

MODERN SELF-DEFENSE IN PRACTICE: TWO CASE SCENARIOS

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INTRODUCTION

Our article “Modern Self-Defense: The Use of Force Against Non-Military Threats”¹ explores the legal bases States could draw on in using military force to respond to significant threats or harms that are not military in nature but that may be optimally tackled with some form of military action where the United Nations Security Council (Security Council) has failed to act.

To illustrate how the arguments in our article could apply in practice, we consider two hypothetical scenarios in this companion piece. First, we imagine a repressive regime engaged in killing, torturing, and using chemical weapons on civilians, causing massive refugee flows into a neighboring State, terrorist attacks on the neighboring State’s territory, and destabilization of the region. Second, we envisage a victim State faced with massive environmental harm caused by an enormous oil spill from a sinking ship off its coast, where the ship is flagged to a different State. In both cases, the territorial State and the Security Council are refusing to act, despite repeated efforts by the victim State. All peaceful measures have been

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1. José Luis Aragón Cardiel, Amanda Davis & Lauranne Macherel, *Modern Self-Defense: The Use of Force Against Non-Military Threats*, 49.3 COLUM. HUM. RTS. L. REV. 99 (2018).

exhausted and the only way to address the threats is to use force. What legal bases could the victim States draw on to justify this?

I. LEGAL ARGUMENTS JUSTIFYING THE USE OF FORCE

Victim States may draw upon three possible legal arguments to justify the use of force against non-military threats: self-defense, humanitarian intervention, and necessity. We explore each in turn below.

A. Self-Defense

Self-defense, set out in Article 51 of the U.N. Charter, is the firmest legal basis on which to justify a use of force. How could self-defense apply to the non-military threats envisaged in these two scenarios?

1. Armed Attack

Article 51 allows use of force against an *armed* attack,² which, in its plain meaning, would seem to require the use of traditional military weapons, such as bombs or artillery. In the *Nicaragua* judgment though, the International Court of Justice (I.C.J.) focused on the *gravity* of harm as the distinguishing feature of an armed attack.³ Such an interpretation suggests it is possible to regard the term “armed attack” not as having self-standing meaning, but simply as setting a threshold of intensity.⁴

Moreover, the I.C.J. has deemed attacks with non-traditional weapons to be “armed attacks” when they have reached a significant enough threshold of intensity, stating that Article 51 applies to “any use of force, regardless of the weapons employed.”⁵ As an example of

2. U.N. Charter art. 51, para. 1 (“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.”).

3. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 191 (June 27) (It is “necessary to distinguish the most grave forms of the use of force [those constituting an armed attack] from other less grave forms.”).

4. AVRA CONSTANTINO, *THE RIGHT OF SELF-DEFENCE UNDER CUSTOMARY INTERNATIONAL LAW AND ARTICLE 51 OF THE UNITED NATIONS CHARTER* 64 (2000).

5. *Nicar. v. U. S.*, 1986 I.C.J. at 176; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 39 (July 8).

an attack with a non-traditional weapon being characterized as an “armed attack,” the Security Council affirmed the United States’ right to respond in self-defense following the 9/11 attacks, where the weapons used to cause death and destruction were hijacked airplanes, rather than traditional “weapons.”⁶

What constitutes an “armed attack” has been also discussed in the context of cyber-attacks, which can cause massive physical damage without using kinetic weapons. The Tallinn Manual, an expert study of how international law applies to cyber warfare, has stated that a cyber operation causing *serious* deaths, injury, damage, or destruction could be an armed attack.⁷ Thus, interfering with computers that control a dam, thereby causing massive floods and civilian casualties, could constitute an example of an armed attack according to the Tallinn Manual.⁸ Such a scenario supports the idea that it is possible to regard the term “armed attack” not as having self-standing meaning, but simply as setting a threshold of intensity.⁹

Notably, Article 51 permits a State to use force in self-defense “if an armed attack occurs.”¹⁰ The focus of this provision is on repelling the armed attack itself, rather than its perpetrator.¹¹ We argue the attack’s source does not change the fact that the State must be able to stop the attack itself from causing harm. The focus should be on addressing the harm caused to the victim State rather than on the particular perpetrator.¹²

Therefore, we propose that a non-military threat could meet the threshold of an “armed attack” where it is on the same scale as, and has destructive physical effects equivalent to, those of a traditional kinetic “armed attack.”¹³ The non-military threat must be

6. S.C. Res. 1373, ¶ 4 (Sept. 28, 2001); S.C. Res. 1368, ¶ 3 (Sept. 12, 2001).

7. Int’l Grp. of Experts at the Invitation of the NATO Coop. Cyber Def. Ctr. of Excellence, Tallinn Manual on the International Law Applicable to Cyber Warfare 54–55 (Michael N. Schmitt ed., 2013).

8. Karl Zemanek, *Armed Attack*, MAX PLANCK ENCYC. PUB. INT’L L. ¶ 20 (2010), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241> [<https://perma.cc/Q3F9-ZSDW>].

9. CONSTANTINOU, *supra* note 4, at 64.

10. U.N. Charter art. 51.

11. Albrecht Randelzhofer & Georg Nolte, *Article 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1400, 1426 (Bruno Simma et al. eds., 2012).

12. *Id.* at 1426; Int’l Law Ass’n, Report on Aggression and the Use of Force 648, 661, 650 (2014) [hereinafter ILA]; Aragón Cardiel et al., *supra* note 1.

13. Aragón Cardiel et al., *supra* note 1.

physical in nature (i.e., it must have the effect of producing a loss of lives and/or extensive destruction of property).¹⁴

2. Necessity: Territorial State Unwilling or Unable to Address the Threat

Any use of force in self-defense must also be justified by “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹⁵

We argue that to establish necessity, the territorial State from which the non-military threat emanates 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.

The “unwilling or unable” test is an extrapolation from neutrality law, which imposes a due diligence obligation on neutral States not to allow belligerent forces to use their territory.¹⁶ Similarly, in more general terms, the *Corfu Channel* case sets out an international law obligation not to cause harm to other States.¹⁷

The “unwilling or unable” doctrine also has detractors and is not universally accepted.¹⁸ However, States have used it in justifying

14. Zemanek, *supra* note 8, ¶¶ 7, 20; see also ILA, *supra* note 12, at 671–72 (arguing that the environment could be used as a tool for direct causation of significant damage on a scale equivalent to what is commonly accepted as use of force and that it should qualify as such).

15. The *Caroline* incident concerned a British attack on an American ship at Niagara Falls on the grounds that the ship was supplying rebel leaders in the Canadian rebellion of 1837. The Secretary of State of the United States, 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-defense, must be limited by that necessity, and kept clearly within it.” 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).

16. Daniel Bethlehem, *Self-defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 769, 773 (2012); Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VA. J. INT’L LAW 483 (2012).

17. *Corfu Channel (U.K. v. Alb.)*, Judgement, 1949 I.C.J. Rep. 4, 22 (Apr. 9).

18. See Kevin J. Heller, *Ashley Deeks’ Problematic Defense of the “Unwilling or Unable” Test*, OPINIO JURIS (Dec. 15, 2011, 8:11 PM), <http://opinio>

the use of force against non-State actors operating from the territory of another State that is “unwilling or unable” to stop the non-State actors from attacking other States.¹⁹ Most recently, while intervening in Syria in the collective self-defense of Iraq, members of the international coalition argued Syria was “unwilling or unable” to address the threat posed by the Islamic State of Iraq and the Levant (ISIL) to Iraq.²⁰

We argue the “unwilling or unable” doctrine could provide a justification to set aside the sovereignty of the territorial State if that State has a specific obligation under international law to eliminate the threat which is harming the victim State.²¹ Examples of such international law obligations include prohibitions on harboring terrorists,²² torture,²³ as well as obligations to stop marine pollution.²⁴

juris.org/2011/12/15/ashley-deeks-failure-to-defend-the-unwilling-or-unable-test/ [https://perma.cc/HB22-9S9G]; Dawood I. Ahmed, *Defending Weak States Against the “Unwilling or Unable” Doctrine of Self-Defense*, 9 J. INT’L L. & INT’L REL. 1, 5 (2013).

19. Examples of the use of low-level force to respond to attacks by non-State actors which have met with acquiescence include Russia’s use of force against Chechen rebels in Georgia in 2002, Turkey’s use of force against the Kurds from 1999, and U.S. airstrikes against Al Qaeda targets in Afghanistan in 1998 in retaliation for the bombings of U.S. embassies in Kenya and Tanzania. See Elena Chachko & Ashley Deeks, *Who is on Board with “Unwilling or Unable”?*, LAWFARE (Oct. 10, 2016 1:55 PM), <https://www.lawfareblog.com/who-board-unwilling-or-unable> [https://perma.cc/SY2Z-KJLT].

20. 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. Chachko & Deeks, *supra* note 19. 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. *Id.* During domestic parliamentary approval processes, governments of Germany, the United Kingdom, and the Netherlands also argued that Syria was “unwilling or unable” to stop ISIL’s attacks. *Id.* The United States emphasized that the strikes were targeted against a terrorist group (ISIL) and not the Syrian government. *Id.*

21. Aragón Cardiel et al., *supra* note 1.

22. Security Council Resolutions 1368 and 1373 impose an *erga omnes* prohibition against harboring terrorists. See S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 1368 (Sept. 12, 2001); Chainoglou Kalliopi, *Reconceptualising the Law of Self-Defence*, 18 KING’S J.L. 61, 64 (2007).

23. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture]. Art. 2 of the Convention Against Torture provides that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction and no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability

Violating such obligations does not in itself provide a legal basis for the use of force, but we argue they could—in combination with the other factors we have outlined—contribute to a justification for the use of force in response to the most extreme situations.

3. Proportionality and Immediacy

The use of force would also be subject to considerations of proportionality and immediacy.²⁵ Proportionality requires that the use of force be limited to targeting only the threat, and not the government, property, or citizens of the territorial State.

B. Humanitarian Intervention

Humanitarian intervention is a better “fit” than self-defense in justifying a use of force to address a situation of humanitarian suffering. It is not an independent basis for the use of force,²⁶ but

or any other public emergency, may be invoked as a justification of torture. *Id.* at 114. The Convention has 163 parties. *Chapter IV, Human Rights, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en [<https://perma.cc/JH53-X7A5>]. The prohibition on torture is also a *jus cogens* norm. SEAN MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 97 (2012).

24. Article 194 of the U.N. Convention on the Law of the Sea obliges parties to “take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.” United Nations Convention on the Law of the Sea art. 194, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

25. The three requirements of self-defense were set out in the *Caroline* case: necessity, immediacy, and proportionality. Proportionality requires that any use of force must be “justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.” Fitzgerald, *supra* note 15, at 478. We do not explore the parameters of immediacy and proportionality in detail in our article as there is no reason to believe they will operate differently depending on whether a threat is military or non-military in nature.

26. The use of force is prohibited in Article 2(4) of the U.N. Charter. U.N. Charter art. 2, para. 4. The prohibition on the use of force is also a *jus cogens* norm. The three exceptions to the use of force are (1) the use of force in self-defense, (2) with Security Council authorization, or (3) with the consent of the territorial state. U.N. Charter art. 51; MURPHY, *supra* note 23, at 492. For discussion of *jus cogens* norms, see Rep. of the Study Grp. of the Int’l Law Comm’n Finalised by Martii Koskeniemi, *Fragmentation of International Law:*

there are examples of State practice such as the North Atlantic Treaty Organization's (NATO) 1999 Kosovo intervention, and air strikes conducted by the United States, United Kingdom, and France in 2017 and 2018, suggesting it could be an emerging norm. We will explore these in the first case scenario.

C. Necessity Exception

The victim State could also draw on the exception of “necessity” contained in the International Law Commission’s Draft Articles on State Responsibility. Article 25 of the Draft Articles provides that a State’s breach of its legal obligations may be excused if this is the “only way” to safeguard “essential interests” against a “grave and imminent peril.”²⁷ The prohibition on the use of force is generally characterized as a peremptory norm, violation of which cannot be excused by necessity.²⁸ We argue in our Article that the 1980 Commentary to the Draft Articles supports the idea that the *jus cogens* character of the prohibition on the use of force may not extend to uses of force that are small in scale.²⁹ This will be discussed in our second scenario.

The prohibition on the use of force set out in Article 2(4) of the U.N. Charter has underpinned the post-World War II security architecture. The thought that States may seek to use any expanded interpretation to advance their own political objectives is concerning. Therefore, in these two scenarios, we are imagining the most egregious circumstances under which States seek to use force.

We will now explore how these doctrines could be applied to two hypothetical scenarios.

Difficulties Arising from the Diversification and Expansion of International Law, ¶ 374, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

27. *Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, [2001] Y.B. Int’l L. Comm’n 80, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter Commentary ILC Articles] (commenting on Article 25).

28. *Id.*, at 84 (commenting on Article 26). The current version of the ILC Articles does not list the prohibition of the use of force as an obligation precluding necessity and does not address this issue. It states simply that the peremptory character of a primary obligation must be determined by the primary obligations themselves. *Id.*

29. Aragón Cardiel et al., *supra* note 1; Special Rapporteur on State Responsibility, *Addendum to the Eighth Report on State Responsibility*, ¶ 15, U.N. Doc. A/CN.4/318/ADD.5-7 (June 19, 1980) [hereinafter Ago Report].

II. FIRST SCENARIO: HUMANITARIAN CRISIS IN A NEIGHBORING STATE

A. Case Scenario

A military coup has overthrown a democratically elected government in State A (the “territorial State”). Seeking to consolidate its grip on power and deter any opposition, the new military regime is engaged in systematic torture and human rights violations against political opponents and journalists on a massive scale. It is killing civilians who are members of an ethnic minority concentrated in the western part of the country, who were strong supporters of the former President (who was a member of their ethnic group). In this process of intimidation, the military regime is using its stocks of chemical weapons, which were meant to have been destroyed according to its obligations as a state party to the *Chemical Weapons Convention*. These actions have caused ten million refugees to flow into “victim” State B, which borders State A.

Terrorist groups have seized upon the instability created by the repression and taken control of the northwestern part of State A’s territory. Operating from State A’s territory, the terrorists have conducted small-scale attacks on towns in State B, seeking to spread fear amongst a religious community which they believe opposes their objectives.

Victim State B is extremely concerned by this instability on its borders. The two States are located in an ethnically heterogeneous region with ethnic groups spread across a number of States. In the past, conflict in one State has triggered uprisings by the same ethnic groups in other States. State B is also concerned about the possibility of chemical weapons fumes drifting over the border from the west of State A into its territory.

Victim State B has called upon the regime in State A to cease its actions and its President has made numerous visits to State A to try to reason with the military regime. It has imposed economic sanctions on State A. The victim State has approached the Security Council multiple times, but Security Council action has been blocked by a persistent veto by one of the Council’s five permanent members, which has a strong relationship with the military regime.

Members of State A and B’s regional organization support State B. They believe a regional intervention is required to restore the legitimate President of State A, who has sought refuge in another

regional State. Every day, thousands of people are dying and hundreds of thousands of refugees are crossing into State B. Given the above, on what basis could State B, operating with a coalition of regional states, justify an intervention? We explore justifications of self-defense, humanitarian intervention, and necessity.

B. Self-Defense: Can the Impact of a Humanitarian Crisis on a Neighboring State Rise to the Level of an “Armed Attack”?

As examples of State practice on which the victim State can draw, India and Tanzania justified interventions in 1971 and 1979 into Pakistan and Uganda, respectively, on the basis of self-defense. India’s actions in Pakistan were in response to the actions of the West Pakistan army, which had “unleash[ed] a reign of terror,” killing one million people, with the objective of exterminating or driving out of the country the Hindu East Pakistani population.³⁰ Tanzania’s actions in Uganda were in response to repression by Idi Amin’s regime, which had killed around 300,000 people and tortured many of its citizens.³¹ India and Tanzania were able to point to actual (small-scale) cross-border attacks from Pakistan and Uganda respectively as “armed attacks.”³² However, their interventions went on to defeat the repressive regimes, indicating some State practice in support of the idea that a State may use force in self-defense to address situations of massive humanitarian suffering.³³ Both interventions were met with limited international censure.³⁴

30. FRANCIS F. ABIEW, *THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION* 113–14 (1999); NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 95–97 (1985); Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 *AM. J. INT’L L.* 275, 276 (1973), Frederik Harhoff, *Unauthorized Humanitarian Interventions—Armed Violence in the Name of Humanity*, 70 *NORDIC J. INT’L L.* 65, 85–86 (2001).

31. ABIEW, *supra* note 30, at 121 n.172; RONZITTI, *supra* note 30, at 102; ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 123 (1993).

32. Pakistan had violently invaded India’s border villages. ABIEW, *supra* note 30, at 113. Meanwhile, Uganda occupied the Kagera salient, a small part of Tanzania’s border territory, for fifteen days in October 1978, carrying out “15 days of plunder.” *Id.* at 121. The Ugandan troops withdrew but small-scale border clashes and “harassment of the Tanzanians along the border” continued. *Id.*

33. *Id.* at 114, 122.

34. India’s actions were not condemned and the Security Council did not pass a resolution. A U.N. General Assembly resolution called for an end to the violence and most countries simply called for respect for East Pakistan’s

1. Armed Attack

Self-defense focuses on the threat posed to the intervening State, which is permitted to use force when it is faced with an “armed attack.” Can the impacts of the humanitarian crisis in State A on victim State B, such as refugee flows, the risk of triggering wider regional instability, the use of chemical weapons or terrorist attacks, constitute “scale and effects” which are equivalent to those of a traditional kinetic “armed attack”? We argue that to establish this, non-military threats must be physical in nature, producing a loss of life and/or extensive destruction of property.

(a) Refugee Flows and Potential to Destabilize the Region

Refugee flows are physical in nature: people have a physical presence and the flows of people away from the territorial State A are a tangible, physical consequence of the instability there. Refugees require land, food, water, and other physical resources to accommodate them. These might, if required from the territorial State on a large enough scale, be seen as equivalent to the destruction of property.

For example, Kenya’s Dadaab refugee camp, which houses 240,000 refugees over fifty square kilometers, is so large it has become Kenya’s fourth largest human settlement (although Kenya is receiving support from the UN Refugee Agency, commonly known as

sovereignty. *See* G.A. Res. 2790 (XXVI) (Dec. 6, 1971). Cold War politics influenced reactions, with the Soviet Union and Eastern Bloc countries (Czechoslovakia, Poland, Hungary, Bulgaria, and Mongolia) supporting India and highlighting the security risk posed to India by the refugees. RONZITTI, *supra* note 30, at 96–97. Bhutan also supported India’s intervention. *Id.* The United States called for a political solution and warned that intervening in the affairs of another State created a dangerous precedent. *Id.* China and Albania were the only States that condemned the intervention. *Id.*

Tanzania’s intervention garnered little international reaction, suggesting acquiescence. ABIEW, *supra* note 30, at 123. The international community largely expressed relief at Amin’s removal and quickly recognized the new government. *Id.* Only Sudan and Nigeria condemned it. AREND & BECK, *supra* note 31, at 124. The intervention received strong support from the United Kingdom, Zambia, Ethiopia, Angola, Botswana, Gambia, and Mozambique. Rwanda, Guinea, Malawi, Canada, and Australia quickly recognized the new regime. ABIEW, *supra* note 30, at 123.

the UNHCR).³⁵ Massive refugee flows can impose a significant economic burden, for example, ten million East-Pakistani refugees imposed an economic burden on India of almost \$700 million in 1971.³⁶

Refugee flows can also be characterized as having security dimensions and therefore resembling an “armed attack.” India described the 1971 refugee flows arriving into its territory, as a result of repression in Pakistan, as an “act of aggression” by Pakistan,³⁷ pointing to the rising intercommunal tensions within India and potentially destabilizing impacts of refugee flows.³⁸ Similarly, after the chemical weapons attack on Khan Sheikhoun, Syria in April 2017, the United States justified airstrikes as a response to the Syrian regime’s actions, which had the potential to destabilize the region, threaten international security, and displace large numbers of refugees.³⁹

35. The population of Dadaab is 239,545, a rapid decline from five years ago when it was 426,000, according to local media. Reuters, *Kenya to Slash Dadaab Population by Half by End of 2016*, AFR. NEWS (June 26, 2016), <http://www.africanews.com/2016/06/26/kenya-to-slash-dadaab-population-by-half-by-end-of-2016/> [https://perma.cc/TRG4-U27A].

36. RONZITTI, *supra* note 30, at 97; ABIEW, *supra* note 30, at 114.

37. RONZITTI, *supra* note 30, at 96; *see also* Brian K. McCalmon, *States, Refugees, and Self-Defense*, 10 GEO. IMMIGR. L.J. 215, 228 (1996) (noting the effect of a refugee flow on India’s decision to invade).

38. ABIEW, *supra* note 30, at 114; Franck & Rodley, *supra* note 30, at 276; Harhoff, *supra* note 30, at 85.

39. President Trump said: “The refugee crisis continues to deepen and the region continues to destabilize, threatening the United States and its allies.” *See 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, *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/ZHA4-MZMD]. Further elaboration was provided in a press guidance. 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/P49C-VMSA]. The Syrian conflict has generated around six million refugees, with over half a million entering Europe. *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/6PAT-V2WW].

The Security Council has also recognized that repression and instability within a State causing massive refugee flows can have security impacts on regional States and threaten regional and international security. In 1991, the Security Council described refugee flows from northern Iraq in 1991 (two million people) as a “threat to international peace and security.”⁴⁰ The Council later said the same thing about the refugee flows from Haiti in 1994.⁴¹

Truly massive refugee flows may also alter ethnic balances and destabilize a region, threatening to trigger broader regional conflict. For example, 230,000 Kosovar Albanians fled Kosovo in 1999.⁴² One justification (amongst others) that the United States and United Kingdom gave for intervening was the potential for instability in Kosovo to trigger broader regional conflict in the Balkans.⁴³ While

40. In the case of Iraq, the Security Council stated in their preamble that the body was “[g]ravely 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.” S.C. Res. 688, ¶ 3 (Apr. 5, 1991).

41. In the case of Haiti, the Security Council authorized a (collective) use of force in response. S.C. Res. 841 (June 16, 1993) (stating concern for regional security in the preamble).

42. S.C. Res. 1199 (Sept. 23, 1998).

43. 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.

William J. Clinton, President of the United States, *We Act to Prevent a Wider War* (Mar. 24, 1999), in *CONFLICT IN THE BALKANS; In the President's Words*, N.Y. TIMES (Mar. 25, 1999), <https://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*). The United States also stated:

[W]ith 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 doesn't 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

the United States did not justify its use of force in Kosovo as self-defense,⁴⁴ it could have argued that the risk of the conflict “spilling over” into regional states was an imminent threat, thus justifying the use of force in anticipatory self-defense. Italy, on the other hand, did characterize the refugee flows from Kosovo as a “direct threat” to its security.⁴⁵

Drawing on these arguments, State B could characterize the refugee flows as having physical impacts on land and economic resources and potentially destabilizing security effects on the host country or wider region of a scale equivalent to a traditional kinetic “armed attack.”

To establish such an impact, several requirements would need to be met. First, the refugee flows would need to be extreme in nature (on the scale of the ten million received by India in 1971). Next, refugee flows would have to take up large amounts of land (for example, making the refugee settlement one of the top four cities in the territorial State). Finally, international assistance would have to not be forthcoming.

legitimate grounds to threaten and, if necessary, use military force.

Daily Press Briefing, James P. Rubin, U.S. Dep’t of State (Mar. 16, 1999), <https://1997-2001.state.gov/briefings/9903/990316db.html> [<https://perma.cc/ZAVT-Q78E>]. 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 its heart. Adam Roberts, *NATO’s ‘Humanitarian War’ over Kosovo*, 41 SURVIVAL 102, 106 (1999) (citing a U.K. Government note of October 1998 at 4). See Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 A.J.I.L. 628, 631 (1999).

44. The United States cited a list of factors justifying the intervention. This included the Federal Republic of Yugoslavia’s failure to comply with Security Council resolutions, widespread violations of international law, the use of excessive and indiscriminate force, human rights violations by Yugoslav security forces, and the threat posed to the region, NATO allies, and international observers. See LORI FISLER DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW, CASES AND MATERIALS* 1155 (2014). The Security Council resolutions the United States cited had demanded that parties cease hostilities and that security forces cease all action affecting the civilian population and were adopted by the Security Council acting under Chapter VII. *Id.*; MURPHY, *supra* note 23, at 512. However, none of these factors provided explicit or specific authorization for the use of force, or are in themselves recognized bases for using force.

45. Klinton 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. 15 (1999–2000); Roberts, *supra* note 43, at 104–12.

Alternately, and more likely, refugee flows could be considered along with other factors, such as chemical weapons or terrorist attacks, as contributing to an overall situation affecting State B. This overall situation could reach the scale and effects of an “armed attack.” These additional factors will be discussed below.

(b) Chemical Weapons

State B is concerned about chemical weapons fumes drifting across the border into its territory from the west of State A, where the military regime is concentrating its attacks. Chemical weapons fumes are physical in nature—they cause loss of life. They can also be seen as a “use of force”: as noted above, the I.C.J. has stated that Article 51 applies to “any use of force, regardless of the weapons employed.”⁴⁶ Thus the chemical weapon fumes can be seen as contributing to an overall situation reaching the scale and effects of an “armed attack” on State B.

State A is directing its chemical weapons attacks at domestic opponents and may not have intended for them to reach State B. Nevertheless, we argue the focus should be on addressing the source of the attack rather than its perpetrator. This is consistent with the focus of Article 51, which states simply “if an armed attack occurs.”⁴⁷

Have there been examples of chemical weapons fumes crossing borders in practice? Professor Ashley Deeks in 2013 noted the theoretical possibility of chemical weapons use in Syria drifting into Turkey and Jordan (while noting there have been no actual reports of chemical weapons use near Syria’s borders).⁴⁸

State B is also concerned that chemical weapons use by State A could impact it indirectly. The military regime in State A may transfer chemical weapons to rebel groups representing the dominant

46. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at ¶ 39; *see also* *Nicar. v. U.S.*, 1986 I.C.J. at 176. Ian Brownlie suggested in 1961 that bacteriological, biological, and chemical weapons were also encompassed by the term “armed” since they “are employed for the destruction of life and property.” Ian Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT’L L. 183, 255–66 (1961).

47. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”); Randelzhofer & Nolte, *supra* note 11, at 1426.

48. Ashley Deeks, *Chemical Weapons in Syria: Enough to Justify the Use of Force?*, LAWFARE (Apr. 26, 2013, 10:25 PM), <https://www.lawfareblog.com/chemical-weapons-syria-enough-justify-use-force> [<https://perma.cc/33LX-HKGT>].

ethnic group, which support the regime's repression of the minority ethnic group. Or the regime, which has very weak controls in place, could lose control of its stockpiles, causing chemical weapons to fall into the hands of the terrorists, who are strengthening their control over parts of State A's territory.⁴⁹ If this threat is "imminent," then State B could argue that its use of force is "anticipatory self-defense" against this threat.

States have cited such possibilities in practice. For example, in justifying its airstrikes after a chemical weapons attack on the Syrian town of Khan Sheikhoun in April 2017, the United States raised the possibility of chemical weapons falling into the hands of ISIL and potentially posing a direct terrorist threat to the United States.⁵⁰ In justifying similar strikes after a chemical weapons attack on the Syrian town of Douma on April 14, 2018, the United Kingdom, United States, and France cited the need to both deter further chemical weapons attacks in Syria; and to prevent the normalization of chemical weapons use which threatened collective security.⁵¹ The

49. This argument was made in Ashley Deeks, *Syria, Chemical Weapons, and Possible US Military Action*, LAWFARE (Dec. 10, 2012, 8:36 PM), <https://www.lawfareblog.com/syria-chemical-weapons-and-possible-us-military-action> [<https://perma.cc/7LRK-SCG5>].

50. Tillerson stated that chemical weapons "could fall into the hands of those who may bring them to our shores to harm U.S. citizens." Rex W. Tillerson, White House Office of the Press Secretary, Press Briefing by Secretary of State Rex Tillerson and National Security Advisor General H.R. McMaster (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/W324-55TR>]; Ashley Deeks, *How does the Syria Situation Stack up to the "Factors" that Justified Intervention in Kosovo?*, Lawfare (Apr. 7, 2017, 8:28AM), <https://www.lawfareblog.com/how-does-syria-situation-stack-the-factors-justified-intervention-kosovo> [<https://perma.cc/EG5W-HSDM>].

51. See Aragón Cardiel *et al.*, *supra* note 1, Part VI. President Trump stated that "the purpose of our actions tonight is to establish a strong deterrent against the production, spread and use of chemical weapons" as a matter of "vital national security interest of the United States." See Donald Trump, President of the U.S., Announcement to the Nation on Military Attack Against Syria (Apr. 13, 2018), in *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-transcript-of-trumps-address-on-syriaairstrikes/?noredirect=on&utm_term=.86e167597114 [<https://perma.cc/Y392-XWCC>]. 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), in *Full Text: British Prime Minister May on military strike against Syria*, REUTERS (Apr. 13, 2018), <https://www.reuters.com/article/us-mideast-crisis-syria-britain-may/full-text-british-prime-minister-may-on-military-strike-against-syria-idUSKBN1HL040>

United Kingdom referred indirectly to the potential dangers that chemical weapons proliferation posed directly to the United Kingdom, noting the nerve agent attack in its territory against Russian agent Sergei Skripal which had occurred a month earlier. Prime Minister May stated that “we cannot allow the use of chemical weapons to become normalized – within Syria, on the streets of the UK, or anywhere else in our world.”⁵²

(c) Terrorist attacks

As discussed above, State B can and should cite non-military factors—such as humanitarian suffering and refugee flows—when justifying a use of force against State A. State B could also point to other threats that are more easily characterized as kinetic in nature, such as the risk from terrorist attacks, in establishing that an “armed attack” has occurred or is imminent. State A has lost control of part of its territory from which terrorists are attacking State B.

Does self-defense extend to the use of force against non-State actors? The I.C.J. held in *Nicaragua* that non-State actors could conduct an “armed attack” if the attack is equivalent in nature to an actual armed attack conducted by regular armed forces.⁵³ Examples of

[<https://perma.cc/AH3C-6TF8>]. Prime Minister May then stated that the strikes were to protect innocent people in Syria, and 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. . . . [W]ithin Syria, on the streets of the UK, or anywhere else in our world.” *Id.* French President Macron stated that “we cannot tolerate the normalisation 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>].

52. May, *supra* note 51.

53. *Nicar. v. U.S.*, 1986 I.C.J. at 195. 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*.” Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139 (July 9) (emphasis added). 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.” *Armed Activities* on

the use of force to respond to attacks by non-State actors which have met with general acquiescence include Russia's use of force against Chechen rebels in Georgia in 2002,⁵⁴ Turkey's use of force against the Kurds from 1999,⁵⁵ the United States' intervention in Afghanistan after the 9/11 attacks,⁵⁶ and the international coalition's intervention in Syria against ISIL beginning in 2014.⁵⁷

2. Necessity: Territorial State Unwilling or Unable to Address the Threat

To establish the necessity of using force in self-defense, we argue that the territorial State from which the non-military threat emanates must be "unwilling or unable" to eliminate the threat.⁵⁸ Victim State B has made repeated pleas to the military regime in State A, but the regime is intent on consolidating power and eliminating opponents. It has no interest and is "unwilling" to stop its chemical weapons use or torture which is creating refugee flow into

the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 147 (Dec. 19). However, Justices Kooijmans and Simma said in separate opinions that if the I.C.J. still viewed Article 51 as limiting the right of self-defense only in 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. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 306, ¶ 28 (Dec. 19) (separate opinion by Kooijmans, J.); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 334, ¶ 11 (Dec. 19) (separate opinion by Simma, J.).

54. Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 14 (2015).

55. Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUR. J. INT'L L. 359, 379, n.139-41 (2009).

56. The Security Council affirmed the United States' right to respond in self-defense after the 9/11 attacks, where the weapons used to cause death and destruction were hijacked airplanes. As self-defense requires an "armed attack," the resolution implied that Al Qaeda's attack on the World Trade Center and Pentagon using hijacked airplanes was indeed an "armed attack." See generally S.C. Res. 1368 (Dec. 20, 2001) (calling upon member states to support international efforts to root out terrorism). Thus, despite the non-traditional means of the attack, the implication is that the scale and physical effects were equivalent to an "armed attack" conducted by a State's armed forces.

57. See Chachko & Deeks, *supra* note 19 (noting that coalition allies justified their participation in Syria as collective self-defense of Iraq, as well as being necessary because Syria had proven itself "unwilling or unable" to prevent the use of its territory for ISIL attacks).

58. See *supra* Section II.B.1.c (discussion on applying framework in terrorist attacks).

State A's territory. It is "unable" to take effective action against the terrorist group gaining control of its northwestern border regions.

To justify an intervention, we argue that the territorial State must have a specific obligation under international law vis-à-vis the victim State to eliminate that threat. Territorial State A is breaching obligations to deny safe havens to terrorists imposed by Security Council Resolutions.⁵⁹ Its use of chemical weapons and torture violates its obligations under the Chemical Weapons Convention and Convention Against Torture, which are also customary norms of international law.⁶⁰

3. Proportionality

Any use of force must be proportional, limited to just the amount of force necessary to repel the threats of chemical weapons and terrorist attacks. For example, the United States' 2017 airstrikes in response to the chemical weapons attack on Khan Sheikhoun targeted only the facility that had delivered the most recent chemical weapons attack.⁶¹

59. Security Council Resolutions 1368 and 1373 impose an *erga omnes* prohibition against harboring terrorists. See S.C. Res. 1368, ¶ 3 (Sept. 12, 2001); see generally S.C. Res. 1373 (Sept. 28, 2001) (calling upon states "to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism"); KALLIOPI CHAINOGLOU, RECONCEPTUALISING THE LAW OF SELF-DEFENCE 115 (2008).

60. 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); Convention against Torture art. 2, *supra* note 23 (stating that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction and no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture); DAMROSCH & MURPHY, *supra* note 44, at 1262 (citing International Committee of the Red Cross statement 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); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME 1: RULES 259 (2005). The prohibition on torture is also a customary, *jus cogens* norm. MURPHY, *supra* note 23, at 97.

61. Damage to Syrian aircraft and support infrastructure had been targeted to "reduce the Syrian government's ability to deliver chemical weapons." Press Release, U.S. Dep't of Def., Statement from Pentagon Spokesman on U.S.

C. Humanitarian Intervention

Humanitarian intervention would be a better “fit” than self-defense in justifying a use of force by State B to address the humanitarian suffering in State A.

Article 2(4) prohibits the use of force, with three exceptions: consent, self-defense under Article 51, or Security Council authorization. Humanitarian intervention is not one of these exceptions and is not an independent basis for the use of force.⁶² However, State B could point to examples of State practice in support of such a doctrine as an emerging norm.

State B could firstly cite NATO’s Kosovo intervention. The United Kingdom asserted that “force may be used in extreme circumstances to avert a humanitarian catastrophe,” justified “on grounds of overwhelming humanitarian necessity” without a Security Council resolution specifically authorizing the use of force.⁶³ NATO’s actions did not receive international condemnation and the

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>]. See also Press Briefing by Sec’y of State Rex Tillerson and Nat’l Security Advisor Gen. H.R. McMaster, *supra* note 50 (the nation’s highest-ranked diplomat making similar statements). 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. See *Russia Warning as US Threatens More Syria Strikes*, AL JAZEERA (Apr. 8, 2017), <http://www.aljazeera.com/news/2017/04/envoy-threatens-syria-military-action-170407181709711.html> [<https://perma.cc/B7EZ-DLAA>]; *US Says Strike on Syria Destroyed Fifth of Assad’s Jets*, AL JAZEERA (Apr. 10, 2017), <http://www.aljazeera.com/news/2017/04/strike-syria-destroyed-assad-jets-170410212129905.html> [<https://perma.cc/HRG2-EK49>].

62. U.N. Charter art. 2, paras. 4, 51; MURPHY, *supra* note 23, at 96, 492.

63. See DAMROSCH & MURPHY, *supra* note 44, at 1155 (citing a statement by U.K. Defense Secretary George Robertson). Security Council resolutions demanded that parties cease hostilities and were adopted under Chapter VII, but did not provide a specific authorization to use force if they were not followed. Specifically, in Resolution 1199, the Security Council, acting under Chapter VII, demanded that all parties cease hostilities and maintain a ceasefire and enter into dialogue. The 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 Organization for Security and Co-operation in Europe (OSCE) and NATO as well as compliance with Resolution 1199. See S.C. Res. 1203, ¶¶ 3, 4 (Oct. 24, 1998).

subsequent establishment of a U.N. interim administration for Kosovo suggested implicit acceptance of its actions.⁶⁴

Responses to chemical weapons use in Syria in 2017 and 2018 are further examples. The United Kingdom justified its participation in airstrikes with the United States and France in April 2018 as a “humanitarian intervention” in response to chemical weapons use. The United Kingdom asserted that it was permitted under international law to take measures in order to alleviate overwhelming humanitarian suffering by degrading the Syrian regime’s chemical weapons capability.⁶⁵

The United States conducted earlier airstrikes in 2017 alone, in response to the Syrian regime’s chemical weapons attack on Khan Sheikhoun. It did not characterize these as a “humanitarian intervention.” However, humanitarian reasons and chemical weapons use were prominent in its justifications. Defense Secretary James Mattis said the United States “would not passively stand by while [Assad] murders innocent people with chemical weapons.”⁶⁶ White House Press Secretary Spicer said that “obviously there’s a huge humanitarian component” behind the U.S. action.⁶⁷ The Syrian

64. See G.A. Res. 1244 (June 10, 1999); Harhoff, *supra* note 30, at 93.

65. Policy Paper, U.K. Prime Minister’s Office, Syria Action – U.K. Gov’t Legal Position (Apr. 14, 2018), <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position> [<https://perma.cc/NHT3-W8C9>]. After the Syrian regime’s apparent chemical weapons attack in eastern Damascus on August 21, 2013, the United Kingdom stated 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 scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime.” Policy Paper, U.K. Prime Minister’s Office, Chemical Weapon Use by Syrian Regime: U.K. Gov’t Legal Position (Aug. 29, 2013), <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/html-version> [<https://perma.cc/Y3ZE-2M3S>]. The United Kingdom made this claim in response to a chemical weapons attack on Eastern Damascus in August 2013, although it did not act on it. See *id.* 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. *Id.*

66. *Syria war: US Missiles ‘Took Out 20% of Aircraft,’* BBC News (Apr. 10, 2017), <http://www.bbc.com/news/worldmiddle-east-39561102> [<https://perma.cc/9TLM-FCEK>].

67. See Aragón Cardiel et al., *supra* note 1, Part VI. Kate Brannen, *Tracking the White House’s Reasons for Bombing Syria*, JUST SECURITY (Apr. 11,

strikes in 2017 and 2018 met with limited international opposition,⁶⁸ and can be seen as examples of State practice in support of the idea

2017), <https://www.justsecurity.org/39864/track-white-houses-reasons-striking-syria/> [<https://perma.cc/UM3J-C6YX>].

68. See Aragón Cardiel et al., *supra* note 1, Part VI. Russia, Syria, Iran, Egypt and Iraq condemned the April 2018 strikes. Fiona Simpson, *Syria strikes latest: World leaders react over US-led military action over Douma atrocity*, EVENING STANDARD (Apr. 14, 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*]; *Syria air strikes: UK publishes legal case for military action*, BBC NEWS (Apr. 14, 2018), <http://www.bbc.com/news/uk-43770102> [<https://perma.cc/5MUU-8JBH>]. Russia and Syria described them as a flagrant violation of the U.N. Charter's prohibition on the use of force. *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/9TM7-RNMJ>]. China said it consistently opposed the use of force in international relations, and that military action bypassing the Security Council violated international law. *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-idUSKBN1HL0MH> [<https://perma.cc/CDQ6-MWRR>]. Security Council members Peru, Côte d'Ivoire, Equatorial Guinea, Bolivia, and Kazakhstan said the use of force could only be authorized by the Security Council. See U.N. Meetings Coverage, Security Council 8233rd Meeting, Following Air Strikes against Suspected Chemical Weapons Sites in Syria, Security Council Rejects Proposal to Condemn Aggression, SC/13296 (Apr. 14, 2018), <https://www.un.org/press/en/2018/sc13296.doc.htm> [<https://perma.cc/4H92-ZD8D>] [hereinafter Security Council 8233rd Meeting]. 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. *Id.* NATO Secretary-General Jens Stoltenberg, the European Union, Turkey, Qatar, Bahrain, Saudi Arabia, Germany, Canada, Poland, Sweden, the Netherlands, Australia, Spain, and Israel expressed support. See, e.g., *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/7HWD-5N2G>]; Simpson, *supra*. *Syria air strikes: US and allies attack 'chemical weapons sites'*, BBC NEWS (Apr. 14, 2018), <http://www.bbc.com/news/world-middle-east-43762251> [<https://perma.cc/24FV-VKJA>].

For reactions to the April 2017 strikes, see *Syria War: Anger After Russia Vetoes Resolution at UN*, BBC NEWS (Apr. 13, 2017), <https://www.bbc.com/news/world-europe-39585071> [<https://perma.cc/AMX3-GCSD>]. Jordan and Saudi Arabia also expressed support, as well as Western nations and blocs (the European Union, NATO, United Kingdom, Australia, Canada, Spain, and Italy) and U.S. allies (Japan and Israel). Julian Ku, *Almost Everyone Agrees that the U.S. Strikes Against Syria Are Illegal, Except for Most Governments*, OPINIO JURIS (Apr. 7, 2017, 4:49 PM), <http://opiniojuris.org/2017/04/07/almost-everyone-agrees-that-the-u-s-strikes-against-syria-are-illegal-under-international-law-except-for-most-governments/> [<https://perma.cc/69S5-ATGB>]. Turkey described the

that chemical weapons use against civilians may justify a (limited) use of force in response to deter further chemical weapons attacks.⁶⁹

Victim State B could also cite the coalition's intervention in Iraq in 1991 to protect the Kurds. Although not justified as a humanitarian intervention, the United States underlined its humanitarian motives, emphasizing that it was establishing areas where humanitarian relief could be provided.⁷⁰ 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.⁷¹ Security Council Resolution 678, adopted under Chapter

strikes as "positive," stating that the Assad regime needed to be punished. *Id.* This was significant, given variable bilateral relations with the United States in recent times. *Id.* China appeared to acquiesce, merely stating that it had always supported a political settlement and hoped all parties would exercise restraint. *Id.* 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. Julian Ku, *China's Surprising Refusal to Criticize the Legality of the U.S. Attack on Syria*, LAWFARE (Apr. 7, 2017, 7:44 PM), <https://www.lawfareblog.com/chinas-surprising-refusal-criticize-legality-us-attack-syria> [<https://perma.cc/UA2N-33YC>]; 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>].

69. Pnina Sharvit Baruch & Brandon Weinstock, *Military Intervention in Syria: Is it Legal?*, INSS INSIGHT, No. 465 (Sept. 11, 2013), <http://www.inss.org.il/publication/military-intervention-syria-legal/> [<https://perma.cc/LX6X-A5N3>].

70. DAMROSCH & MURPHY, *supra* note 44, at 1181. As background, 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. S.C. Res. 688, pmbl. ¶ 3 (Apr. 5, 1991). The Security Council, in Resolution 688, demanded that Iraq cease the "repression of Iraqi civilians" and allow humanitarian access. *Id.* ("Gravely 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.")

71. There were unconfirmed reports that Iraq's attacks on the Kurds and Shias included the use of chemical weapons. S.C. Res. 678, pmbl. ¶ 8 (Apr. 3, 1991). In Resolution 687, passed two days before Resolution 688, the Security Council, acting under Chapter VII, warned Iraq of "grave consequences" if there were "any further use" of chemical weapons. *Id.* The United States drew on this language in its justification for using force, warning Iraq of grave consequences if chemical weapons were used. 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 file with the *Columbia Human Rights Law Review*); Patrick

VII, demanded that Iraq cease its use of chemical weapons and warned of “grave consequences” for non-compliance, but did not specifically authorize the use of force.⁷² The intervention was met with limited international criticism.⁷³

These examples suggest both that the use of force to address humanitarian suffering may be accepted in the most serious cases where the Security Council has shown that it will not act, and that humanitarian intervention could be seen as an emerging norm.

The victim State could also cite interventions by the Economic Community of West African States (ECOWAS) to overthrow military governments engaged in human rights violations and to install or re-install democratically elected heads of state—similar to the situation envisaged in this scenario—as examples of state practice. ECOWAS’

E. Tyler, *U.S. Planning Air Strikes if Iraq Uses Gas on Rebels Baghdad Reportedly Told Commanders to Use Chemicals*, BALTIMORE SUN (Mar. 10, 1991), http://articles.baltimoresun.com/1991-03-10/news/1991069074_1_chemical-weapons-high-command-baghdad [<https://perma.cc/843P-2ANN>]. The United Nations found no evidence of the use of chemical weapons. Special Comm’n, Sixth Report Under Resolution 699, ¶ 29, U.N. Doc. S/1994/750 (June 24, 1994). UNSCOM stated that, “The chemical analysis of the samples . . . showed no evidence of the presence of chemical-weapons agents in the samples and so indicated that chemical weapons had not been used during the previous two years in the inspected area The environmental conditions . . . observed and documented by the team supported the results of the analysis.” *Id.* In an earlier report, UNSCOM noted that during its field visit, “Iraq refused the inspection team’s demand to interview army personnel who were in the vicinity of the site of the alleged attack at the time when it was said to have occurred.” Special Comm’n, Fifth Report Under Resolution 699, ¶ 8, U.N. Doc. S/26910, (Dec. 21, 1993), *cited in* HUMAN RIGHTS WATCH, *Briefing Paper: The Iraqi Government Assault on the Marsh Arabs*, (Jan. 2003), https://www.hrw.org/legacy/backgroundunder/mena/marsharabs1.htm#P175_49671 [<https://perma.cc/PY9A-AQWA>].

72. Security Council Resolution 687 required Iraq to destroy all chemical weapons in ¶ 8. S.C. Res. 687, ¶ 8 (Apr. 2, 1991). It was adopted under Chapter VII and warned Iraq of “grave consequences” if there was any further use of chemical weapons. *Id.* Resolution 688 demanded that Iraq cease the repression of Iraqi civilians. *See* S.C. Res. 688, ¶¶ 1, 2 (Apr. 5, 1991).

73. 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/UEN3-GXBN>]. The intervention generally went “unremarked.” *Id.* Weller writes that, “While not endorsing coalition action . . . [the U.N.] has nevertheless taken over the humanitarian operation commenced by the intervening states through the deployment of U.N. guards, rather than seeking to overturn the outcome of the operation.” *Id.*

interventions in Liberia (1989), Sierra Leone (1998), and Gambia (2017) were met with general acquiescence.⁷⁴

In arguing in favor of a right of humanitarian intervention, the victim State could argue that addressing humanitarian suffering is in line with general international law principles, such as elementary considerations of humanity.⁷⁵ The U.N. Charter expresses the objective of “reaffirm[ing] faith in fundamental human rights”⁷⁶ and the victim State could argue that the Charter’s prohibition on the use of force in Article 2(4) must be balanced against this.⁷⁷ Moreover,

74. See Aragón Cardiel et al., *supra* note 1 (discussing these examples of interventions). In 1989, ECOWAS intervened in 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. 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/7C5H-BGHC>]. ECOWAS said the intervention, to ensure a ceasefire was upheld in order to allow free and fair elections, was motivated by the need to “stop[] the senseless killing of innocent civilians . . . and to help the Liberian people to restore their democratic institutions.” *Id.* After the intervention, the Security Council commended ECOWAS’ efforts and imposed an arms embargo to assist. S.C. Res. 788, ¶¶ 1, 8 (Nov. 19, 1992). In Sierra Leone, ECOWAS forces intervened in 1998 to reinstate democratically-elected President Kabbah, whom a military coup had overthrown. Harhoff, *supra* note 30, at 92. Some, including the Security Council, had accused the military regime of humanitarian repression. S.C. Res. 1132 (Oct. 8, 1997). The Security Council in Resolution 1132 gave some political cover, although not specific authorization, for the intervention. After the intervention, the President of the Security Council welcomed the end of the military junta’s rule. Harhoff, *supra* note 30, at 92; Karsten Nowrot & Emily W. 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, 362 (1998). Most recently, ECOWAS threatened to use force (“take all necessary measures”) in 2017 if President Jammeh of The Gambia did not respect the result of an election he had lost and step down by January 20, 2017. 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/SL55-Z6FS>]. Jammeh was also accused of significant human rights violations. *Id.* In Resolution 2337, the Security Council expressed “full support” for ECOWAS “in its commitment to ensure, by political means first” respect for the election results. S.C. Res. 2337, ¶ 6 (Jan. 19, 2017).

75. U.K. v. Alb., 1949 I.C.J. at 22; Oscar Schachter, *International Law in Theory and Practice* 123–25 (1991).

76. U.N. Charter, pmbl.

77. U.N. Charter, art. 55 (“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . (c) universal

the most serious human rights violations of torture and genocide, which State A is committing, violate *jus cogens* norms that international criminal law designates for punishment.⁷⁸

The idea that sovereignty should not shield human rights violations—or at least the need for States to protect populations from the most serious human rights violations—has received some endorsement from States in the “Responsibility to Protect” (“R2P”) doctrine.⁷⁹ The 2005 World Summit of Leaders affirmed the international community’s preparedness to “take action” to protect populations from genocide, crimes against humanity, and ethnic cleansing where national governments were manifestly failing to do so - but only through action authorized by the Security Council.⁸⁰

This does not address the question of what action would be permitted if the Security Council fails to act, but it strongly implies that the international community cannot stand by and do nothing in the face of the most egregious humanitarian catastrophes. The independent International Commission on Intervention and State Sovereignty, which first proposed “R2P,” noted that if the Security Council failed to act in the most “conscience-shocking” situations of large scale killing, “concerned states may not rule out other means” to address the situation, and that one last resort option may be for a regional organization to act and then seek subsequent authorization from the Security Council.⁸¹

In justifying its intervention, State B could point to Security Council resolutions recognizing the threat to international peace and security posed by the military regime in State A, and human rights violations documented by a U.N. investigative panel. For example, in the Kosovo intervention, NATO States cited Security Council resolutions calling on parties to cease hostilities adopted under

respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”).

78. Rome Statute of the International Criminal Court, A/CONF.183/9, art. 5–8 (2002).

79. Responsibility to Protect: The Global Moral Compact for the 21st Century 1–14 (Richard Cooper & Juliette Kohler eds., 2009).

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

81. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT XIII (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [<https://perma.cc/C3PJ-QPNT>]. Military intervention can be justified where all non-military options been explored and found unavailing, when it is proportional, with reasonable prospects of success, and when it is genuinely motivated to address a humanitarian threat. *Id.* at XII.

Chapter VII.⁸² In its airstrikes in response to the Syrian regime's 2017 Khan Sheikhoun chemical weapons attack, the United States was able to point to a series of chemical weapons attacks documented by a U.N. panel and violations of Security Council resolutions.⁸³ In the airstrikes responding to the Syrian regime's April 2018 chemical weapons attack on Douma, France noted Security Council resolutions requiring Syria to cease using chemical weapons and Syria's violation of its international obligations under the *Chemical Weapons Convention*.⁸⁴

It is important that State B act together with a coalition of States in its regional organization, indicating a collective belief that action is necessary, and not just that State B is acting to pursue its own geopolitical objectives.

Humanitarian intervention also envisages an operation limited strictly to that which is necessary and proportionate to relieve humanitarian need. An intervention could be limited to creating safe zones and enforcing them through no-fly zones, as seen in Kosovo in 1999 and to protect the Iraqi Kurds in 1991.⁸⁵

Any humanitarian intervention must be limited to the most extreme situations. In arguing in favour of humanitarian intervention, State B should be aware that other states could draw on this state practice in justifying their own uses of force. For example, Russia analogized Crimea to Kosovo in its 2014 intervention, claiming it was intervening to address violations of human rights of Ukrainians of Russian ethnicity.⁸⁶

82. 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>].

83. Press Briefing by Sec'y of State Rex Tillerson and Nat'l Security Advisor Gen. H.R. McMaster, *supra* note 50; Rick Gladstone, *U.N. Panel Points Finger at Syria in Sarin Attack on Village*, N.Y. TIMES (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/world/middleeast/syria-chemical-khan-sheikhoun.html> (on file with *Columbia Human Rights Law Review*).

84. France referred specifically to Syria's violations of Security Council resolutions 2235 and 2209. These resolutions reaffirmed Security Council Resolution 2118, which decided that Syria shall not use or retain chemical weapons and to impose measures under Chapter VII of the U.N. Charter in the event of non-compliance. S.C. Res. 2118, ¶¶ 4, 21 (Sept. 27, 2013); S.C. Res. 2209, ¶¶ 3, 7 (Mar. 6, 2015); S.C. Res. 2235, ¶¶ 2, 15 (Aug. 7, 2015). See Statement by French Delegate, Security Council 8233rd Meeting, *supra* note 68.

85. DAMROSCH & MURPHY, *supra* note 44, at 1181.

86. Robert McCorquodale, *Ukraine Insta-Symposium: Crimea, Ukraine and Russia: Self-Determination, Intervention and International Law*, OPINIO JURIS

D. Necessity

“Necessity” may excuse a State’s breach of its legal obligations—in this case the use of force without Security Council authorization—if this is the “only means” to safeguard “essential interests” against a “grave and imminent peril.”⁸⁷

A State’s security is an “essential interest.”⁸⁸ The region where State A and B are located has a history of cross-border, inter-ethnic conflict indicating the very real risk that the instability in State A could “spill over” and trigger a wider regional conflict. Moreover, thousands of people in State A are being killed every day—civilians in State A are facing the “grave and imminent peril” of death or torture. The Security Council is failing to act, making the use of force without its authorization the “only way” to address the situation.

These arguments have been made before. For example, Belgium argued before the I.C.J. that the humanitarian catastrophe in Kosovo constituted a “grave and imminent peril.”⁸⁹ Belgium argued that “essential values” were i) human rights such as the right to life and freedom from torture and ii) the collective security of the entire region.⁹⁰

The use of force is generally characterized as a *peremptory norm*, violation of which would not be justified by necessity, according to Article 26 of the ILC’s Draft Articles on State Responsibility.⁹¹ We argue that the 1980 Commentary to the Draft Articles supports the idea that part of the spectrum of the use of force is not a *jus cogens* norm and that small-scale uses of force should not be ruled out.⁹²

(Mar. 10, 2014, 12:00 PM), <http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-crimea-ukraine-russia-self-determination-intervention-international-law/> [<https://perma.cc/YZ9B-D5AG>]; 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/8P47-DKH8>].

87. Commentary ILC Articles, *supra* note 27, at 80 (commenting on Article 25).

88. *Id.*

89. *Serb. & Montenegro v. Bel.*, *supra* note 82.

90. *Id.*

91. Commentary ILC Articles, *supra* note 27, at 84 (commenting on Article 26).

92. The 1980 Articles did not consider the entire spectrum of the prohibition on the use of force at Article 2(4) of the U.N. Charter as *jus cogens*. Ago Report, *supra* note 29, ¶ 7. The Draft drew a clear distinction between “acts of

Thus, it could be argued that the exercise of necessity would permit a small use of force, such as creating safe zones. This argument will be set out in Section C of Scenario 2.

III. SECOND SCENARIO: ENVIRONMENTAL CATASTROPHE

A. Case Scenario

An oil tanker, flagged to State A, has spilled 200,000 tons of oil into the sea after hitting a rock that did not appear in nautical charts. The tanker is travelling off the coast of State A, in State A's territorial sea. The tanker is still afloat but is sinking slowly, and still carrying 90,000 tons of oil aboard. The oil is leaking from a breach in the ship's hull, making the oil slick larger. The crew has been rescued, but the captain has voluntarily decided to stay onboard to try to steer the ship. State B neighbors State A, and sea currents are pushing the oil slick towards its coastline.

The oil slick will reach the coast of States A and B within two days unless a change in the currents push it out into the high seas. There is a 20% chance of this occurring. If the oil slick reaches the coast, it will likely result in one of the biggest environmental catastrophes of all time.

The oil slick is simply too large for regular containment techniques to address it. A group of experts has determined that the only way to minimize the potential catastrophe is to heavily bombard both the contaminated area and the oil tanker in an attempt to burn as much oil as possible. This action would reduce the potential damage of the oil spill by 90%.

State A has announced that it will not take any action to address the situation, hoping for a change in sea currents. It has labeled the bombardment option "unorthodox," "egregious," and "barbaric." This is a veiled pretext to hide from the public that State A's government agencies lack the capacity to take any effective

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*." *Id.* See also Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 6 (2000) (citing the Ago Report as evidence that states possess the "right to self-preservation").

action, including an air force which is obsolete, lacking the ability to conduct a military operation of this type.

State B is State A's neighbor and 60% of the oil slick is likely to impact its coast, which is fringed by protected coral reefs which provide an important spawning ground for fish. 15% of State B's GDP comes from fishing and much of its population live below the poverty line, relying on subsistence fishing. This means the impacts of the spill will heavily affect its economy and its population's livelihoods. The oil slick contains chemical residues which would poison the reefs, causing severe health problems, and potentially death to humans consuming fish from these waters.

Unlike State A, State B is willing and able to bombard the oil slick and the tanker to prevent the catastrophe. State B's intelligence agency is also ready to produce evidence that State A's air force is unable to conduct this operation. Would international law allow this use of force?

B. Self-Defense

The right to use force in self-defense is subject to State B having been the victim of an "armed attack," and must be guided by considerations of necessity, immediacy, and proportionality. Are these requirements fulfilled here?

1. An Environmental Catastrophe as an "Armed Attack"

The oil spill is likely to heavily damage a protected marine area in State B, producing severe economic losses to the fishing industry of State B and, therefore, to the livelihoods of its people. The I.C.J. stated in *Nicaragua* that only the "most grave" uses of force constitute an "armed attack," and that this notion of "gravity" was a matter of "scale and effects."⁹³ Here, the gravity of the threat is apparent, as the oil spill will likely result in one of the biggest environmental catastrophes of all time, impacting on human health, and potentially causing death.

Even if the gravity of the threat is clear, could the spill be considered an "armed attack" for the purposes of Article 51 of the U.N. Charter?

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

(a) Existence of a Perpetrator

A first hurdle is the absence of a perpetrator, which would seem to be implicit in the notion of “armed attack.” After all, an “attack” cannot just occur by itself. Here, State A was not involved in creating the environmental threat: the oil spill is the product of an accident. Thus, if State A is not the perpetrator, any military intervention by State B in the territorial sea of State A that State A has not explicitly consented to would violate State A’s sovereignty.

However, Article 51 of the U.N. Charter makes no explicit reference to the requirement that an “armed attack” have a “perpetrator”, stating simply “if an armed attack occurs.”⁹⁴ The focus of this provision is on repelling the armed attack itself⁹⁵ rather than its perpetrator. We argue that the source of an attack does not change the fact that the State must be able to act to stop the attack from causing harm.⁹⁶

We argue in our Article that a reasonable middle ground could be achieved by limiting the use of force to the non-military threat itself.⁹⁷ In the instant case, this would involve restricting the bombardment to the area affected by the spill, using weaponry as light as possible, and attempting to avoid any damage to citizens of State A’s property—which is practicable in the sea.

(b) Use of Kinetic Weaponry?

Article 51 allows the use of force in response to an *armed* attack. The plain meaning of an “armed attack” would seem to require the use of traditional kinetic military weaponry, which, in modern warfare, refers to projectiles in a broad sense. We argue that an “armed attack” should not be defined by the nature of the attack, but rather by its destructive physical effects.⁹⁸

There is no kinetic weaponry involved in our scenario, but the potential scale and destructive effects of the oil slick in the coastal

94. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”).

95. Randelzhofer & Nolte, *supra* note 11, at 1426.

96. ILA, *supra* note 12, at 661.

97. Aragón Cardiel et al., *supra* note 1.

98. The I.C.J. has held that Article 51 applies to “any use of force, regardless of the weapons employed.” *See* *Nicar. v. U.S.*, 1986 I.C.J. at 176; *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at ¶ 37.

environment of State B are massive. While the spill will primarily have an indirect impact on human life, as lives or private property are not immediately at risk, the destruction of the coral reef of State B is certainly akin to an “extensive destruction of property” over the longer term and should merit the same response as a kinetic “armed attack.” Poisoning of the reef could also impact human life if people in State B, particularly subsistence fishers, consume fish contaminated by the oil spill.

(c) Necessity and Immediacy of the Use of Force

We argue that to establish the necessity of an intervention, the territorial State from which the non-military threat emanates 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.

In this case, criterion (a)—that is, State A being “unwilling or unable” to address the threat—has not been fulfilled.⁹⁹ First, while State A has publicly rejected the solution proposed by the group of experts—bombarding the oil slick—there is no mention of State B having approached State A seeking permission to bombard the stricken vessel and State A having rejected the request. The oil slick will still take two days to reach the coasts of States A and B—if it ever reaches the coast—and thus there is still time for State B to exhaust all diplomatic avenues.

Given the situation, State B could request that an independent group of experts set a “point of no return” timeline, or a line on a nautical chart, signaling the moment after which the solution of bombarding the vessel will no longer be feasible and the damage to State B’s coast will be irreparable. This would help determine the timeframe for the negotiations with State A and would

99. The requirements of the “unwilling or unable” test have never been clearly defined. Professor Ashley Deeks has put forward a proposal of what this test would require in practice. Deeks’ six-prong test includes (i) the need to prioritize consent or cooperation with the territorial State; (ii) an analysis of the nature of the threat posed by the non-State actor—in our case, the military threat; (iii) submitting a request to the territorial State to address the threat and gauging the time to respond; (iv) making a reasonable assessment of the territorial State’s control and capacity; (v) analyzing the proposed means to suppress the threat; and (vi) reviewing any prior interactions with the territorial State in relation to any similar requests to intervene. *See Deeks, supra* note 16, at 519–32.

serve an evidentiary purpose in showing the immediacy of the damage and the necessity of the intervention.

Moving to criterion (b), since State B faces a massive oil spill off its coastline, it could point to State A's violations of its obligation under United Nations Convention on the Law of the Sea to stop marine pollution from spreading.¹⁰⁰ State B should also point to the *Trail Smelter* case's holding that "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."¹⁰¹ State B can argue that it cannot be left without a remedy if State A has breached its "no harm" obligations under international law and there is still a way to prevent the damage that may be caused by the spill. Violating such international obligations does not in itself provide a legal basis for a use of force—according to Article 103 of the U.N. Charter, in the event of a conflict between the Charter and another treaty, the obligations under the Charter prevail, including its prohibition on the use of force.¹⁰² However we argue it could, in combination with the other factors we have outlined, provide one possible justification for the use of force in response to the most extreme and egregious situations.

Violating international obligations relating to marine pollution is not on the same scale as, for example, the killing of one million civilians in Pakistan in 1971, but the use of force envisaged here is also small in scale and proportional, limited to bombing a single vessel and the area of sea containing the oil slick.

100. This U.N. Convention obliges parties to:

[T]ake all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

UNCLOS, *supra* note 24.

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

102. U.N. Charter art. 103.

(d) Proportionality of the Use of Force

To meet the requirement of proportionality, any use of force would need to be strictly limited to the oil tanker and addressing the immediate impacts of the oil slick, with adequate warning to any ships or boats in the area to avoid loss of life. As part of this assessment, the presence of the captain on the tanker must also be considered. If he refuses to leave the vessel, proportionality requires that the life of the captain be balanced against the potential damage that would be caused by the spill. To avoid such a difficult decision, State B should attempt a rescue operation by helicopter and consider forcibly removing the captain if he refuses to cooperate.

C. Necessity

State B could also draw on the exception of “necessity,” under which States may excuse a violation of their international legal obligations if this is the “only way” to safeguard “essential interests” against a “grave and imminent peril.”¹⁰³

In this case, the environmental catastrophe clearly represents a “grave and imminent” peril to State B’s coastline. The I.C.J. deemed the protection of the environment an “essential interest” of a State in the *Gabčíkovo-Nagymaros Project* case.¹⁰⁴

However, according to Article 26, the Draft Articles on State Responsibility do not excuse violation of a *peremptory norm*, such as the prohibition of the use of force contained in Article 2(4) of the U.N. Charter.¹⁰⁵ We argue, nonetheless, that low-intensity, highly-targeted uses of military force could be excused by necessity since a low intensity is not sufficient to breach the *jus cogens* prohibition of the use of force.¹⁰⁶ This argument is based on the 1980 Draft ILC Articles, which 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

103. Commentary ILC Articles, *supra* note 27, at 80 (commenting on Article 25).

104. Case Concerning the *Gabčíkovo-Nagymaros Project* (Hung. V. Slov.) Judgment, 1997 I.C.J. Rep. 7, 41 (Sept. 25).

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

106. See Aragón Cardiel et al., *supra* note 1; Commentary ILC Articles, *supra* note 27, at 35.

aggression, or not, in any case, as breach[es] of an international obligation of *jus cogens*.¹⁰⁷ The latter actions included the elimination of “a source of troubles which threatened to occur or to spread across the frontier.”¹⁰⁸

This interpretation appears to have been strongly inspired by the circumstances surrounding the Torrey Canyon incident, which involved only a small amount of force. In that case, the British government bombarded an oil tanker that had run aground close to the coast of Cornwall in an attempt to burn the oil that was onboard and prevent a bigger catastrophe.¹⁰⁹ The Commentary stated that “[whatever] other possible justifications there may have been for the British Government’s action, it seems to the Commission that . . . the action taken by the British Government would have had to be recognized as internationally lawful because of a state of necessity.”¹¹⁰

The 1980 Commentary thus appears to provide support for the principle that a low-level use of force should not be regarded as a breach of the *jus cogens* prohibition on the use of force. Thus an argument based on necessity could be made in this case as the use of force is limited to bombing a single vessel. The intervening state should also rely on other justifications, such as self-defense, which is a better “fit” in seeking to justify the use of force to address cross-border threats.

CONCLUSION

These interventions in response to non-military threats of a humanitarian and environmental catastrophe rely on several grounds.

The first ground is self-defense. We argue that a non-military threat can meet the threshold of an “armed attack” where it is on the same scale as, and has destructive physical effects equivalent to, those of a traditional kinetic “armed attack.” The non-military threat must be physical in nature—it must have the effect of producing a

107. Boed, *supra* note 92, at 6 (citing the Ago Report).

108. Ago Report, *supra* note 29, ¶ 56.

109. 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>].

110. Ago Report, *supra* note 29, ¶ 35. This would be the case even if the ship owner had not abandoned the wreck and even if he had tried to oppose its destruction.

loss of lives and/or extensive destruction of property. The physical consequences of the humanitarian crisis we envisage in the first scenario include refugee flows, terrorist attacks, chemical weapons and the potential to destabilize regional security. The physical impacts of the oil spill in our second scenario include massive marine pollution, affecting livelihoods and health, potentially causing human death.

Under the first ground of self-defense, we also argue the territorial State must be “unwilling or unable” to address the threat and in violation of its international law obligations in order to establish the “necessity” of using force. In the first scenario, the territorial State is violating prohibitions on harboring terrorists, chemical weapons use, and torture. In the second case, the territorial State is violating obligations relating to marine pollution. In both cases the territorial State is refusing to address the causes of this threat: in the first scenario, the territorial State is refusing and/or ineffective in addressing terrorist attacks emanating from its territory. In the second scenario, the territorial State is refusing to address massive oil pollution emanating from a stricken vessel.

The second ground is humanitarian intervention, discussed in the first scenario. Humanitarian intervention is not an independent basis for the use of force, but interventions such as Kosovo in 1999 and airstrikes following chemical weapons attacks in Syria in 2017 and 2018, and doctrines such as R2P provide some support for its existence as an emerging norm.

The third and final ground is necessity. Necessity recognizes that in exceptional circumstances, international law may excuse what would otherwise be illegal—in this case the use of force without Security Council authorization in response to a catastrophe.

Recognition of a limited right of self-defense to respond to the most extreme situations of humanitarian suffering when the Security Council is unwilling to act would provide states with a necessary tool to address critical shortcomings of the international security architecture. However, we emphasize that the use of force to respond to situations involving non-military threats must be limited to exceptional circumstances and highly constrained, as the norm in Article 2(4) against the use of force is strong and that an expanded justification for the use of force may create a precedent for others to use the same justification.