religious sect. Countless Iraqis have been displaced. And chilling reports describe ISIL militants rounding up families, conducting mass executions, and enslaving Yazidi[sic] women.” Press Release, The White House, Statement by the President (Aug. 7, 2014, 9:30 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/08/07/statement-president> [<https://perma.cc/S8YR-5LYQ>].

The United Nations Assistant Secretary General for Human Rights, Ivan Simonovic, also said ISIL’s campaign against the Yazidis may amount to attempted genocide, calling for the United States to act in response. *UN: ISIL assaults against Yazidis may be genocide*, REUTERS (Oct. 21, 2014), <http://america.aljazeera.com/articles/2014/10/21/un-official-saysisilassaultsyazidipossiblegenocide.html> [<https://perma.cc/XM7B-LH33>].

C. Chemical Weapons Convention

The use of chemical weapons is prohibited under the 1993 Chemical Weapons Convention,³³¹ which, with 192 States parties, is almost universally ratified and reflects customary international law.³³²

The Convention does not provide a basis for force to be used in the case of violation, providing rather for serious breaches to be resolved in conformity with international law, and/or referred to the Security Council or General Assembly.³³³ However, chemical weapons violations have been used as one reason amongst others in justifying the use of force in Iraq in 1991 and in Syria in 2017 and 2018. These will be discussed below.

V. USING A COMBINATION OF LEGAL RATIONALES: SELF-DEFENSE, HUMANITARIAN INTERVENTION, AND INTERNATIONAL LAW VIOLATIONS

In practice, States often draw upon several rationales in justifying their actions, of which violations of international law prohibitions against chemical weapons use, torture, and genocide may be a secondary justification, in addition to primary justifications of humanitarian intervention or self-defense. Further, rationales of humanitarian intervention or self-defense put forward by States may be mixed and are not always clearly differentiated. Rationales often focus on both a situation of humanitarian suffering within a State and the external impacts this is having on other States, including refugee

331. Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997).

332. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 259 (2005). The International Committee of the Red Cross (ICRC) states in rule 74 of its study of customary international humanitarian law that the use of chemical weapons is prohibited as a norm of customary international law in both international and non-international armed conflicts. *Id.* at 259.

333. Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317 (entered into force Apr. 29, 1997) (Article XII (3) provides for the Conference of States Parties to “recommend collective measures to states parties in conformity with international law; Article XII(4) provides that in cases of non-compliance of particular gravity, the Conference of States Parties shall “bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.”).

flows, chemical weapons fumes, attacks from non-State actors, or the risk of conflict “spilling over” into other states. An intervening State could seek to characterize these cumulative impacts as having physical effects akin to an “armed attack.”

Koh has argued that States should be able to intervene to address a humanitarian situation if it is creating major impacts on other States.³³⁴ This suggests a simultaneous reliance on humanitarian intervention and self-defense rationales. Koh argues intervention should be permitted if a humanitarian crisis inside a State creates external consequences, such as “the proliferation of chemical weapons, massive refugee outflows, and events destabilizing to peace and security of the region.” Such consequences could be characterized as sufficiently disruptive of the international order to pose an imminent threat to the intervening nations, giving rise to an urgent need to act in individual and collective self-defense.³³⁵

Three examples of the use of force by States which draw on a range of rationales, including chemical weapons use, humanitarian suffering, and external impacts of the conflict such as refugee flows or destabilization of a region are the United States-led Coalition’s intervention in Iraq in 1991 in response to attacks on the Kurds; airstrikes by the United States on Syria in 2017 following a chemical weapons attack by the Syrian regime; and airstrikes conducted by the United States, France and the United Kingdom on Syria on 14 April, 2018 following another chemical weapons attack by the Syrian regime.

A. Iraq 1991

In intervening in Iraq in 1991, a United States led coalition drew on violations of prohibitions on chemical weapons use, torture and genocide as well as humanitarian motives in justifying the use of force.

After Iraq withdrew from Kuwait in 1991, there were reports of widespread attacks by Iraqi forces against Shiite Muslims and Kurds in northern Iraq seeking autonomy.³³⁶ The Security Council, in Resolution 688, demanded that Iraq cease the “repression of Iraqi

334. Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013), <https://www.justsecurity.org/1506/koh-syria-part2/> [<https://perma.cc/X4E9-S3KU>].

335. *Id.*; Milena Sterio, *Humanitarian Intervention Post-Syria: Legitimate and Legal?*, 40 BROOK. J. INT’L L. 109, 156 (2014).

336. DAMROSCH & MURPHY, *supra* note 13, at 1180.

civilians” and allow humanitarian access.³³⁷ Resolution 688 did not authorize the use of force, but it was still used as political cover for the coalition to use force by creating no-fly zones and safe havens. The United States underlined its humanitarian motives, emphasizing that it was establishing areas where humanitarian relief could be provided.³³⁸

Possible chemical weapons use was another factor, with unconfirmed reports that Iraq’s attacks on the Kurds and Shias included the use of chemical weapons.³³⁹ In Resolution 687, passed several days before Resolution 688, the Security Council, acting under Chapter VII, warned Iraq of “grave consequences” if there was “any further use” of chemical weapons.³⁴⁰ The United States reiterated this language, cautioning Iraq of “grave consequences” if Iraq used chemical weapons.³⁴¹ The repression also drove refugees towards the Turkish and Iranian borders.³⁴² The Security Council characterized this “massive flow of refugees across international frontiers” as a “threat to international peace and security.”³⁴³ The intervention therefore could be seen as having several justifications: humanitarian motives, chemical weapons use, and refugee flows. The use of force was limited and proportional, restricted to establishing and enforcing no-fly zones.³⁴⁴

337. S.C. Res. 688, preamble ¶ 3 (Apr. 5, 1991). The Security Council asserted it was, “[g]ravelly concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region.”

338. DAMROSCH & MURPHY, *supra* note 13, at 1181.

339. Chris Hedges, *In a Remote Southern Marsh, Iraq is Strangling the Shiites*, N.Y. TIMES (Nov. 16, 1993), <http://www.nytimes.com/1993/11/16/world/in-a-remote-southern-marsh-iraq-is-strangling-the-shiites.html?pagewanted=all> (on

340. S.C. Res. 687, ¶ 8 (Apr. 3, 1991).

341. Patrick E. Tyler, *U.S. Planning Air Strikes if Iraq Uses Gas on Rebels Baghdad Reportedly Told Commanders to Use Chemicals*, BALT. SUN (Mar. 10, 1991), http://articles.baltimoresun.com/1991-03-10/news/1991069074_1_chemical-weapons-high-command-baghdad [<https://perma.cc/Z9E2-KZR3>].

342. S.C. Res. 688, ¶ 3 (Apr. 5, 1991).

343. *Id.*

344. DAMROSCH & MURPHY, *supra* note 13, at 1180. Policing the no-fly zones involved military confrontations with Iraqi forces, so force was actually used.

B. UK Assertion of a Right of Humanitarian Intervention in Response to Chemical Weapons Use, 2013

In 2013, the United Kingdom asserted a narrow right of humanitarian intervention targeted at addressing that humanitarian suffering caused by chemical weapons.³⁴⁵ After the Syrian regime's apparent chemical weapons attack in Eastern Damascus on August 21, 2013, it asserted that if action in the Security Council were blocked, the United Kingdom would still be permitted under international law to take "exceptional measures" to "alleviate the . . . humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime."³⁴⁶ Force was ultimately not used in 2013, but it was in 2017 and 2018, as outlined below.

C. United States Airstrikes in Syria, April 2017

The United States provided a mix of rationales in justifying its use of force in response to suspected chemical weapons use in Syria in April 2017. This intervention drew on rationales including chemical weapons use, humanitarian motives, violations of international humanitarian law, and the destabilizing impact of the conflict, including through refugee flows.³⁴⁷ As with its justification for acting

345. Pnina Sharvit Baruch & Brandon Weinstock, *Military Intervention in Syria: Is it Legal?*, INSS INSIGHTS: INST. NAT'L SEC. STUD. (Sept. 11, 2013), <http://www.inss.org.il/publication/military-intervention-syria-legal/> [<https://perma.cc/23NN-ZS6W>].

346. *Chemical Weapon Use by Syrian Regime—UK Government Legal Position* (Aug. 29, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf [<https://perma.cc/Y6E9-R3LL>]. According to the United Kingdom, such humanitarian intervention would be available under the same three factors it set out in justifying its response in Kosovo on humanitarian grounds: extreme and urgent humanitarian distress on a large scale, no alternative to the use of force, and a strictly limited and proportional use of force. *See also* Sir Daniel Bethlehem, *The Legal Basis in Favor of a Principle of Humanitarian Intervention*, EUR. J. INT'L L. BLOG (Sept. 12, 2013), <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/> [<https://perma.cc/EN43-X5L5>] (examining the United Kingdom's bases for humanitarian intervention).

347. President Trump's statement is available as a video. Video: *President Trump Makes Statement on Syria*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/video/us/politics/100000005032090/president-trump-makes-statement-on-syria.html> (on file with the *Columbia Human Rights Law Review*). Deborah Pearlstein distills the United States' rationale as: (1) "[i]t is in this vital national security interest of the United States to prevent and deter the

in Kosovo, the United States did not articulate an overarching legal rationale.

The Syrian regime conducted a suspected chemical weapons attack on the rebel held town of Khan Sheikhoun on April 4, 2017, in which eighty-nine people were killed.³⁴⁸ In response, three days later, the United States fired fifty-nine cruise missiles at Syria's Shayrat airbase, the origin of the chemical attack.³⁴⁹ The strikes targeted Syrian jets, aircraft fuel, and ammunition sites.³⁵⁰ This was a use of force against the Syrian regime of Bashar Al-Assad, which distinguishes it from the use of force against the non-State actor ISIL by the international coalition, discussed above in Section II.B.2. The United States articulated the following justifications:

Chemical weapons use: The airstrikes occurred days after a chemical weapons attack by the Syrian regime. Defense Secretary James Mattis said the United States would “not passively stand by while [Assad] murders innocent people with chemical weapons.”³⁵¹ The United States said Syria's use of chemical weapons violated its obligations under the Chemical Weapons Convention, as well as Security Council resolutions, including Resolution 2118 which had required Syria to cease using chemical weapons.³⁵² Significantly,

spread and use of deadly chemical weapons”; (2) “Syria used banned chemical weapons, violated its obligations under the Chemical Weapons Convention and ignored the urging of the UN Security Council”; and (3) “[t]he refugee crisis continues to deepen and the region continues to destabilize, threatening the United States and its allies.” See Deborah Pearlstein, *The Strike in Syria—Is the International Law Calculation Different Now Than in 2013?*, OPINIO JURIS (Apr. 6, 2017), <http://opiniojuris.org/2017/04/06/the-strike-in-syria-is-the-international-law-calculation-different-now-than-in-2013/> [https://perma.cc/3HBM-932U].

348. *Syria Chemical ‘Attack’: What We Know*, BBC NEWS (Apr. 26, 2017), <http://www.bbc.com/news/world-middle-east-39500947> [https://perma.cc/V269-5JWY].

349. *Syria war: Why was Shayrat airbase bombed?*, BBC NEWS (Apr. 7, 2017), <http://www.bbc.com/news/world-us-canada-39531045> [https://perma.cc/BFP9-RNPW].

350. *Syria war: Anger After Russia Vetoes Resolution at UN*, BBC NEWS (Apr. 13, 2017), <http://www.bbc.com/news/world-europe-39585071> [https://perma.cc/AMX3-GCSD]; *Syria war: US Missiles ‘Took Out 20% of Aircraft’*, BBC NEWS (Apr. 10, 2017), <http://www.bbc.com/news/world-middle-east-39561102> [https://perma.cc/9TLM-FCEK]; *US Says Strike on Syria Destroyed Fifth of Assad’s Jets*, AL JAZEERA (Apr. 11, 2017), <http://www.aljazeera.com/news/2017/04/strike-syria-destroyed-assad-jets-170410212129905.html> [https://perma.cc/HRG2-EK49].

351. *Syria War: U.S. Missiles ‘Took Out 20% of Aircraft’*, *supra* note 350.

352. President Trump Makes Statement on Syria, *supra* note 347. President Trump said, “Syria used banned chemical weapons, violated its obligations under the Chemical Weapons Convention.” *Id.* Secretary of State Tillerson noted

Resolution 2118 stated that any use of chemical weapons in Syria would result in the imposition of “measures” under Chapter 7.³⁵³ While this Resolution does not provide specific authorization for the use of force, it does provide some political cover for the U.S. airstrikes.

The U.S. Department of Defense said its April 2017 strikes were intended to “deter” the regime from using chemical weapons again.³⁵⁴ In so doing, the United States referred to a “convincing body of reporting” documenting widespread international law violations by the Syrian government, including four previous chemical attacks documented by a U.N. Joint Investigative Mechanism.³⁵⁵

Humanitarian reasons: While the United States did not assert that its actions were a “humanitarian intervention,” it did cite humanitarian considerations as a reason for acting. White House Press Secretary Sean Spicer said that in addition to national security interests, there was “obviously a huge humanitarian component” behind the U.S. action.³⁵⁶ National Security Adviser H.R. McMaster

“previous agreements that had been entered into pursuant to U.N. Security Council Resolution 2118 . . . whereby [Syria] would surrender their chemical weapons under the supervision of the Russian government.” Press Briefing by Secretary of State Rex Tillerson and National Security Advisor General H.R. McMaster, WhiteHouse.gov (Apr. 6, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-secretary-state-rex-tillerson-national-security-advisor-general-h-r-mcmaster-4-6-2017/> [<https://perma.cc/J79P-2Q5E>].

353. S.C. Res. 2118, ¶ 21 (Sept. 27, 2013). The Security Council decided “in the event of non-compliance with this resolution, including . . . any use of chemical weapons by anyone in the Syrian Arab Republic to impose measures under Chapter VII of the United Nations Charter.” *Id.*; see also Michael Schmitt & Chris Ford, *The Use of Force in Response to Syrian Chemical Attacks: Emergence of a New Norm?*, JUST SECURITY (Apr. 8, 2017), <https://www.justsecurity.org/39805/force-response-syrian-chemical-attacks-emergence-norm/> [<https://perma.cc/84WW-KNCX>] (discussing Security Resolution 2118 and Security Council enforcement of that resolution).

354. Schmitt & Ford, *supra* note 353; Marty Lederman, (*Apparent Administration Justifications for Legality of Strikes Against Syria*, JUST SECURITY (Apr. 8, 2017), <https://www.justsecurity.org/39803/apparent-administration-justifications-legality-strikes-syria/> [<https://perma.cc/UHT9-DMGY>] (“Syria’s contempt for multiple UNSCRs including UNSCR 1540 and those seeking to give effect to UNSCR 2118, specifically UNSCRs 2209, 2235, 2314, and 2319.”); Press Release, U.S. Dep’t of Def., Statement from Pentagon Spokesman on U.S. Strike in Syria (Apr. 6, 2017), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1144598/statement-from-pentagon-spokesman-capt-jeff-davis-on-us-strike-in-syria/> [<https://perma.cc/DT5L-3J63>].

355. Lederman, *supra* note 354.

356. Kate Brannen, *Tracking the White House’s Reasons for Bombing Syria*, JUST SECURITY (Apr. 11, 2017), <https://www.justsecurity.org/39864/track-white-houses-reasons-striking-syria/> [<https://perma.cc/D48F-UPXK>].

referred to “inhumane attacks on innocent civilians with chemical weapons.”³⁵⁷

Refugees, destabilizing impact of the conflict: The United States, through President Donald J. Trump, also argued that the strikes were necessary as the refugee crisis in Syria continued to deepen, threatening the United States and its allies.³⁵⁸ The Syrian government’s actions were destabilizing the region and creating international security concerns, including through large and growing flows of refugees.³⁵⁹ The Syrian conflict has generated around six million refugees, with over half a million entering Europe.³⁶⁰

International Humanitarian Law Violations: The United States also noted the Syrian regime’s indiscriminate use of banned weapons to kill and injure civilians, violating International Humanitarian Law.³⁶¹ Such violations had also been recognized in a Security Council Resolution demanding that parties to the Syrian conflict cease attacks against civilians and the indiscriminate use of weapons.³⁶²

In establishing the necessity for the use of force, the United States noted the exhaustion of all reasonably available peaceful remedies before its use of force, including intensive diplomatic efforts to end the armed conflict and eliminate Syria’s chemical weapons stockpile.³⁶³ This was evidenced by the continuation of the conflict for five years, repeated blockage of Security Council action, three ceasefire attempts, and several U.N. envoys attempting to find political solutions.³⁶⁴

357. Press Briefing by Secretary of State Rex Tillerson and National Security Advisor General H.R. McMaster, *supra* note 352.

358. President Trump Makes Statement on Syria, *supra* note 347. Trump said, “The refugee crisis continues to deepen and the region continues to destabilize, threatening the United States and its allies.” *Id.* Further elaboration was provided in press guidance. Lederman, *supra* note 356.

359. President Trump Makes Statement on Syria, *supra* note 347; Lederman, *supra* note 354.

360. Schmitt & Ford, *supra* note 353; *Mediterranean Migrant Arrivals Top 363,348 in 2016; Deaths at Sea: 5,079*, INT’L ORG. FOR MIGRATION (Jan. 6, 2017), <https://www.iom.int/news/mediterranean-migrant-arrivals-top-363348-2016-deaths-sea-5079> [<https://perma.cc/P9JN-2VSS>].

361. Lederman, *supra* note 356.

362. S.C. Res. 2254 (Dec. 18, 2015); Ashley Deeks, *How Does the Syria Situation Stack up to the “Factors” that Justified Intervention in Kosovo?*, LAWFARE (Apr. 7, 2017), <https://www.lawfareblog.com/how-does-syria-situation-stack-the-factors-justified-intervention-kosovo> <https://perma.cc/JGX3-AGWJ>.

363. Lederman, *supra* note 356.

364. Deeks, *supra* note 362.

The United States said the strikes were proportional because they targeted the facility that had delivered the most recent chemical weapons attack.³⁶⁵ Damage to Syrian aircraft and support infrastructure had been targeted to “reduc[e] the Syrian Government’s ability to deliver chemical weapons.”³⁶⁶ Runways at the airbase were left intact as the United States wanted to make clear that its action was in response to the chemical weapons attack, not a signal of broader U.S. willingness to become involved in Syria’s internal conflict.³⁶⁷

International reactions “largely condoned” the use of force, with only Russian, Iran, and Syria condemning it.³⁶⁸ China appeared to acquiesce, merely stating that it had always supported a political settlement and hoped all parties would exercise restraint.³⁶⁹

D. United States, United Kingdom, and France Airstrikes in Syria, April 2018

A very similar strike was conducted on April 14, 2018 by the United States, joined by the United Kingdom and France. The strike followed a chemical weapons attack by the Syrian regime on the rebel held town of Douma and targeted three facilities used for chemical weapons storage and development.³⁷⁰

The primary justification for the strikes was to deter further chemical weapons attacks and prevent the normalization of chemical weapons use.³⁷¹ France referred to Syria’s violation of its international

365. Press Briefing by Secretary of State Rex Tillerson and National Security Advisor General H.R. McMaster, *supra* note 352; Statement from Pentagon Spokesman on U.S. Strike in Syria, *supra* note 354.

366. Press Release, U.S. Dep’t of Def., *supra* note 354.

367. *US Says Strike on Syria Destroyed Fifth of Assad’s Jets*, *supra* note 350.

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

369. This is significant given China’s strong support for non-intervention in the internal affairs of other states in principle, its condemnation of the Kosovo intervention on these grounds, and its joining of Russia in blocking Security Council action in Syria. See Julian Ku, *China’s Surprising Refusal to Criticise the Legality of the U.S. Attack on Syria*, LAWFARE (Apr. 7, 2017), <https://www.lawfareblog.com/chinas-surprising-refusal-criticize-legality-us-attack-syria>.

370. *Syria air strikes: US still ‘locked and loaded’ for new chemical attacks*, BBC (Apr. 15, 2018), <http://www.bbc.com/news/world-middle-east-43771840> [<https://perma.cc/E2Y5-47H7>].

371. U.S. President Trump stated that “[t]he purpose of our actions tonight is to establish a strong deterrent against the production, spread and use of chemical weapons.” *Full Transcript of Trump’s address on Syria airstrikes*, WASH. POST (Apr. 13, 2018), <https://www.washingtonpost.com/news/post-politics/wp/2018/04/13/full->

obligations under the Chemical Weapons Convention, as well as Security Council resolutions requiring Syria to cease using chemical weapons.³⁷² The United States, United Kingdom, and France emphasized substantial evidence establishing the Syrian regime's

transcript-of-trumps-address-on-syriaairstrikes/?noredirect=on&utm_term=.86e167597114 (on file with the *Columbia Human Rights Law Review*). U.K. Prime Minister May referred to "targeted strikes to degrade the Syrian Regime's chemical weapons capability and deter their use." Theresa May, U.K. Prime Minister, PM's Press Conference Statement on Syria (Apr. 14, 2018), <https://www.gov.uk/government/speeches/pms-press-conference-statement-on-syria-14-april-2013> [<https://perma.cc/FV75-NHNL>]. French President Macron stated that "[w]e cannot tolerate the normalization of the employment of chemical weapons, which is an immediate danger to the Syrian people and to our collective security." Elysée, Présidence de la République, Press Statement by the President of the French Republic on the intervention of the French armed forces in response to the use of chemical weapons in Syria (Apr. 14, 2018), <http://www.elysee.fr/communiqués-de-presse/article/press-statement-by-the-president-of-the-french-republic-on-the-intervention-of-the-french-armed-forces-in-response-to-the-use-of-chemical-weapons-in-syria/> [<https://perma.cc/L58K-5FT9>].

372. France referred specifically to Syria's violations of Security Council resolutions 2235 and 2209. Press Release, Security Council, Security Council 8233rd Meeting, Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression, U.N. Press Release SC/13296 (Apr. 14, 2018), <https://www.un.org/press/en/2018/sc13296.doc.htm> [<https://perma.cc/8W6M-TEM4>] [hereinafter Press Release of the Security Council 8233rd Meeting] (first citing S.C. Res. 2209 (March 6, 2015); then citing S.C. Res. 2235 (Aug. 7, 2015)). Security Council Resolutions 2235 and 2209 reaffirmed Security Council Resolution 2118, which decided that Syria shall not use or retain chemical weapons and that measures under Chapter 7 of the U.N. Charter would be imposed in the event of non-compliance. See S.C. Res. 2235, ¶¶ 2, 15 (Aug. 7, 2015); S.C. Res. 2209, ¶¶ 3, 7 (Mar. 6, 2015); S.C. Res. 2118, ¶¶ 4, 21 (Sept. 27, 2013).

responsibility for the attack.³⁷³ France also noted the Syrian regime's disregard for International Humanitarian Law.³⁷⁴

In addition, in a policy paper issued after the intervention, the United Kingdom justified its actions as a humanitarian intervention.³⁷⁵ Repeating its 2013 assertion, the United Kingdom stated that it was

373. Press Release of the Security Council 8233rd Meeting, *supra* note 372; Syria 'Chemical Attack': France's President Macron 'Has Proof,' BBC (Apr. 12, 2018), <http://www.bbc.com/news/world-middle-east-43740626> [<https://perma.cc/FP2Q-5KD7>]; Elysée, *supra* note 371. The White House stated that it had a "high level of confidence" about the Syrian regime's culpability for the use of poisonous gas in Douma and that "we can say that the Syrian government was behind this attack." See Patrick Wintour, Ewen MacAskill, Julian Borger, & Angelique Chrisafis, *US says it has proof Assad's regime carried out Douma gas attack*, GUARDIAN (Apr. 14, 2018), <https://www.theguardian.com/world/2018/apr/13/uk-denounces-claims-it-was-behind-staged-syrian-gas-attack> (on file with the *Columbia Human Rights Law Review*). Prime Minister May stated that:

A significant body of information including intelligence indicates the Syrian Regime is responsible for this latest attack. I cannot tell you everything. But let me give an example of some of the evidence that leads us to this conclusion. Open source accounts allege that a barrel bomb was used to deliver the chemicals. Multiple open source reports claim that a Regime helicopter was observed above the city of Douma on the evening of 7th April. The Opposition does not operate helicopters or use barrel bombs. And reliable intelligence indicates that Syrian military officials co-ordinated what appears to be the use of chlorine in Douma on 7th April. No other group could have carried out this attack. Indeed, Daesh for example does not even have a presence in Douma. And the fact of this attack should surprise no-one. We know that the Syrian regime has an utterly abhorrent record of using chemical weapons against its own people. On 21st August 2013 over 800 people were killed and thousands more injured in a chemical attack also in Ghouta. There were 14 further smaller scale chemical attacks prior to that summer. At Khan Shaykhun on 4th April last year, the Syrian Regime used sarin against its people killing around 100 with a further 500 casualties. And based on the Regime's persistent pattern of behaviour and the cumulative analysis of specific incidents we judge it highly likely both that the Syrian regime has continued to use chemical weapons since then, and will continue to do so.

May, *supra* note 371.

374. Syria 'Chemical Attack,' *supra* note 373.

375. Policy paper, *Syria action – UK government legal position*, GOV.UK (Apr. 14, 2018), <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> ("3. The UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force is humanitarian intervention. . . .").

permitted under international law to take measures in order to alleviate overwhelming humanitarian suffering “by degrading the Syrian regime’s chemical weapons capability.”³⁷⁶ The United Kingdom referred to humanitarian suffering caused by the use of chemical weapons, as well as the death of 400,000 people since the start of the conflict.³⁷⁷ It noted that its actions were “directed exclusively to averting a humanitarian catastrophe caused by the Syrian regime’s use of chemical weapons.”³⁷⁸

The United States, United Kingdom, and France emphasized that there was no alternative to the use of force because action in the Security Council had been repeatedly blocked by Russian vetoes.³⁷⁹ Kuwait commented that division in the Council had “encouraged parties to continue violating its resolutions and international humanitarian law.”³⁸⁰ The United States, United Kingdom, and France underlined the proportionality of their actions, stating that the strikes

376. *Id.* ¶ 1.

377. *Id.* ¶ 4(i).

378. *Id.* ¶ 4(iii).

379. See Press Release of the Security Council 8233rd Meeting, *supra* note 372 (reporting that the U.S. delegate said that “[d]iplomacy had been given chance after chance” and that the French delegate said that “the Council had failed to act, due to systematic veto use by the Russian Federation”); May, *supra* note 371 (“[O]n each occasion when we have seen every sign of chemical weapons being used, any attempt to hold the perpetrators to account has been blocked by Russia at the UN Security Council, with six such vetoes since the start of 2017. . . . [W]e have no choice but to conclude that diplomatic action on its own will not be any more effective in the future than it has been in the past.”); see also Policy Paper, *supra* note 375, ¶ 4(ii) (“There was no practicable alternative to the truly exceptional use of force . . .”); Elysée, *supra* note 371. Prime Minister May also stated that the Syrian Regime has a history of using chemical weapons against its own people in the most cruel and abhorrent way. And a significant body of information including intelligence indicates that Syrian Regime is responsible for this latest attack. This persistent pattern of behavior must be stopped. . . . We have sought to use every possible diplomatic channel to achieve this. But our efforts have been repeatedly thwarted. Even this week the Russians vetoed a Resolution at the UN Security Council which would have established an independent investigation into the Douma attack. So there is no practicable alternative to the use of force to degrade and deter the use of chemical weapons by the Syrian Regime.

Theresa May, U.K. Prime Minister, PM Statement on Syria (Apr. 14, 2018), <https://www.gov.uk/government/news/pm-statement-on-syria-14-april-2018> [<https://perma.cc/RGE3-EL2V>].

380. Statement by Kuwaiti delegate *in* Press Release of the Security Council 8233rd Meeting, *supra* note 372.

were limited to the Syrian regime's chemical weapons facilities and that they did not seek to intervene more broadly in the Syrian conflict.³⁸¹ France also noted that parties had been given a week's warning of the strikes.³⁸² No civilian or military casualties had been reported.³⁸³

Russia, Syria, Iran, and Iraq condemned the strikes.³⁸⁴ Russia and Syria described them as a flagrant violation of the U.N. Charter's prohibition on the use of force.³⁸⁵ China said it consistently opposed the

381. U.K. Prime Minister May said the strikes were "not about intervening in a civil war[, nor] about regime change," but rather "it was a limited, targeted and effective strike with clear boundaries that expressly sought to avoid escalation and did everything possible to prevent civilian casualties" by specifically targeting "a chemical weapons storage and production facility, a key chemical weapons research centre and a military bunker involved in chemical weapons attacks." May, *supra* note 371. France's Minister of the Armed Forces Florence Parly said that France was not looking to escalate the conflict, while "France's foreign minister[] called the US-led response 'targeted and proportionate.'" *Syria's war: France rules out 'confrontation' with Russia*, AL JAZEERA (Apr. 14, 2018), <https://www.aljazeera.com/news/2018/04/syria-war-france-rules-confrontation-russia-180414063828974.html> [<https://perma.cc/HJH5-WR9L>]. President Trump said, "America does not seek an indefinite presence in Syria under no circumstances." *Full Transcript*, *supra* note 371.

382. *Syria's war: France rules out 'confrontation' with Russia*, *supra* note 381.

383. *Syria air strikes: UK publishes legal case for military action*, BBC (Apr. 14, 2018), <http://www.bbc.com/news/uk-43770102> [<https://perma.cc/HJ8D-ZQD7>] [as of April 14].

384. Fiona Simpson, *Syria strikes latest: World leaders react over US-led military action over Douma atrocity*, EVENING STANDARD (Apr. 15, 2018), <https://www.standard.co.uk/news/world/world-leaders-react-over-usled-military-action-on-syria-a3814086.html> (on file with the *Columbia Human Rights Law Review*) (reporting on Russia and Iran's responses); *Syria air strikes*, *supra* note 383 (reporting on Russia and Syria's responses). The Russian Ambassador stated that "Without a mandate from the Council and in violation of the Charter and international norms, an aggressive act against a sovereign State had been carried out." Press Release of the Security Council 8233rd Meeting, *supra* note 372. Syria's representative told the Security Council the strikes were a "flagrant violation" of its sovereignty. *Id.* Iraq's Foreign Ministry described the strikes as a "dangerous development" and said that "[s]uch action could have dangerous consequences, threatening the security and stability of the region and giving terrorism another opportunity to expand after it was ousted from Iraq and forced into Syria to retreat to a large extent." *An unequivocal message: How the world reacted to the Syrian airstrikes*, TELEGRAPH (Apr. 15, 2018), <https://www.telegraph.co.uk/news/2018/04/14/unequivocal-message-world-reacted-syrian-airstrikes/> (on file with the *Columbia Human Rights Law Review*).

385. Russian President Vladimir Putin condemned the use of force as "an act of aggression against a sovereign state that is on the frontline in the fight against terrorism" and stated that the attacks were "not sanctioned by the UN

use of force in international relations and that military action bypassing the Security Council violated international law.³⁸⁶ Security Council members Cote d'Ivoire and Kazakhstan said the use of force could only be authorized by the Security Council.³⁸⁷ Security Council members Equatorial Guinea and Bolivia said the strikes violated the U.N. Charter.³⁸⁸ Peru expressed concern and cautioned that responses to crimes in Syria must adhere to the Charter, international law, and Security Council resolutions.³⁸⁹ Nevertheless, a Russian Security Council resolution condemning "aggression" by the United States and its allies failed, with only Russia, China and Bolivia voting in favor.³⁹⁰ NATO Secretary-General Jens Stoltenberg, the European Union, Turkey, Qatar, Bahrain, Saudi Arabia, Germany, Canada, Poland, the Netherlands, Australia, Spain and Israel expressed support.³⁹¹

Security Council and in violation of the UN Charter and norms and principles of international law." *Putin: US-led strikes on Syria 'an act of aggression*, AL JAZEERA (Apr. 14, 2018), <https://www.aljazeera.com/news/2018/04/syria-russia-iran-condemn-tripartite-attack-damascus-180414052625352.html> [https://perma.cc/U577-3XYM]. Syria's Ministry of Foreign Affairs condemned the attacks as an act of "aggression" and a "flagrant violation of international law." *Who says what about US, UK, France airstrikes on Syria*, PRESS TV (Apr. 14, 2018), <http://www.presstv.com/Detail/2018/04/14/558525/syria-airstrike-round-up> [https://perma.cc/7DVR-XV3D]. Syria's representative told the Security Council that "Syria and its many friends and allies were perfectly capable of responding to aggression, . . . emphasizing those provisions of the United Nations Charter dealing with the sovereignty of States and the non-use of force in international relations." Therefore, this was a "flagrant violation against Syria's sovereignty." Press Release of the Security Council 8233rd Meeting, *supra* note 372.

386. *China says Syrian Strikes violate international law, urges dialogue*, REUTERS (Apr. 14, 2018), <https://www.reuters.com/article/us-mideast-crisis-syria-china/china-says-syrian-strikes-violate-international-law-urges-dialogue-idUSKBN1HLOMH> [https://perma.cc/NAK4-8HFF].

387. Press Release of the Security Council 8233rd Meeting, *supra* note 372.

388. *Id.*

389. *Id.*

390. *Id.*

391. For reactions of Middle Eastern countries, see *Arab World reacts to US-led airstrikes in Syria*, ANADOLU POST (Apr. 14, 2018), <https://aa.com.tr/en/middle-east/arab-world-reacts-to-us-led-airstrikes-in-syria/1118523> [https://perma.cc/A48G-492V]. For reactions of the European Union, Germany, Canada, and Israel, see *Syria latest: World Leaders React over US military action over Douma atrocity*, EVENING STANDARD (Apr. 15, 2018), <https://www.standard.co.uk/news/world/world-leaders-react-over-us-led-military-action-on-syria-a3814086.html> (on file with the *Columbia Human Rights Law Review*). For reactions of Poland, Sweden and the Netherlands, see Press Release of the Security Council 8233rd Meeting, *supra* note 372. For NATO reaction, see *Syria air strikes: US and allies attack 'chemical weapons sites'*, BBC (Apr. 14, 2018), <http://www.bbc.com/news/world-middle-east-43762251> [https://perma.cc/FXW5-LMYF]. For Spain's reaction, see

E. Self-Defense as an Alternative Justification?

Could the United States, United Kingdom, or France have alternatively drawn on a self-defense rationale to justify their strikes, based on the threat posed by chemical weapons to them directly? The chemical weapons attacks were conducted by Assad's regime in Syria, targeting Syrians in rebel-held areas. They were not targeted at a neighboring State or U.S. partner such as Turkey, Jordan, or Iraq.

In justifying the April 2018 strike, the United States, United Kingdom and France noted the danger posed to collective security by the normalization of chemical weapons use.³⁹² The United Kingdom drew a link with the nerve agent attack in its territory against Russian agent Sergei Skripal. Prime Minister May stated that "we cannot allow the use of chemical weapons to become normalized—either within Syria, on the streets of the United Kingdom, or elsewhere."³⁹³

Similarly, in justifying its April 2017 strike, the United States, through Secretary of State Tillerson, raised the possibility of chemical weapons falling into the hands of non-State actors such as ISIL and thus potentially posing a direct terrorist threat to the United States. Tillerson stated that chemical weapons could fall into the hands of those who may bring them "to our shores to harm American citizens."³⁹⁴ In both 2017 and 2018, President Trump cited the United States' "vital

Jamie Grierson, *US locked and loaded if chemical weapons used again – as it happened*, GUARDIAN (Apr. 15, 2018), <https://www.theguardian.com/world/live/2018/apr/14/syria-donald-trump-announcement-chemical-attack-live?page=with%3Ablock-5ad1c76be4b0e47a8e806ef8> [<https://perma.cc/R9FN-BKMG>]. For Australia's reaction, see Michael Koziol, *Australia 'fully supports' air strikes against Syria but was not involved*, SYDNEY MORNING HERALD (Apr. 14, 2018), <https://www.smh.com.au/politics/federal/australia-fully-supports-air-strikes-against-syria-but-was-not-involved-20180414-p4z9n5.html> (on file with the *Columbia Human Rights Law Review*).

392. President Macron said the use of chemical weapons posed "an immediate danger to the Syrian people and to our collective security." Prime Minister May said the strikes were to protect innocent people in Syria, but also because "we cannot allow the erosion of the international norm that prevents the use of these weapons" and "while this action is specifically about deterring the Syrian regime, it will also send a clear signal to anyone else who believes they can use chemical weapons with impunity – within Syria, in the UK or anywhere else in our world." President Trump stated that establishing a deterrent against the production, spread and use of chemical weapons was "a vital national security interest of the United States." May, *supra* note 371; Elysée, *supra* note 371; *Full Transcript*, *supra* note 371.

393. May, *supra* note 371.

394. Press Briefing by Secretary of State Rex Tillerson and National Security Advisor General H.R. McMaster, *supra* note 352.

national security interest[s]” in establishing a deterrent against chemical weapons use.³⁹⁵

In 2017, Trump also noted the impact of refugee flows generated by the conflict inside Syria on European partners, saying that this could threaten U.S. allies and destabilize the region.³⁹⁶ Thus, the United States, United Kingdom, and France referred not only to the internal conflict within Syria, but also its external impacts on other states through contributing to the normalization of chemical weapons use, refugee flows, and destabilization of the region.

The interventions in Iraq and Syria in 2017 and 2018 provide further examples of State practice in support of the idea that a highly targeted and limited intervention to address humanitarian suffering—a non-military situation—may be permissible in the most extreme circumstances. They are also examples of the mix of rationales a country may use in justifying the use of force: humanitarian suffering, chemical weapons use, refugee flows, the destabilizing impact of the conflict, security interests in preventing the proliferation, and possible use by non-State actors of chemical weapons. The rationales cited focus both on the internal situation of humanitarian suffering, chemical weapons use and *jus in bello* violations, as well as the external impacts of the conflicts on other States in terms of refugee flows, region destabilization, heightened risk of terrorist attacks on other States, and chemical weapons proliferation.

VI. NECESSITY

A. Necessity and Non-Military Threats

The Independent International Commission concluded that NATO’s campaign in Kosovo was “illegal, yet legitimate.”³⁹⁷ Even if the intervention violated international law on the use of force, could it still be excused under the doctrine of necessity?

It is possible that an action that breaches the prohibition on the use of force could still be excused under the laws of State Responsibility. These rules stem from customary international law and are codified in the International Law Commission’s Articles on

395. President Trump Makes Statement on Syria, *supra* note 347 (“It is in this vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons.”); *Full Transcript*, *supra* note 371.

396. President Trump Makes Statement on Syria, *supra* note 347; Lederman, *supra* note 354.

397. See Section III.A.1.

Responsibility of States for International Wrongful Acts (ILC Articles).³⁹⁸ ILC Articles 20 to 26 list the circumstances under which the wrongfulness of an act under international law may be excused.³⁹⁹ These circumstances include necessity, self-defense, distress, and force majeure. These circumstances do not constitute an exception to every State's obligation to comply with international law, but rather an excused violation.⁴⁰⁰ This means the State using force must prove the existence of the circumstance precluding wrongfulness.⁴⁰¹ Therefore, the ILC Articles constitute both an additional layer of analysis and a possible safety net that may help justify the legality of military action directed to a non-military threat, even where an action breaches the prohibition of the use of force.

The most relevant circumstance for the purposes of this Article is "necessity," which is different from the principle of necessity as a parameter of the right to resort to force in self-defense. Necessity is an excuse—not a right⁴⁰²—for breaching a State's international obligation when necessary to protect an "essential interest" of that State against a "grave and imminent peril" and when there are no other means to stop that peril.⁴⁰³ ILC Article 25 defines necessity as follows:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

398. Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 2 Y.B. Int'l L. Comm'n 46–104, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter Commentary ILC Articles].

399. *Id.* at 72–84.

400. ILA, *supra* note 38, at 665.

401. *Id.*

402. Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. J. 1, 6 (2000) (citing *Addendum to the Eighth Report on State Responsibility by Mr. Roberto Ago*, U.N. Doc. A/CN.4/318/ADD.5-7, reprinted in 1980 Y.B. Int'l L. Comm'n vol. II, pt. 1, 13, 16, para. 7 [hereinafter Ago Report]).

403. See generally Commentary ILC Articles, *supra* note 398, at 83 (explaining that "[n]ecessity may only be invoked to safeguard an essential interest from a grave and imminent peril").

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- a) the international obligation in question excludes the possibility of invoking necessity; or
- b) the State has contributed to the situation of necessity.

Determining whether a State's interest is "essential" depends on the circumstances of the case and the "particular interests of the State and its people, as well as of the international community."⁴⁰⁴ In turn, the essential interests of the victim State must be balanced against any essential interests of the territorial State that will suffer the consequences of the breach.⁴⁰⁵

The "grave and imminent peril" must be "objectively established and not merely apprehended" as possible by the intervening State.⁴⁰⁶ The intervening State's course of action taken must be the "only way" available to safeguard the "essential interest."⁴⁰⁷ This means a State must explore all alternative lawful avenues before its breach of an international law obligation will be excused on this basis, even if the alternative avenues are more costly or less convenient.⁴⁰⁸ Lastly, the intervening State must not have contributed to the state of necessity. Compliance with these requirements must be assessed on a case-by-case basis, but all of them would seem to accommodate the idea of using force against a non-military threat.

In relation to the Kosovo intervention, Belgium drew on the doctrine of necessity in justifying its actions before the ICJ.⁴⁰⁹ Belgium argued that the humanitarian catastrophe in Kosovo, as acknowledged in Security Council resolutions, constituted a "grave and imminent peril."⁴¹⁰ Its action was necessary to safeguard essential interests, such as human rights, including the right to life and freedom from torture, and the collective security of the entire region.⁴¹¹ Belgium also referred

404. *Id.* at 83.

405. G.A. Res. 56/83 (Dec. 12, 2001).

406. Commentary ILC Articles, *supra* note 398, at 83.

407. *Id.*

408. *Id.* See Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.) Judgement, 1997 I.C.J. Rep. 7 (Sept. 25).

409. JENS DAVID OHLIN & LARRY MAY, NECESSITY IN INTERNATIONAL LAW 49–50 (2016).

410. *Id.*

411. *Id.* The ICJ did not resolve the case on the merits as it was dismissed on jurisdictional grounds. *Id.* at 50

to Security Council Resolutions recognizing that the Federal Republic of Yugoslavia's behavior threatened international peace and security.⁴¹²

Could "necessity" be used to respond to an environmental catastrophe? The *Gabčíkovo-Nagymaros Project* case, in which the ICJ recognized that safeguarding the ecological balance of a nation's resources constituted a State's "essential interest," would seem to point in that direction.⁴¹³ The 1967 *Torrey Canyon* incident also provides an example of "necessity" providing a possible justification for the use of force in response to an environmental threat.⁴¹⁴ In that incident, a Liberian oil tanker ran aground close to the coast of Cornwall outside British territorial waters and began to spill large amounts of oil that quickly approached the British coastline.⁴¹⁵ After exhausting all alternative avenues, the British government decided to bomb the ship to burn the remaining oil and prevent an even bigger catastrophe.⁴¹⁶ No lives were lost.⁴¹⁷ The British Government did not invoke any legal justification for this action, and there was no negative response from the international community.⁴¹⁸ The situation this Article's analysis addresses slightly differs from the facts of the *Torrey Canyon* case as it imagines a situation where an oil spill occurred in the waters of another State, but that other State was reluctant to address the threat. Nevertheless, the case provides an instructive example.

B. Use of Force Excused by Necessity: Violation of a Peremptory Norm?

Still, there is one additional requirement that may constitute a hurdle to a justification of "necessity" for the use of force: Article 26

412. The situation in Kosovo was recognized as a threat to international peace and security in S.C. Res. 1174 (June 15, 1998) and S.C. Res. 1203 (Oct. 24, 1998).

413. Case Concerning the *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.) Judgement, 1997 I.C.J. Rep. 7, ¶ 52 (Sept. 25).

414. Vaughan, *supra* note 4.

415. *Id.*

416. *Id.*

417. *Id.*

418. Vaughan, *supra* note 4; see generally Commentary ILC Articles, *supra* note 398, at 83 ("[necessity] has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population").

of the ILC's Articles on State Responsibility provides that the Articles do not excuse a violation of a peremptory norm.⁴¹⁹

Article 2(4) of the U.N. Charter's prohibition of the use of force may well be a peremptory norm. The ICJ first characterized Article 2(4) as a *jus cogens* norm in its *Nicaragua* judgment.⁴²⁰ However, the authoritativeness of this characterization has been debated, given that *Nicaragua* merely discussed the *jus cogens* character of Article 2(4) "without any direct application of [the supposed] peremptory norm."⁴²¹ The current version of the ILC Articles does not list Article 2(4)'s prohibition of the use of force as an obligation precluding necessity.⁴²² Neither does the current version address the relationship between "necessity" and Article 2(4), stating simply that the peremptory character of a primary obligation must be determined by the primary obligations themselves.⁴²³ "Whether measures of forcible humanitarian intervention" or "military necessity" may be lawful under international law is not covered by the excuse of necessity set out in Article 25, according to the Commentary to the Articles.⁴²⁴

In contrast, the 1980 Draft ILC Articles did include the prohibition on the use of force as an obligation precluding a plea of necessity.⁴²⁵ However, the 1980 Draft ILC Articles did not seem to consider the whole extent of Article 2(4) of the U.N. Charter as *jus cogens*. The 1980 Draft drew a clear distinction between "acts of aggression, conquest and forcible annexation" and other less forcible acts that, "although infringing the territorial sovereignty of a State, need not necessarily be considered as act[s] of aggression, or not, in any case, as breach[es] of an international obligation of *jus cogens*."⁴²⁶ The

419. The Vienna Convention on the Law of Treaties, *supra* note 23, art. 53 defines a peremptory norm of international law (or *jus cogens*) as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

420. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶¶ 188–90 (June 27).

421. DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGN MODERN TREATY INTERPRETATION 310 (2012) (citing Gordon A. Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT'L L. 93, 94 (1987)).

422. See Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, art. 25 (2001).

423. Commentary ILC Articles, *supra* note 398, at 174.

424. *Id.*

425. Roman Boed, *supra* note 402, at 6 (citing Ago Report, *supra* note 402).

426. *Id.* at 33 (alterations in original). Namely, the 1980 Commentary to the ILC Articles referred to:

latter actions included the elimination of “a source of troubles which threatened to occur or to spread across the frontier.”⁴²⁷

In other words, according to the 1980 Draft ILC Articles, less forcible acts did violate Article 2(4) of the U.N. Charter, but they could be excused by necessity because, due to their low intensity, they were not considered to breach a peremptory norm. Hence, under the 1980 Draft, minor uses of force against any form of threat were allowed insofar as all the remaining requirements of the plea of necessity were fulfilled.

This interpretation appears to have been strongly inspired by the circumstances surrounding the *Torrey Canyon* incident, which involved only a small amount of force.⁴²⁸ The Commentary to the 1980 Draft ILC Articles stated that “[whatever] other possible justifications there may have been for the British Government’s action, it seems to the Commission that, even if the shipowner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government would have had to be recognized as internationally lawful because of a state of necessity.”⁴²⁹ In making this statement, the ILC expressly recognized the existence of a doctrine of environmental necessity.⁴³⁰ However, none of these considerations were incorporated into the final version of the ILC Articles.

Most sources indicate that nowadays Article 2(4) of the U.N. Charter constitutes *jus cogens*.⁴³¹ But there are reasons to consider that not the whole spectrum of the prohibition of the use of force is a peremptory norm. The rationale of *Torrey Canyon* is still valid today and necessity may justify low-level uses of force in order to prevent a major catastrophe.⁴³² Also, there is no reason to think that the change

incursions into foreign territory to forestall harmful operations by an armed group which was preparing to attack the territory of the State, or [those] in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their base in that foreign territory, or [actions] to protect the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of the State, or to eliminate or neutralize a source of troubles which threatened to occur or to spread across the frontier.

Id. at 33 n.151 (alterations in original).

427. Ago Report, *supra* note 402, ¶ 56.

428. See generally Commentary ILC Articles, *supra* note 398, at 82.

429. Ago Report, *supra* note 402, at 51.

430. Boed, *supra* note 402, at 11.

431. Randelzhofer & Dörr, *supra* note 15, at 231.

432. See Douglas Guilfoyle, *Humanitarian Intervention: Neither Right, nor Responsibility, but Necessity?*, EJIL TALK! (May 5, 2009), <http://www.ejiltalk.org/>

in the text of the ILC Articles was meant as a rejection of *Torrey Canyon*. It simply means the portions of the text relating to environmental necessity and low-level uses of force were not relevant to the final formulation of Article 25, which did not list the prohibition of the use of force as an obligation precluding necessity and so did not address the issue. Hence, necessity may provide a legal basis to justify some small-scale operations that serve to effectively counter a non-military threat.

CONCLUSION

A State seeking to use force to respond to a non-military threat, such as an unprecedented refugee flow resulting from a situation of massive humanitarian suffering and threatening the stability of surrounding States or an environmental catastrophe, can draw on several justifications. Self-defense is the clearest. Non-military threats can be characterized as having the scale and effects of an “armed attack” if they create physical consequences such as loss of life or extensive property destruction. The “necessity” for acting should be established if the territorial State is “unwilling or unable” to meet international obligations to prevent terrorism or environmental harm, or to protect human rights.

A justification could also draw on evolving State practice in support of humanitarian intervention, such as the NATO intervention in Kosovo, and acceptance by States of the Responsibility to Protect doctrine, indicating recognition by States that the most serious human rights violations should be addressed.

The justification for using force could also refer to violations of *jus cogens* norms owed *erga omnes*, such as the prohibition on genocide and torture, and positive obligations to uphold such norms. This is reinforced by the fact that these most serious crimes are universally condemned and defined for punishment. It would also draw on the doctrines of necessity that recognize that in exceptional circumstances, international law may excuse what would otherwise be illegal—in this case, the use of force.

When taken together these ideas and doctrines reinforce each other. These rationales have been used in examples of State practice, most notably India’s intervention into Pakistan, Tanzania’s intervention in Uganda, and the response to Syria’s chemical weapons

use in April 2017. In these cases, States used force to respond to threats that were non-military in nature where there was no other way of addressing them.

Any exercise of force to respond to situations involving threats that are not armed or military in nature would only occur in exceptional circumstances and should be highly constrained in its nature, recognizing that the norm in Article 2(4) against the use of force is strong and that an expanded justification for the use of force is highly susceptible to abuse. It should also be done with awareness that it may create a precedent for others to use the same justification.