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## Humanitarian Intervention Post-Syria: Legitimate and Legal?

Milena Sterio

*Cleveland-Marshall College of Law, Cleveland State University, [m.sterio@csuohio.edu](mailto:m.sterio@csuohio.edu)*

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# HUMANITARIAN INTERVENTION POST-SYRIA: LEGITIMATE AND LEGAL?

*Milena Sterio\**

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\* The Charles R. Emrick Jr.-Calfée Halter & Griswold Professor of Law, Cleveland-Marshall College of Law. The author would like to thank organizers of the 2013 International Law Weekend for the opportunity to present a version of this paper as well as fellow panelists at the same conference: Jose Alvarez, Michael Scharf, Paul Williams, and Theodore Meron. The author would also like to thank the Cleveland-Marshall College of Law for its generous research support, which has been invaluable for the research and writing of this Article.

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## INTRODUCTION

“Even in the most intense policy discussions, lawyers are not potted plants.”<sup>1</sup>

Harold Hongju Koh, former Legal Advisor of the United States Department of State and a professor at Yale Law School, wrote the above-cited phrase in the context of Syria. In the wake of a violent and ongoing civil war in this volatile nation, including the use of chemical weapons by Syrian President Bashar al-Assad against his own civilian population, Koh has argued that nations like the United States should use force in Syria under the paradigm of humanitarian intervention.<sup>2</sup> President Obama has made similar arguments, and several nations have considered and contemplated staging a multilateral, United States-led humanitarian intervention in Syria.<sup>3</sup> The discussion over a potential use of military force in Syria has dwindled in light of a recently passed Security Council resolution, which has created a United Nations-led chemical weapons inspection and destruction regime.<sup>4</sup> President Assad has thus far agreed to comply with the terms of this regime.<sup>5</sup> However,

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<sup>1</sup> Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part III—A Reply)*, JUST SECURITY (Oct. 10, 2013, 11:45 AM), <http://justsecurity.org/1863/syria-law-humanitarian-intervention-part-iii-reply> [hereinafter Koh, *Part III*].

<sup>2</sup> See *infra* Part V.

<sup>3</sup> See *infra* note 135 and accompanying text.

<sup>4</sup> Resolution 2118 requires that Syria eliminate its chemical stockpile and allow complete access for both the United Nations and the Organization for the Prohibition of Chemical Weapons chemical weapons inspectors. If Syria does not comply with either demand, the Security Council would need to adopt a second resolution regarding imposition of military or other actions against Syria under Chapter VII of the U.N. Charter. S.C. Res. 2118, U.N. Doc. S/RES/2118 (Sept. 17, 2013) [hereinafter Resolution 2118].

<sup>5</sup> Colum Lynch, *U.N. Warning: Chemical Inspectors Face New Risks in Syria*, FOREIGN POLICY (Dec. 3, 2013, 2:31 PM), [http://thecable.foreignpolicy.com/posts/2013/12/03/un\\_warning\\_chemical\\_inspec](http://thecable.foreignpolicy.com/posts/2013/12/03/un_warning_chemical_inspec)-

should Assad disregard the inspection regime and defy the international community, the issue of humanitarian intervention will once again become center-stage.<sup>6</sup>

Humanitarian intervention is a disputed concept for which no normative rules exist, and many in the international community have grappled with the question of whether and under what circumstances external actors may intervene in the affairs of a sovereign state in order to halt humanitarian abuses. In order to fill this legal vacuum, Koh has recently argued for the necessity of developing a normative framework for the legality of humanitarian intervention and has proposed such a framework.<sup>7</sup> While the proposed framework was developed by Koh in the context of Syria, it could be applied to any future situations of humanitarian suffering, and it would essentially change existing international law by creating another instance of both legitimate and legal use of force.

Currently, international law, as enshrined in the United Nations Charter, prohibits states from using force against other states except in two situations: pursuant to Security Council authorization or in self-defense.<sup>8</sup> In a situation like Syria, where no particular nations can claim self-defense against the Assad regime because the conflict has been internal and where the Security Council is paralyzed because one or more veto-wielding nations are against military intervention,<sup>9</sup> international law appears powerless to halt ongoing humanitarian abuses. Yet, most

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tors\_face\_new\_risks\_in\_syria (noting that the Syrian government “has continued its ‘constructive cooperation’” in the process of removing chemical weapons from Syria and transporting them to a destruction site).

<sup>6</sup> See *id.* (observing that while the chemical weapons inspection regime has gone smoothly thus far, the United Nations Secretary-General has expressed concern over the safety of inspectors in Syria and that Syria is still facing an enormous humanitarian crisis “with more than 9 million civilians in need of assistance, and more than 2.5 million people largely cut off from aid”).

<sup>7</sup> See Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013, 9:00 AM), <http://justsecurity.org/1506/koh-syria-part2/> [hereinafter Koh, *Part II*].

<sup>8</sup> See *infra* Part I.

<sup>9</sup> See, e.g., Press Release, Security Council, Speakers Call for Voluntary Suspension of Veto Rights in Cases of Mass Atrocity Crimes, as Security Council Debates Working Methods, U.N. Press Release SC/11164 (Oct. 29, 2013), <http://www.un.org/press/en/2013/sc11164.doc.htm> (noting that “[w]hile ‘slow and tortured’ improvements had helped the Security Council gradually build greater transparency and efficiency, the 15-member body must urgently step

commentators would agree that standing idle is not the most appropriate response. Many international law scholars have proposed preserving the existing international law rules as they stand and developing policy arguments and factor-based exceptions to the ban on the use of force in order to justify military interventions in some instances.<sup>10</sup> This was the approach adopted by the United States Department of State during the Kosovo crisis, and this is the preferred approach regarding Syria, according to some scholars.<sup>11</sup> Koh finds this approach unappealing and has instead argued in favor of developing a new legal framework for humanitarian intervention because he appropriately believes that it is the lawyers' duty to work toward developing new rules of international law when the old ones prove insufficient and undesirable.<sup>12</sup>

Part I of this Article discusses the current state of affairs under international law by focusing on the existing ban on the use of force and the established exceptions thereto. It also discusses various instances in which states have used force outside of this legal framework. Part II discusses the developing concept of humanitarian intervention as well as related theories, such as Responsibility to Protect and involuntary sovereignty waiver. Part III focuses on the ongoing crisis in Syria and briefly describes Syrian history and the current-day conflict. Part IV discusses proposed justifications under existing international law for the legality of military intervention in Syria. Part V examines Koh's proposed normative framework for humanitarian intervention by critically assessing its elements and proposing additional criteria. Part VI applies Koh's framework to Syria and concludes that Syria could constitute a perfect case for humanitarian intervention under Koh's proposed framework, should the Assad regime choose to disobey the United Nations-imposed weapons inspection and destruction regime. Ultimately, this Article

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up efforts to improve its working methods, including through the collective voluntary suspension of veto rights in cases involving mass atrocity crimes"); see also Ian Birrell, *We Must End This UN 'Paralysis' on Syria*, GUARDIAN (Sept. 8, 2013, 3:30 PM), <http://www.theguardian.com/commentis-free/2013/sep/08/un-paralysis-syria-security-council-russia> (arguing that the Security Council "paralysis" should come to an end in the context of Syria).

<sup>10</sup> For a brief description of these arguments, see *infra* Part V.

<sup>11</sup> See *infra* Part V.

<sup>12</sup> See Koh, *Part III*, *supra* note 1; Koh, *Part II*, *supra* note 7.

agrees that Koh's proposed framework would constitute a beneficial development in international law and that developing a new normative framework, which would create another legal exception to the prohibition on the use of force, is necessary in today's world of internal warfare and humanitarian suffering. Lawyers should not stand idle and support outdated concepts of international law. Instead, lawyers should join Koh's efforts in developing new norms in order to legally justify the use of force against states that abuse their own citizens and cause humanitarian catastrophes.

## I. USE OF FORCE UNDER INTERNATIONAL LAW

International law prohibits states from using force, except in two situations: in self-defense or pursuant to the United Nations Security Council's authorization.<sup>13</sup> This Part will discuss this basic norm, the two exceptions thereto, as well as examples from recent history where states have used force against other states outside the two exceptions.

### A. *The Prohibition on the Use of Force*

The prohibition on the use of force is a basic norm of international law. The United Nations Charter states in Article 2(4) that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."<sup>14</sup> Under the Charter, nations "agreed . . . to forgo the use of external force to change the political status quo. Nations would be assured their fundamental independence, the enjoyment of their territory, their freedom—a kind of right to be let alone."<sup>15</sup> The International Court of Justice has confirmed that the United Nations Charter rules on the use of force were part of customary law with the character of *jus cogens* norms.<sup>16</sup>

The prohibition on the use of force flows from the Charter's traditional conception of state sovereignty. Sovereignty has his-

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<sup>13</sup> See *infra* Part II.A.

<sup>14</sup> U.N. Charter art.2, para. 4.

<sup>15</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE* 137 (2d ed. 1979).

<sup>16</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 190 (June 27).

torically implied that states were free to engage in whatever behavior they saw fit within their own borders.<sup>17</sup> Moreover, states could not intervene in the internal affairs of other states, regardless of how reprehensible such affairs may have been. Sovereignty functioned as a shield, protecting states from intrusion by external actors.<sup>18</sup> As Louis Henkin famously wrote: "The essential quality of statehood in a state system is the autonomy of each state. State autonomy suggests that a state is not subject to any external authority unless it has voluntarily consented to such authority."<sup>19</sup>

The idea of state sovereignty is reflected in several other doctrines of international law. One of the most significant of such is the principle of *uti possidetis*. This principle protects the sanctity of existing borders by proclaiming that "states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence."<sup>20</sup> Once such borders are set, they become international boundaries, which all other actors in the international arena must respect. *Uti possidetis* is tightly linked to the idea of state sovereignty: the notion that a state, as delineated by its borders, may not be encroached upon by anybody in the international arena. The International Court of Justice has confirmed that *uti possidetis* is a general principle of law whose "obvious purpose is to prevent the independence and stability of new States."<sup>21</sup> Moreover, the principle of *uti possidetis* has been applied more broadly to protect intra-state borders from subsequent change. The

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<sup>17</sup> For a general discussion of the traditional notion of international law and state sovereignty, see Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMP. L. REV. 213, 214 (2008).

<sup>18</sup> The Report of the International Commission on Intervention and State Sovereignty correctly points out that sovereignty traditionally functioned as control. See INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 12–13 (Dec. 2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [hereinafter ICISS Report].

<sup>19</sup> LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 11 (1995).

<sup>20</sup> Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 590 (1996).

<sup>21</sup> Frontier Dispute (Burk. Faso/Mali), 1986 I.C.J. 554, ¶ 20 (Dec. 22). The International Court of Justice has also discussed and affirmed the principle of *uti possidetis* in Land, Island and Maritime Frontier Dispute (El Sal./Hond.; Nicar. intervening), 1992 I.C.J. 351, ¶ 345 (Sept. 11) ("[T]his is a principle the application of which is automatic: on independence, the boundaries of the relevant colonial administrative divisions are transformed into international frontiers.").

Badinter Commission, a body of experts appointed by the then European Community to provide legal opinions on a series of difficult questions arising from the break-up of the former Yugoslavia, affirmed and applied the principle of *uti possidetis* to the republican borders existing between former Yugoslav states, elevating such provincial borders to the level of internationally protected frontiers.<sup>22</sup> The Badinter Commission's opinion, notwithstanding the significant criticism that it generated, demonstrates that the world's most prominent jurists were willing to extend the applicability of *uti possidetis* to a situation where intra-state borders were at stake in order to preserve status quo and potentially prevent further territorial squabbles.<sup>23</sup> However, the preservation and application of *uti possidetis* has led, somewhat unfortunately, to the international community's reluctance to intervene in the internal affairs of a sovereign state. "[T]he extension of *uti possidetis* to modern breakups leads to genuine injustices and instability by leaving significant populations both unsatisfied with their status in new states and uncertain of political participation there."<sup>24</sup>

In addition, the principle of non-intervention is another corollary to the notion of state sovereignty and a consequence of the United Nations' Charter's prohibition on the use of force against states. The traditional notion of sovereignty also implied that only states were relevant actors in international law; only states could be subject to international norms and treaties, and any prohibition on different types of behavior could only extend to states.<sup>25</sup> Thus, if a state chose to abuse its own population, this was not a problem of international law as private individuals did not constitute subjects of international law. Similar to the idea that the international community would not intervene if such intervention would result in the disturbance of state borders, the concept of state sovereignty dictated that international law should not intervene in matters occurring solely within such

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<sup>22</sup> Conference on Yugoslavia, Arbitration Commission, Opinion No. 3, 31 I.L.M. 1499 (1992).

<sup>23</sup> For criticism of the Badinter Commission Opinion No. 3, see Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L. L. 1, 38 (1993) (arguing that the Commission's "neo-decolonization territorial approach can have troubling consequences if used to legitimize secession for groups possessing a distinct political status while denying the right of secession to territorially based ethnic communities not formally organized into political units").

<sup>24</sup> Ratner, *supra* note 20, at 591.

<sup>25</sup> Sterio, *supra* note 17, at 216.



state borders. “[I]nternational law . . . plac[es] a duty on all sovereign states not, broadly speaking, to intervene in the internal affairs of others. . . . [A] state has the international legal right, the sovereign right, to conduct itself throughout its territory as, by and large, it sees fit.”<sup>26</sup> The principle of nonintervention, like that of *uti possidetis*, flows from the concept of state sovereignty and dictates that states have the right to be free of outside interference. The application of *uti possidetis* essentially seals state borders and prevents further change through forceful action, and the principle of nonintervention further protects states, as delineated by their protected borders, from subsequent encroachment by external actors. Article 2(4) of the United Nations Charter is an illustration of this type of logic and a direct application of the principles of sovereignty, *uti possidetis*, and nonintervention.

### B. Exceptions to the Prohibition

The United Nations Charter allows only two small exceptions to the prohibition on the use of force. First, the Charter provides for the right of self-defense.<sup>27</sup> Pursuant to Article 51, every state, if it has been the subject of an armed attack by another state or a group of other states, may exercise its inherent right of self-defense by militarily striking against the offending state(s).<sup>28</sup> The right of self-defense inscribes itself neatly within the conception of state sovereignty. If a state attacks another state, it thereby acts against the sovereignty of the victim state. The sovereignty shield has been broken, and the victim state may respond militarily in order to defend itself. Self-defense does not

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<sup>26</sup> Alan James, *The Concept of Sovereignty Revisited*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP* 334, 336 (Albrecht Schnabel & Ramesh Thakur, eds., 2000).

<sup>27</sup> Throughout history, much has been written about the international law of self-defense. See, e.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF DEFENSE* (4th ed. 2005); see also J.L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872 (1947); Jordan J. Paust, *Use of Military Force in Syria by Turkey, NATO, and the United States*, 34 U. PA J. INT'L L. 431 (2013) (discussing the right of self-defense in the context of Syria).

<sup>28</sup> “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, until the Security Council has taken measures necessary to maintain international peace and security.” U.N. Charter art. 51.

encroach on the notion of sovereignty because it is exercised by the victim state, whose own sovereignty has already been broken, and because it is exercised against the attacker state, which, to begin with, clearly did not respect the notion of sovereignty. Alternatively, a state that exercises military action against another state in self-defense does not violate Article 2(4) because its actions are not committed against the territorial integrity or political independence of the attacker state. Instead, its actions are exercised out of self-protection and self-defense.

Second, the Charter allows for the possibility of collective military action against an offending state, pursuant to the explicit authorization of the Security Council.<sup>29</sup> Here, the premise is that state sovereignty is sacred—unless the Security Council determines that it no longer is. The United Nations Charter was negotiated in the wake of World War II, when victor countries recognized the need to participate in a world organization in a joint effort to preserve peace, but hung on to their superiority and the need to preserve a political advantage in the global arena.<sup>30</sup> The compromise that emerged after rounds of negotiations in San Francisco in 1945 reflected this tension.<sup>31</sup> The new organization was structured as a global forum preoccupied with maintaining international peace and security, where all states around the globe could participate on an equal footing within the so-called General Assembly.<sup>32</sup> The concept of state equality and sovereignty is thus present throughout the United Nations Charter. The super-sovereign states, however, preserved their

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<sup>29</sup> U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”).

<sup>30</sup> See, e.g., HENKIN, *supra* note 15, at 137–38 (noting that the states involved in the negotiation of the U.N. Charter sought to outlaw war and that this was their main objective).

<sup>31</sup> See, e.g., *History of the United Nations: San Francisco Conference*, UNITED NATIONS, [http://www.un.org/en/aboutun/history/sanfrancisco\\_conference.shtml](http://www.un.org/en/aboutun/history/sanfrancisco_conference.shtml) (last visited Sept. 12, 2014) (noting that clashes of opinion over the veto structure of the Security Council between states negotiating the U.N. Charter in San Francisco in 1945 threatened to break up the conference).

<sup>32</sup> For a general discussion of the history of the United Nations, see *The Formation of the United Nations, 1945*, U.S. DEPT. OF STATE, OFFICE OF THE HISTORIAN, <http://history.state.gov/milestones/1937-1945/UN> (last visited Sept. 12, 2014).

political, military, and economic advantage through the structure of the Security Council, where five permanent members (United States, United Kingdom, France, the Soviet Union, and China) maintained veto power.<sup>33</sup> The victor countries of World War II, the so-called Great Powers, thereby preserved the right to unilaterally determine the outcome of future sovereignty-encroaching actions by the United Nations, such as the authorization to use force against a member state.

Because of the Cold War and the often politically conflicting positions of the United States and the Soviet Union, the Security Council remained relatively inactive throughout its initial four decades of existence, authorizing the use of force on two occasions: in Korea in 1950 and in Iraq in 1990 (the First Gulf War).<sup>34</sup> Since the end of the Cold War, the Security Council has been more active, authorizing the deployment of troops for various purposes. It has allowed a limited use of force by United Nations peacekeeping operations in the former Yugoslavia, Somalia, the Democratic Republic of the Congo, Kosovo, and East Timor, and by regional arrangements, such as the ECOWAS Mission in Côte d'Ivoire (ECOMICI), the European Union force in the Democratic Republic of the Congo (EUFOR R.D. Congo), and the African Union Mission in Somalia (AMISOM).<sup>35</sup> Furthermore, it has authorized the use of "all necessary means" or "all necessary measures" by multinational forces in Somalia, Haiti, Rwanda, Eastern Zaire, Albania, Bosnia and Herzegovina, East Timor, the Democratic Republic of the Congo, Liberia, and

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<sup>33</sup> As of today, it is unlikely that the five permanent members of the Security Council would accept changing the existing veto structure. At a recent meeting in March 2013, representatives of the five permanent members declared the following:

Many of reform proposals include a demand on elimination of veto power of the permanent members or include a proposal to provide veto powers to new permanent members. We would like to declare that our delegations will not compromise to any of proposals which would change the current veto structure.

Luka Kavčič, *The Security Council Big Five: 'Current Veto Structure Will Not Change'*, UN HERALD (Mar. 21, 2013), <http://unherald.blogspot.com/2013/04/the-security-council-big-five-are-clear.html>.

<sup>34</sup> See *Frequently Asked Questions*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/about/faq.shtml#measures> (last visited Sept. 10, 2014).

<sup>35</sup> *Id.*

Iraq.<sup>36</sup> The most recent example of Security Council authorization to use force against a member state was Resolution 1973 in 2011, authorizing Member States, acting nationally or through regional organizations or arrangements, to take all necessary measures to protect civilians under threat of attack in Libya.<sup>37</sup> The fact that the Security Council has authorized the use of military force multiple times against multiple United Nations' member states since the end of the Cold War illustrates the idea that state sovereignty may no longer represent an ultimate shield against external intervention, and that Article 2(4)'s prohibition on the use of force can be circumvented through the Security Council's consistent willingness to breach state sovereignty in certain situations.

However, most instances of Security Council approval for the use of force have involved either limited mandates for the use of force (for instance, to protect civilians in Libya or for specific peacekeeping operations in the former Yugoslavia, Somalia, East Timor, etc.) or missions led through regional organizations, as in the case of ECOWAS, the European Union or the African Union. Instances where the Security Council has approved the general use of force by "all necessary means" against a United Nations member state have remained limited and rare throughout the organization's history. This state of affairs exemplifies the United Nations Charter's preferred system, where the use of force is a rare and limited exception to the otherwise generally prevailing ban on the use of force. In negotiating the Charter, states essentially agreed not to use force in the hope that peace and security would be preserved throughout the world if everyone agreed and respected the system.

### *C. States' Use of Force Throughout Charter History*

Throughout history, states have, of course, used force against other states outside the paradigm of the United Nations Charter. One circumstance under which states have used force throughout the second half of the twentieth century is intervention by a state to protect its nationals. Some have argued that a state's intervention to protect its nationals is an instance of self-defense, which was lawful under customary law before the promulgation of the Charter, and has remained lawful under the

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<sup>36</sup> *Id.*

<sup>37</sup> S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 11, 2011).

Charter.<sup>38</sup> Protection of nationals was relied upon by the British government to support its armed intervention in Egypt during the 1956 Suez Canal crisis; moreover, this was a ground advanced by the United States for its 1983 invasion of Grenada and its 1989 invasion of Panama.<sup>39</sup> In addition, states have argued that intervention to protect their nationals or rescue them from being held hostage is a lawful use of force.<sup>40</sup> Examples of this include Israel's intervention in Uganda to release Israeli hostages from a hijacked plane at Entebbe and the United States' intervention in Iran to rescue hostages from the U.S. Embassy.<sup>41</sup>

An additional paradigm under which states have used force during the Cold War was intervention to support democracy or other socialist regimes. President Reagan famously announced in 1985 that freedom movements are "our brothers" and that "we owe them our help."<sup>42</sup> This declaration gave rise to the so-called "Reagan Doctrine": the idea that the United States had the right to intervene by force to defend democratic governments in other states.<sup>43</sup> Similarly, Soviet Union leader, Leonid Brezhnev, asserted the right of socialist states to intervene in another state if socialism was threatened there; this concept became known in international law as the "Brezhnev Doctrine."<sup>44</sup>

Both of the aforementioned paradigms advanced by states for the use of force have failed to garner significant support by the international community. Protection of nationals remains a narrow ground upon which states may attempt to justify the use of force; however, the use of this narrow ground would not justify

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<sup>38</sup> D. W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 87–90 (1958); *see also* LORI F. DAMROSCH, LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER, HANS SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 973 (4th ed.) [hereinafter DAMROSCH ET AL.]. *But see* IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 301 (1963) (arguing against the legality of the use of force through intervention to protect nationals).

<sup>39</sup> DAMROSCH ET AL., *supra* note 38, at 973–74.

<sup>40</sup> Louis Henkin, *The Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 41–42 (2d ed. 1991).

<sup>41</sup> DAMROSCH ET AL., *supra* note 38, at 975.

<sup>42</sup> W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 26, 34 (Lori Fisler Damrosch & David J. Scheffer, eds., 1991) (citation omitted).

<sup>43</sup> *Id.*

<sup>44</sup> The Brezhnev Doctrine manifested itself in 1968 through the Soviet invasion of Czechoslovakia. DAMROSCH ET AL., *supra* note 38, at 977.

the use of large-scale military force against a regime, and would certainly not legitimize a humanitarian intervention to rescue nationals of the offending regime. Both the Reagan and the Brezhnev Doctrines were rejected by the International Court of Justice in the Nicaragua case, which held that “[t]he Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.”<sup>45</sup> In sum, states have at times referred to these grounds to justify their use of force against fellow states, but these sporadic types of military action have done little to change the existing customary law and its Charter-driven ban on the use of force.

Mindful of the Charter system and its prohibition on the use of force, states have at other times attempted to justify their military actions by advancing legal arguments consistent with the Charter itself. In most instances, states have argued that their military action constitutes an instance of self-defense: individual, collective, traditional, preventative, or preemptive. The former Soviet Union has claimed that it was exercising self-defense when it intervened in Afghanistan in 1979.<sup>46</sup> Russia, its successor state, made a similar argument when it sent troops into the Georgian breakaway provinces of South Ossetia and Abkhazia in 2008.<sup>47</sup> The United States claimed self-defense numerous times in the 1980s, when President Reagan launched military incursions into Panama, Grenada, Haiti, and Nicaragua.<sup>48</sup> Most of the latter instances of use of force by the United States in-

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<sup>45</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 263 (June 27).

<sup>46</sup> The Soviet Union claimed that it had been invited by the then Afghan Prime Minister Amin to help him stabilize his government in its fight against an Islamic insurgency throughout the country; the Soviet claim was essentially one of collective self-defense. See *Russian Invasion of Afghanistan*, HISTORY LEARNING SITE, [http://www.historylearningsite.co.uk/russia\\_invasion\\_afghanistan.htm](http://www.historylearningsite.co.uk/russia_invasion_afghanistan.htm) (last visited Sept. 10, 2014).

<sup>47</sup> For a detailed discussion of the 2008 “war” involving Russia and Georgia, see MILENA STERIO, *THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: “SELFISTANS,” SECESSION, AND THE RULE OF THE GREAT POWERS* 86–88 (2013).

<sup>48</sup> DAMROSCH ET AL., *supra* note 38, at 937 (noting that U.S. representatives, during military incursions into Grenada, Nicaragua, and Panama in the 1980s, continued to rely on the validity of the U.N. Charter and sought to justify American actions under that law).

volved a claim of so-called anticipatory or preventative self-defense. This means that the other state was in fact the aggressor about to harm the United States and so the United States could strike in anticipation or preventively against that other state in order to prevent the harm from occurring.<sup>49</sup> During the second Bush Administration, the concept of self-defense evolved to a new level. The so-called “Bush Doctrine” attempted to justify the use of force through preemptive self-defense.<sup>50</sup> This novel concept implied that the United States could use force against another state if that state acted in ways that could potentially harm the United States at some point in the future. Thus, instead of waiting for the “enemy” to move closer to its alleged goal of harming the United States, the Bush Doctrine authors claimed that the United States could strike preemptively

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<sup>49</sup> *Id.* at 966–67 (describing the circumstances giving rise to the 1989 military action against Panama, which were, according to the then President George H.W. Bush, exercised in self-defense). For a general discussion of anticipatory self-defense, see Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633–35 (1984).

<sup>50</sup> The Bush Doctrine was developed in the National Security Strategy of the United States, published on September 17, 2002. This strategic document stated the following:

The security environment confronting the United States today is radically different from what we have faced before. Yet the first duty of the United States Government remains what it always has been: to protect the American people and American interests. It is an enduring American principle that this duty obligates the government to anticipate and counter threats, using all elements of national power, before the threats can do grave damage. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. There are few greater threats than a terrorist attack with WMD.

To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense. The United States will not resort to force in all cases to preempt emerging threats. Our preference is that nonmilitary actions succeed. And no country should ever use preemption as a pretext for aggression.

against the offending state or nonstate actor,<sup>51</sup> without having to wait for that state to get critically closer to amassing an attack on the United States.<sup>52</sup>

States other than the Great Powers have also invoked self-defense to justify their use of force against other states. Both Azerbaijan and Armenia have claimed self-defense throughout their military actions against each other over the disputed Nagorno-Karabakh region,<sup>53</sup> and Israel has claimed self-defense in most of its wars with Egypt, Lebanon, and Syria.<sup>54</sup> Additionally,

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<sup>51</sup> In the wake of 9/11, some scholars have asserted that international law has evolved to allow states to exercise self-defense, whether traditional or preemptive, against nonstate actors as well. As evidence of this, scholars have cited Security Council Resolution 1368, which confirmed the right to use force in self-defense against nonstate actors (al Qaeda), thereby confirming the idea that international law authorizes states to use force in self-defense against nonstate actors. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (calling on states to “work together urgently to bring to justice the perpetrators, organizers and sponsors” of the attacks and reaffirming the inherent right of self-defense in accordance with Article 51 of the U.N. Charter in the context of 9/11 terrorist attacks). See Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L. L.J. 439, 451–52 (2010).

<sup>52</sup> President Bush made clear that the role of preemptive strikes would be significant in any future American national defense and foreign policy. In a speech to the U.S. Military Academy (West Point) cadets in 2002, he stated the following: “We cannot defend America and our friends by hoping for the best. We cannot put our faith in the word of tyrants, who solemnly sign non-proliferation treaties, and then systemically break them. If we wait for threats to fully materialize, we will have waited too long. . . . Our security will require transforming the military you will lead—a military that must be ready to strike at a moment's notice in any dark corner of the world. And our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives.” Press Release, White House Office of the Press Sec’y, President Bush Delivers Graduation Speech at West Point (June 1, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/print/20020601-3.html>.

<sup>53</sup> For a detailed briefing of the Azerbaijan-Armenia conflict, see INT’L CRISIS GRP., *Armenia and Azerbaijan: A Season of Risks*, EUROPE BRIEFING NO. 71 (Sept. 26, 2013), available at <http://www.crisisgroup.org/~media/Files/europe/caucasus/b071-armenia-and-azerbaijan-a-season-of-risks.pdf>.

<sup>54</sup> For a detailed discussion of Israeli wars with Lebanon, and Syria involving claims of self-defense, see STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 173–79 (1996). For a discussion of the Israeli war with Egypt, including a discussion of Israel’s position of anticipatory self-defense against Egypt, see JOHN QUIGLEY, THE SIX-DAY WAR AND ISRAELI SELF-DEFENSE 123–26 (2013).



scholars have discussed whether NATO air-strikes against the former Yugoslavia in 1999, in aid of Kosovar Albanians, could have represented an instance of legitimate collective self-defense.<sup>55</sup> This Article does not attempt to discuss the validity of each of these self-defense claims, nor to evaluate the legal soundness of doctrines such as preventive or preemptive self-defense. Instead, this Article limits itself to observing that while many states may feel that the current norms on the use of force, as they exist within the United Nations structure, are unfair or inflexible, most states actually advance legal arguments pursuant to such norms whenever they use force against other states.

At times, states have chosen not to legally justify their military actions within the existing legal structure of the United Nations, but instead have offered nonlegal rationales to support their behavior or have claimed that their actions were necessary because of an extraordinary situation. First, states have made nonlegal arguments to support their use of force against other states. Most notably, North Atlantic Treaty Organization (NATO) countries asserted a moral, humanitarian rationale to justify their prolonged air strikes against the Federal Republic of Yugoslavia in 1999. The Independent International Commission on Kosovo, chaired by Richard Goldstone and Carl Tham, asserted in its post-intervention analysis the following interpretation of the evolution of humanitarian intervention doctrine, which well reflected the views of many NATO countries having participated in the air strikes: "This interpretation is a situation in a gray zone of ambiguity between an extension of international law and

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<sup>55</sup> See, e.g., Frederic L. Kirgis, *The Kosovo Situation and NATO Military Action*, AM. SOC'Y INT'L L. INSIGHTS (Mar. 12, 1999), <http://www.asil.org/insights/volume/4/issue/1/kosovo-situation-and-nato-military-action>. For more scholarly debate on Kosovo, see the American Journal of International Law 93/4, October 1999, available at <http://www.asil.org/ajil/kosovo.htm> (Editorial Comments: NATO's Kosovo Intervention). See e.g., Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828 (1999); Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834 (1999); Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841 (1999); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 852 (1999); Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857 (1999); W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860 (1999).

a proposal for an international moral consensus.”<sup>56</sup> In fact, most of the countries involved in the air strikes chose not to use legal arguments to support the validity of their use of force, and most of these countries adopted a moral, nonlegal rhetoric.<sup>57</sup> Asichard Goldstone, the chair of the above-mentioned International Commission on Kosovo, famously argued that the use of force against the Federal Republic of Yugoslavia was illegal but legitimate because “although a right of humanitarian intervention was not consistent with the U.N. Charter if conceived as a legal text, it might, depending on the context, reflect the spirit of the Charter as it pertained to the overall protection of people against gross abuse.”<sup>58</sup> Second, during the same Kosovo bombing campaign, the United States, which was one of the main actors and instigators of the air strikes, used the following “exceptionalism” rhetoric: the then Secretary of State, Condoleeza Rice, continuously referred to Kosovo as “*sui generis*”—a case which does not create a precedent because of Kosovo’s unique situation.<sup>59</sup> Ac-

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<sup>56</sup> INDEP. INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 164 (2000) [hereinafter Kosovo Comm’n].

<sup>57</sup> For example, a few days before the start of the NATO-led aerial strikes against the former Yugoslavia in 1999, the spokesperson for the U.S. Department of State stated that “[w]e and our NATO allies have looked to numerous factors in concluding that such action, if necessary, would be justified” and that “we and our NATO allies believe there are legitimate grounds to threaten and, if necessary, use military force.” Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT’L L. 628, 631 (1999). But see the position of the United Kingdom government: “We are in no doubt that NATO is acting within international law and our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe.” Simon Duke, Hans-Georg Ehrhart & Matthias Karadi, *The Major European Allies: France, Germany, and the United Kingdom*, in KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP, *supra* note 26, at 128, 137.

<sup>58</sup> KOSOVO COMM’N, *supra* note 56, at 186. For Goldstone’s position that the Kosovo intervention was illegal but legitimate, see Ian Williams, *The NS Interview: Richard Goldstone*, NEW STATESMAN (Dec. 30, 2009), <http://www.newstatesman.com/middle-east/2010/01/interview-israel-law>.

<sup>59</sup> *U.S. Rules Out Recognising South Ossetia*, CIVIL.GE DAILY NEWS ONLINE (Mar. 6, 2008, 11:45 AM), <http://www.civil.ge/eng/article.php?id=17273>. See KOSOVO COMM’N, *supra* note 56, at 174 (“NATO and its supporters have wisely avoided staking out any doctrinal claims for its action either prior to or after the war. Rather than defining the Kosovo intervention as a precedent, most

ording to Rice, the use of force in Kosovo had been justified because of the unique factors present in that situation, including the break-up of the former Yugoslavia, of which Kosovo had been a province, and the extraordinary force used by the Milosevic regime against Kosovar Albanians.<sup>60</sup> Similarly, the United Nations Secretary-General, Ban Ki-Moon, has referred to Kosovo as a "highly distinctive situation" because of the involvement of the international community in this volatile region.<sup>61</sup>

Once again, this Article does not attempt to assess the validity of this type of *sui generis* claim; instead, it will point out that states, including arguably the most powerful ones, always refer to the existing use of force framework in their legal arguments to justify a specific instance of use of force, and if a solid legal argument cannot be worked out, they resort to claiming that a particular use of force was exceptional and a peculiar situation. Countries like the United States presumably make this type of argument because they are uncomfortable with the idea that any other nation could use force outside the confines of the United Nations system. Most countries presumably also believe that any use of force should remain exceptional and rare, which is why the use of force to prevent a humanitarian catastrophe has met solid resistance. While many countries probably agree that all humanitarian suffering should be stopped, they often disagree about whether using military force outside of the United Nations system to prevent the suffering is justified.

The following section will provide a brief background on the notion of humanitarian intervention and will also discuss more novel developments such as the Responsibility to Protect doctrine and the theory of involuntary sovereignty waiver.

## II. THE EMERGING CONCEPT OF HUMANITARIAN INTERVENTION

Humanitarian intervention has emerged as a vertical restraint on state behavior during the second half of the twentieth century. It is closely linked to other theories, such as Responsibility to Protect and involuntary sovereignty waiver, both of

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NATO supporters among international jurists presented the intervention as an unfortunate but necessary and reasonable exception.").

<sup>60</sup> *U.S. Rules Out Recognising South Ossetia*, *supra* note 59.

<sup>61</sup> *UN Secretary-General Ban Ki-moon: I Wish to Note that Kosovo is a Highly Distinctive Situation*, INTERFAX, <http://web.archive.org/web/20080314204124/http://www.interfax.com/17/373003/Inter-view.aspx> (last visited Sept. 7, 2014).

which contemplate instances where external actors may be justified in intervening in the internal affairs of a rogue regime that has chosen to abuse its own population.

### *A. Origins of Humanitarian Intervention*

Throughout the twentieth century, international law evolved from a set of norms governing inter-state behavior to a complex maze of rules, regulations, codes, and directives covering not just states but also a variety of nonstate actors, including the individual.<sup>62</sup> Norms governing state behavior vis-à-vis individuals living within state borders developed during the second half of the last century. The fields of human rights law and humanitarian law evolved, imposing a whole new set of prohibitions on state actors.<sup>63</sup> The notion of humanitarian intervention, which emerged over the past few decades, positions itself in the midst of the human rights movement because the use of force by a state actor against another state actor in order to prevent individual or group suffering implies that the protection of the individual is important enough to justify a breach of state sovereignty. Scholars have labeled this phenomenon as “revolutionary” because “it contradicts the notion of national sovereignty—that is, that a state can do as it pleases in its own jurisdiction.”<sup>64</sup> The state that launches a humanitarian intervention will encroach upon the sovereignty of the state that has been abusing human rights; the interventionist state will thus use force against the abuser. The concept of humanitarian intervention is a so-called vertical constraint on states, whereby external norms are imposed on otherwise sovereign states “by diplomatic and public persuasion, coercion, shaming, economic sanctions, isolation, and in more egregious cases, by humanitarian intervention.”<sup>65</sup>

The use of force for humanitarian purposes does not fall within the exceptions to the overall ban on any use of force, namely self-defense and Security Council authorization. In most instances of humanitarian intervention, the intervening state is not acting

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<sup>62</sup> See Sterio, *supra* note 17, at 214–15.

<sup>63</sup> *Id.* at 226–32 (discussing changes in international human rights law through the creation of new norms and the development of limitations on state sovereignty).

<sup>64</sup> DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 6 (2d ed. 1983).

<sup>65</sup> John Alan Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT'L L. 907, 941 (2006).

in self-defense because its own interests and borders are not being threatened. Moreover, in most instances, the Security Council does not become involved because of a permanent member's veto.<sup>66</sup> If the Security Council were to become involved, then any use of force would presumably be authorized through a Council resolution and the humanitarian intervention would be legal and justified under the current Charter structure. However, because the Security Council has experienced frequent paralysis, a state may decide to take military action in order to prevent a humanitarian catastrophe, either on its own or through a coalition of other willing states. This situation is one of true humanitarian intervention, where the intervening state or states need to invoke this emerging norm of international law in order to justify their use of force.<sup>67</sup> Recent examples of humanitarian intervention include the 1991 United Nations-sanctioned intervention in north Iraq in order to protect the Kurds,<sup>68</sup> the 1999 air strikes against the Federal Republic of Yugoslavia,<sup>69</sup> as well as the more remote actions by India in East Pakistan in order to "liberate" Bangladesh, and by Tanzania in Uganda in order to oust dictator Idi Amin.<sup>70</sup>

Humanitarian intervention has been an important subject of discussion among states and in particular, more recently in the

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<sup>66</sup> See, e.g., BRIAN D. LEPARD, *RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS* 362 (2002) (noting that Security Council members' vetoes have blocked humanitarian interventions in the past).

<sup>67</sup> See Inocencio Arias, *Humanitarian Intervention: Could the Security Council Kill the United Nations?*, 23 *FORDHAM INT'L L.J.* 1005, 1011 (noting the legal difficulty faced by states that engaged in a non-Security Council authorized humanitarian intervention because the "split in the Security Council—and the resulting gridlock created by the veto power of the Permanent Members—places any international intervention, no matter how apocalyptic the outrage being committed, in legal quicksand.").

<sup>68</sup> Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 *DENV. J. INT'L L. & POL'Y* 373, 384 (2003).

<sup>69</sup> For a discussion of the 1999 NATO air strikes in Kosovo as precedent for humanitarian intervention, see Fernando R. Tesón, *Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention*, 1 *AMSTERDAM L. FORUM* 43 (2009); AIDAN HEHIR, *HUMANITARIAN INTERVENTION AFTER KOSOVO: IRAQ, DARFUR AND THE RECORD OF GLOBAL CIVIL SOCIETY* (2008); Ciarán Burke & Martijn Stronks, *Kosovo, Georgia: Humanitarian Intervention and Independence*, 1 *AMSTERDAM L. F.* 1 (2009).

<sup>70</sup> Koh, *Part II*, *supra* note 7.

context of the 1999 air strikes against the Federal Republic of Yugoslavia. In 1999, NATO countries engaged in a series of aerial attacks against Yugoslav leadership in order to halt ethnic violence that was being perpetrated against Kosovar Albanians.<sup>71</sup> The Security Council was deadlocked because of Russian and Chinese opposition to any military action against the Federal Republic of Yugoslavia, and the NATO campaign took place outside of the confines of the Charter-sanctioned use of force structure.<sup>72</sup> Thus, this campaign can be viewed as an instance of humanitarian intervention. The campaign nonetheless provoked controversy. NATO justified the intervention in Yugoslavia as a humanitarian operation, fought “to avert a humanitarian catastrophe by disrupting the violent attacks currently being carried out by the Yugoslav security forces against the Kosovo Albanians and to limit their ability to conduct such repression in the future.”<sup>73</sup> Many agreed with the NATO-asserted humanitarian rationale, and some scholars supported the intervention by arguing that humanitarian action can be justified “where a government or effective authority actively exterminates its populace, or where it denies to it that which is necessary for its survival, or where it forcibly displaces it.”<sup>74</sup> Others, however, were more critical. Some scholars argued that the NATO intervention was illegal under international law and the existing Charter system because of the inherent danger of adopting a humanitarian rationale to authorize future uses of force. “[I]f it is accepted that a state or group of states can unilaterally decide to intervene . . . [t]he door will have been opened to all sorts of subjective claims as to when interventions are justified and when they are not.”<sup>75</sup> Some have questioned the NATO countries’ allegedly humanitarian motivation by asking why NATO countries were not willing to intervene in other equally problematic areas.<sup>76</sup> Others

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<sup>71</sup> For a detailed discussion of the 1999 Kosovo air strikes, see James Mayall, *The Concept of Humanitarian Intervention Revisited*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP*, *supra* note 26, at 319–33.

<sup>72</sup> *Id.* at 327.

<sup>73</sup> This statement was issued by the British Secretary of Defence, George Robertson. Paul Rogers, *Lessons to Learn*, 55 *WORLD TODAY*, no. 8/9, at 4–6 (1999).

<sup>74</sup> Marc Weller, *Armed Samaritans*, *COUNSEL*, at 20–22 (Aug. 1999).

<sup>75</sup> Michael Byers, *Kosovo: An Illegal Operation*, *COUNSEL*, at 16–18 (Aug. 1999).

<sup>76</sup> Mayall, *supra* note 71, at 331.

have suggested the need to reform the Security Council by eliminating the veto structure and by replacing it with a voting majority.<sup>77</sup>

Despite the initial lack of consensus on the status of humanitarian intervention within international law, it is clear that states have continuously debated the concept of humanitarian intervention and have at times accepted its legitimacy. The sections below will discuss two concepts related to intervention: Responsibility to Protect and involuntary sovereignty waiver, both of which provide evidence that the international community is becoming increasingly comfortable with breaking the sovereignty shield and discussing the possibility of intervention against rogue regimes.

### *B. Responsibility to Protect*

The term “Responsibility to Protect” was first coined in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), a commission formed in response to Kofi Annan’s question of when the international community must intervene in order to stop humanitarian suffering.<sup>78</sup> In essence, ICISS was tasked with ascertaining when the principle of state sovereignty should yield to some type of intervention aimed at preventing a human rights and humanitarian crisis. The ICISS Report noted a shift from the traditional notion of “sovereignty as control” toward “sovereignty as responsibility in both international functions and external duties.”<sup>79</sup> Despite its promising start, the concept of Responsibility to Protect failed to garner significant state support because of two devastating events: the September 11, 2001 terrorist attacks on the World Trade Center and the March 2003 United States’ invasion of Iraq.<sup>80</sup> Most states remained focused on preventing further terrorist at-

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<sup>77</sup> Catherine Guicherd, *International Law and the War in Kosovo*, 41 SURVIVAL, no. 2, Summer 1999, at 25.

<sup>78</sup> ICISS Report, *supra* note 18; see also Max W. Mathews, Note, *Tracking the Emergence of a New International Norm: the Responsibility to Protect and the Crisis in Darfur*, 31 B.C. INT'L & COMP. L. REV. 137 (2008).

<sup>79</sup> ICISS Report, *supra* note 18, sec. 2.14.

<sup>80</sup> See INT'L COALITION FOR THE RESPONSIBILITY TO PROTECT, *An Introduction to the Responsibility to Protect*, RESP. TO PROTECT, § 1, <http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop> (last visited Sept. 24, 2014) [hereinafter INT'L COALITION].

tacks, and many states feared that any intervention-type doctrine like Responsibility to Protect would be used in the future to justify another Iraq-like invasion.<sup>81</sup> Kofi Annan however continued to promote Responsibility to Protect.<sup>82</sup> In addition, the African Union countries embraced the concept of Responsibility to Protect by including it in the Constitutive Act of the organization's Charter.<sup>83</sup> In fact, Article 4(h) of the Constitutive Act states that it is the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity,"<sup>84</sup> which reflects the African Union member states' commitment to Responsibility to Protect as it authorizes member states to intervene in each other's affairs in order to prevent humanitarian catastrophes from occurring.

Ultimately, by 2005, Responsibility to Protect garnered enough support to result in the creation of the World Summit Outcome Document, a document agreed to by the heads of state present at that year's World Summit.<sup>85</sup> Paragraphs 138–139 stipulate the following: that each individual state has the primary Responsibility to Protect its populations from genocide, war crimes, crimes against humanity and ethnic cleansing; that the international community should assist and encourage states to exercise this responsibility; and that the international community has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to help protect populations threatened by these crimes.<sup>86</sup> In addition, this Document stipulates that "when a state manifestly fails in its protection

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<sup>81</sup> *Id.*

<sup>82</sup> As part of his effort to promote Responsibility to Protect, in 2003, the U.N. Secretary-General, Kofi Annan, formed the High-level Panel on Threats, Challenges and Change to report on how the U.N. should confront the greatest security threats of the twenty-first century. Moreover, the Secretary-General published his own report entitled *In Larger Freedom: Towards Development, Security and Human Rights for All*, in which, similar to the High-level Panel, he emphasized the need of governments to take action against threats of massive human rights violations and other large scale acts of violence against civilians. INT'L COALITION, *supra* note 80.

<sup>83</sup> ORG. OF AFRICAN UNITY, CONSTITUTIVE ACT OF THE AFRICAN UNION (July 11, 2000), available at [http://www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm).

<sup>84</sup> *Id.*

<sup>85</sup> INT'L COALITION, *supra* note 80, § 4.

<sup>86</sup> *Id.*



responsibilities, and peaceful means are inadequate, the international community must take stronger measures, including collective use of force authorized by the Security Council through its Chapter VII powers.”<sup>87</sup>

Since the 2005 World Summit, Responsibility to Protect has experienced several important advancements. First, the Security Council unanimously adopted Resolution 1674 on the Protection of Civilians in Armed Conflict, which includes the first official Security Council reference to the Responsibility to Protect.<sup>88</sup> Second, the Security Council also passed Resolution 1706, authorizing the deployment of United Nations peacekeeping troops in Darfur, which referred to Resolution 1674 and paragraphs 138 and 139 on the Responsibility to Protect in the 2005 World Summit Outcome Document.<sup>89</sup> Third, several Security Council resolutions have focused on the protection of civilians in conflict areas and have indirectly referenced Responsibility to Protect. In 2011, Resolution 1970 called upon Libya’s “Responsibility to Protect” by referring the situation to the International Criminal Court and imposing financial sanctions as well as an arms embargo.<sup>90</sup> Resolution 1973 called for the enforcement of a no-fly zone and for “all necessary measures . . . to protect civilians and civilian populated areas under threat or attack. . . . [w]hile excluding a foreign occupation force of any form.”<sup>91</sup> This Resolution condemned the Libyan government for failing to comply with international law and for allowing gross violations of human rights and attacks that may amount to crimes against humanity.<sup>92</sup> Also, in 2011, the Security Council adopted Resolution 1975 on Cote d’Ivoire, condemning human rights violations occurring against the civilian population in this country that could amount to crimes against humanity.<sup>93</sup> Moreover, this Resolution stated that it was the primary responsibility of each state to protect civilians and reaffirmed the U.N. mandate in Cote d’Ivoire to use all necessary means to protect civilians.<sup>94</sup> These sets of resolutions focusing on two conflict areas, Libya and Cote

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<sup>87</sup> *Id.*

<sup>88</sup> S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

<sup>89</sup> S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

<sup>90</sup> S.C. Res. 1970, U.N. Doc. S/RES 1970 (Feb. 26, 2011).

<sup>91</sup> S.C. Res. 1973, paras. 4–12, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

<sup>92</sup> *Id.* at 1.

<sup>93</sup> S.C. Res. 1975, U.N. Doc. S/RES/1975 (Mar. 30, 2011).

<sup>94</sup> *Id.* at 2.

d'Ivoire, reflect the notion that the Security Council member states believe that each state has a Responsibility to Protect civilians within its own borders and more importantly, should a state fail to protect civilians, it is appropriate and important for the Security Council to use force in order to stabilize the area and prevent further humanitarian suffering.

While it can be argued that Responsibility to Protect is a newly emerging norm of customary law, this theory has not reached the status of binding law yet. Recent opposition by states to the use of Responsibility to Protect demonstrates the lack of consistent state practice needed for the creation of a customary norm. In 2007, Russia and China “vetoed a resolution within the Security Council on the situation in Burma, arguing that Burma did not pose a threat to international peace and security,” that the internal affairs of a sovereign state should not be debated within the Security Council, and that the situation should instead be referred to the Human Rights Council.<sup>95</sup> In addition, Security Council member states failed to refer to Responsibility to Protect in the Darfur Resolution, which had authorized the deployment of a hybrid United Nations-African Union military force in this troubled region, but which did not specifically reference the emerging theory of Responsibility to Protect.<sup>96</sup> “As compared to the earlier Resolution 1674, this limited endorsement was disappointing to the community of civil society and policy-makers working to advance the norm.”<sup>97</sup>

Moreover, states have opposed Responsibility to Protect outside of the Security Council: on budgetary matters, in the General Assembly, and regarding appointments to specialized United Nations positions related to Responsibility to Protect. First, during the General Assembly's fifth Committee bi-annual budget debate, the Committee refused to fund the office of the new Special Adviser on Responsibility to Protect.<sup>98</sup> While this decision was partly caused by other procedural matters, it nonetheless reflected some member states' viewpoint that Responsibility to Protect had actually never been agreed to as a norm during the 2005 World Summit. Additionally, on February 21, 2008, the office of the Secretary-General announced the appointment of Edward Luck as a Special Adviser with a focus on the

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<sup>95</sup> INT'L COALITION, *supra* note 80.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

Responsibility to Protect populations from genocide, ethnic cleansing, war crimes and crimes against humanity.<sup>99</sup> This office has been previously titled "Special Adviser on the Responsibility to Protect";<sup>100</sup> it is reasonable to assume that this title change reflected the resistance to this position from some United Nations Member States.

Most importantly, this theory, even if it were to become binding law, does not alter the existing rules on the use of force under international law because Responsibility to Protect places any kind of military intervention against an offending state within the existing Security Council structure. In other words, although states have the Responsibility to Protect their populations from humanitarian suffering, it is up to the international community, through the Security Council, to force states into compliance through a potential use of military force. Responsibility to Protect does not authorize states to use force against other states in an effort to prevent humanitarian suffering.

Finally, any implementation of Responsibility to Protect has been slow. On January 12, 2009, the United Nations Secretary-General issued a report entitled "Implementing the Responsibility to Protect."<sup>101</sup> The report presented a three-pillar approach. First, Pillar One stresses that states have the primary Responsibility to Protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>102</sup> Second, Pillar Two emphasizes the necessity for the international community to assist States directly in building the latter's capacity to protect their populations from the most heinous crimes, such as genocide, war crimes, ethnic cleansing, and crimes against humanity. Pillar Two also stresses the need to assist those populations which live under dire conditions before a crisis or conflict break out. Furthermore, it "addresses the commitment of the international community to provide assistance to States in building capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing RtoP*].

<sup>102</sup> *Id.* pt. II.

out.”<sup>103</sup> Finally, Pillar Three focuses on the responsibility of the international community to take action to prevent genocide, ethnic cleansing, war crimes, and crimes against humanity when a state is manifestly failing to protect its population.<sup>104</sup> The Secretary-General’s report urged the General Assembly to develop a strategy for implementing Responsibility to Protect, as described in the report.<sup>105</sup> The General Assembly passed a resolution on September 14, 2009, whereby it accepted to continue considering Responsibility to Protect.<sup>106</sup> Since 2009, the General Assembly member states have engaged in multiple debates and dialogues about Responsibility to Protect, but as of now, member states have not progressed further than agreeing to continue “considering” this concept.<sup>107</sup> Despite the Secretary-General’s report and his continuous urging of states to implement Responsibility to Protect, states have resisted any real implementation, and this concept has simply remained a subject of discussion on the General Assembly’s agenda.

While Responsibility to Protect may remain a controversial subject of future discussions and while its implementation may appear doubtful, the fact remains that states seem at least willing to debate the concept, showing thereby their readiness to discuss sovereignty-encroaching theories. In this sense, Responsibility to Protect is revolutionary.

### C. *Involuntary Sovereignty Waiver*

The theory of involuntary sovereignty waiver is another concept that purports to legitimize intervention in the affairs of a sovereign state if the state abuses its own population, thereby prioritizing the protection of human rights over state sovereignty. The term “involuntary sovereignty waiver” was first articulated in the United States’ policy, as articulated by Richard Haass, the Director of Policy Planning for the State Department in the George W. Bush Administration and the current President of the Council on Foreign Relations.<sup>108</sup> Haass argued that

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<sup>103</sup> *Id.* pt. III.

<sup>104</sup> *Implementing RtoP*, *supra* note 101, pt. IV.

<sup>105</sup> *Id.* para. 71

<sup>106</sup> G.A. Res. 63/308, ¶ 2, U.N. Doc. A/RES/63/308 (Oct. 7, 2009).

<sup>107</sup> See INT’L COALITION, *supra* note 80, § 8.

<sup>108</sup> Haass initially developed his theory in 2002, arguing that states waive their sovereignty if they commit atrocities against their own people or if they harbor terrorists. Nicholas Lemann, *The Next World Order*, NEW YORKER, Apr. 1,

rogue states “waive” their sovereignty, inviting thereby intervention by outside actors if they commit one of the following sets of acts: harboring weapons of mass destruction; sponsoring or protecting terrorists; and committing humanitarian abuses.<sup>109</sup> According to Haass, such rogue states can no longer claim the protection of their otherwise inherent sovereignty shield and can be intruded upon by outside actors wishing to eradicate rogue behavior.<sup>110</sup> Thus, Haass claimed that “sovereignty is not a blank check” and that “outlaw regimes” jeopardize their sovereignty “by pursuing reckless policies fraught with danger for their citizens and the international community.”<sup>111</sup> Haass argued, however, that such outside intervention could be staged by one of the powerful states themselves, such as the United States, without any involvement on behalf of the United Nations or direct approval by the Security Council.<sup>112</sup> According to Haass’ argument, humanitarian intervention would be one of the exceptions to the general ban on the use of force, under which powerful

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2002, at 45–46; Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L L. & FOREIGN AFF. 361, 401 (2005). Haass amended his theory in 2003 by including states that pursue weapons of mass destructions. Richard N. Haass, Dir. of the Policy Planning, U.S. Dept. of State, Remarks to the School of Foreign Service and the Mortara Center for International Studies at Georgetown University: Sovereignty: Existing Rights, Evolving Responsibilities (Jan. 14, 2003), in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 698–700 (Henry J. Steiner et al. eds., 3d ed. 2008) [hereinafter Georgetown Speech].

<sup>109</sup> Georgetown Speech, *supra* note 108.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Georgetown Speech, *supra* note 108, at 698. While Haass does not specifically articulate that powerful countries, like the United States, can stage military actions unilaterally without Security Council authorization, under the involuntary sovereignty waiver theory, this argument is implicit in Haass’ articulated policy. See Michael J. Kelly, *Sovereignty Redux: The ICJ Ruling in Congo v. Uganda*, JURIST (Dec. 22, 2005, 8:01 AM), <http://jurist.org/forum/2005/12/sovereignty-redux-icj-ruling-in-congo.php> (arguing that Haass’ policy on involuntary sovereignty waiver provided the Bush Administration with a much-needed rationale to support the 2003 invasion, which, because of the lack of Security Council authorization, would otherwise have constituted an illegal war).

states could engage in unilateral military action against a rogue state in order to prevent a humanitarian catastrophe.<sup>113</sup>

It is unclear whether Haass intended for this theory to apply to states other than the United States or its allies; it is also unclear that any other scholars or states have embraced this view.<sup>114</sup> Nonetheless, the involuntary sovereignty waiver theory illustrates the United States Administration's willingness to acknowledge the existence of a humanitarian intervention-type justification for the use of unilateral military force. This type of argument, like the concept of Responsibility to Protect, demonstrates states' willingness to debate and potentially propose novel theories on the use of force, which could break the traditional sovereignty shield and authorize force outside of the confines of the United Nations Charter system.

In light of the above, it can be argued that humanitarian intervention is an emerging norm of international law and that together with theories such as Responsibility to Protect and involuntary sovereignty waiver, it demonstrates the international community's struggle to strike the right balance between traditional norms of state sovereignty and the modern-day need for external military involvement in bloody civil wars. In other words, while the international community seems ready to discuss sovereignty-breaking concepts, such as humanitarian intervention, Responsibility to Protect, and involuntary sovereignty waiver, the precise status and content of these theories have remained in flux. The catastrophic situation in Syria, which is explored below, illustrates the weakness of this type of approach: when international law is uncertain or prohibitive of military action against a rogue regime, such a regime can benefit from the situation and provoke unimaginable suffering.

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<sup>113</sup> For a detailed discussion of Haass' view, see Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 403–04 (2005).

<sup>114</sup> Scholars have discussed Haass' theory in the context of an evolving "rule" by the Great Powers—the most powerful states on the international stage, such as the Security Council permanent members (United States, Russia, China, France, and Great Britain) and other economically, politically, and militarily powerful states (e.g., Germany, Japan, and Italy). Because Haass argued that interventions could be unilaterally staged by powerful countries, like the Great Powers, against "rogue" regimes, scholars have wondered whether this constitutes a return to a Great Powers' Rule. See, e.g., Kelly, *supra* note 113; STERIO, *supra* note 47.

## III. BACKGROUND ON SYRIA

Many discussions about the use of force under the paradigm of humanitarian intervention have recently taken place in the context of Syria, where a violent civil war has threatened both the stability of this volatile nation, as well as the Middle-Eastern regional geo-political equilibrium. This section explores the history of Syria, leading up to its fragile present state.

Syria is a multi-ethnic nation and home to a majority of Arab Sunnis and many other minority groups, such as Arab Alawites, Christians, Armenians, Assyrians, Druze, Kurds, and Turks.<sup>115</sup> It was a part of the Ottoman Empire from the sixteenth century until the First World War. After the War, Syria was integrated into the French mandate in the Middle East. It gained independence from France in 1946, but its first decades as a sovereign nation were marred by violence and conflict.<sup>116</sup> Following the 1956 Suez Crisis, Syria aligned itself with the communist Soviet Union in exchange for acquiring military weapons from this super power.<sup>117</sup> From 1958–1961, Syria briefly merged with Egypt, but this union fell apart, resulting in further instability within Syria.<sup>118</sup> In 1967, Syria fought alongside Egypt against Israel in the Six-Day War, during which Israel captured the entire Golan Heights.<sup>119</sup> Following hostilities with Jordan in 1970, Hafez al-Assad, the father of the current president Bashar al-Assad, rose to power and emerged as ruler of Syria.<sup>120</sup> Violence and warfare ensued throughout Hafez al-Assad's regime. In 1973, Syria fought against Israel in the so-called Yom Kippur War, during which Israeli forces pushed further into Syrian territory.<sup>121</sup> In early 1976, Syrian forces entered Lebanon, where they fought for control against Israel through an extensive use of proxy wars. Syrian forces remained in Lebanon until 2005.<sup>122</sup> In the late

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<sup>115</sup> See *Syria Profile*, BBC NEWS, <http://www.bbc.co.uk/news/world-middle-east-14703856> (last updated Mar. 19, 2014) [hereinafter *Syria Profile*].

<sup>116</sup> *Id.*

<sup>117</sup> *Syria: History: Ideology and Foreign Policy to 1990*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/578856/Syria/278806/Ideology-and-foreign-policy-to-1990> (last visited Sept. 10, 2014).

<sup>118</sup> *Syria Profile*, *supra* note 115.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> ABRAHAM RABINOVICH, THE YOM KIPPUR WAR: THE EPIC ENCOUNTER THAT TRANSFORMED THE MIDDLE EAST 302 (2004).

<sup>122</sup> *Syria Profile*, *supra* note 115.

1970s, an Islamic uprising orchestrated by the Muslim Brotherhood and aimed against the government resulted in further violence, culminating in the 1982 Hama Massacre, where thousands of Syrians were killed by the Syrian army.<sup>123</sup>

Hafez al-Assad died in 2000 and was succeeded by his son, Bashar al-Assad, who ran unopposed for the presidential post. Bashar al-Assad's election initially sparked hope for reform, but his regime quickly quashed any protest.<sup>124</sup> The current crisis began as part of the Arab spring: a series of peaceful protests took place in Syria in the spring of 2011, to be brutally quashed by the Syrian army.<sup>125</sup> By the summer of 2011, army defectors formed the Free Syrian Army and began fighting against government forces. The opposition movement is dominated by Sunnis, whereas Assad and the governing regime are mostly Alawites.<sup>126</sup> According to some reports, close to 200,000 people have been killed in this bloody conflict, and over 1.7 million Syrians have fled to the neighboring countries of Jordan, Turkey, Iraq, and Lebanon.<sup>127</sup> Recently, the conflict escalated, resulting in the use of particularly heinous weapons by the Syrian government. In August 2013, President Assad allegedly used chemical weapons against Syrian civilians. A team of United Nations inspectors has confirmed this.<sup>128</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (noting that “[f]ollowing the death of Hafez al-Assad in 2000 Syria underwent a brief period of relaxation. Hundreds of political prisoners were released, but real political freedoms and a shake-up of the state-dominated economy never materialized”).

<sup>125</sup> *Id.*

<sup>126</sup> Kim Sengupta, *Syria's Sectarian War Goes International as Foreign Fighters and Arms Pour into Country*, INDEPENDENT, Feb. 20, 2012, <http://www.independent.co.uk/news/world/middle-east/syrias-sectarian-war-goes-international-as-foreign-fighters-and-arms-pour-into-country-7216665.html>.

<sup>127</sup> Matthew Weaver, *Syria Crisis: Number of Refugees Tops 1.5 Million, Says UN*, GUARDIAN (May 16, 2013, 12:55 PM), <http://www.theguardian.com/world/2013/may/16/syria-crisis-refugees-million-un>; John Heilprin, *UN: Death toll from Syrian Civil War Tops 191,000*, USA TODAY (Aug. 22, 2014, 6:26 AM), <http://www.usatoday.com/story/news/world/2014/08/22/united-nations-syria-death-toll/14429549/> (noting that 191,000 people have been killed to date in the Syrian war); MIGRATION POLICY CTR., *Syrian Refugees: A Snapshot of the Crisis—In the Middle East and Europe*, <http://syrianrefugees.eu/> (noting that Syrian refugees have been fleeing to Turkey, Lebanon, Jordan, and Iraq) (last updated Oct. 2014).

<sup>128</sup> *Syria Chemical Attack: What We Know*, BBC NEWS (Sept. 24, 2013, 5:46 AM), <http://www.bbc.co.uk/news/world-middle-east-23927399>; see also U.N. Secretary-General, *United Nations Mission to Investigate Allegations of the*



The ongoing crisis situates itself perfectly within the ongoing situation in Syria, where all constitutional and democratic freedoms and values have been lacking. While Syria is officially a constitutional democracy, many constitutionally-protected freedoms were suspended between 1963 and 2011 under an Emergency Law presumably because of its ongoing conflict with Israel over Golan Heights.<sup>129</sup> Most human rights observers have expressed serious concern over Syria's human rights record, calling it one of the worst on the planet.<sup>130</sup> The current conflict has only exacerbated an already volatile situation.

Syrian demographics have additionally fueled the ongoing conflict. The majority of Syrians—approximately 74 percent—are Sunni Arab; President Assad and his government belong to a minority Alawite group that comprises approximately 13 percent of the population; Christians constitute a 10 percent minority; other minority groups such as Turks, Kurds, Assyrians, etc. constitute the remaining portion of the population.<sup>131</sup> Christians have aligned themselves with the ruling Alawites, from whom they have expected protection from the more radical Islamic Sunnis. Many Christians, alongside Alawites, hold prominent posts within Syria.<sup>132</sup> Most Christians have thus supported Assad throughout the conflict and have argued that if Assad were

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*Use of Chemical Weapons in the Syrian Arab Republic: Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013* (Sept. 13, 2013), available at [http://www.un.org/disarmament/content/slideshow/Secretary\\_General\\_Report\\_of\\_CW\\_Investigation.pdf](http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf).

<sup>129</sup> *Decrees on Ending State of Emergency, Abolishing SSSC, Regulating Right to Peaceful Demonstration*, SYRIAN ARAB NEWS AGENCY (April 22, 2011), <http://www.sana-syria.org/eng/361/2011/04/22/pr-342711.htm>.

<sup>130</sup> *Freedom in the World 2011*, FREEDOM HOUSE, <http://freedomhouse.org/report/freedom-world/freedom-world-2011?page=363&year=2011&country=8143> (last visited Sept. 13, 2014); see also *Human Rights in Syria*, HUM. RTS. WATCH, <http://www.hrw.org/middle-eastn-africa/syria> (last visited Oct. 19, 2014); *Syria*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/countries/middle-east-and-north-africa/syria> (last visited Oct. 19, 2014).

<sup>131</sup> *Syria Demographics Profile 2014*, CIA WORLD FACTBOOK, [http://www.indexmundi.com/syria/demographics\\_profile.html](http://www.indexmundi.com/syria/demographics_profile.html) (last updated Aug. 23, 2014).

<sup>132</sup> Stephen Starr, *Syria's Christians Continue to Stand by Assad Regime*, GLOBALPOST (Feb. 6, 2002, 7:00 AM), <http://www.globalpost.com/dispatch/news/regions/middle-east/120205/syria-christians-assad-regime-damascus-russia-china> ("Thousands of Christians are tied up in the regime's security apparatus and are employed in high-ranking government and military positions.").

removed, the dominant Sunnis would install an Islamic, extremist government, which would harm Christians and all other minority groups even further.<sup>133</sup>

In the wake of the horrific violence and bloodshed in Syria and in particular, following allegations of chemical weapons used by the Assad regime, the international community has grappled with the issue of whether to militarily intervene in this volatile region. The United Nations Security Council has been blocked over the issue because both Russia and China have threatened to veto any resolution calling for military action against Syria.<sup>134</sup> The United States briefly attempted to build consensus over the idea of staging a unilateral intervention in Syria, alongside allies such as Great Britain and France.<sup>135</sup> In September 2013, United States Secretary of State, John Kerry, negotiated an agreement with the Russian Prime Minister, Sergei Lavrov, whereby Syrian leadership would agree to a chemical weapons inspection and ultimate destruction regime.<sup>136</sup> All veto holders on the Security Council agreed to the proposed regime, and Resolution 2118 was passed by the Security Council on September 27, 2013.<sup>137</sup> Resolution 2118 requires first that Syria eliminate its chemical stockpile and allow complete access for both the United Nations and the Organization for the Prohibition of Chemical Weapons chemical weapons inspectors. It then con-

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<sup>133</sup> *Id.* (“As a fellow minority, Christians have long supported the Alawite regime in order to ensure protection and rights for themselves.”).

<sup>134</sup> Louis Charbonneau & Michelle Nichols, *U.N. Security Council Powers Meet Again on Syria; No Outcome*, REUTERS (Aug. 29, 2013, 5:39 PM), <http://www.reuters.com/article/2013/08/29/us-syria-crisis-un-idUSBRE97S17R20130829> (noting that Russia and China had vetoed three proposed resolutions that would have condemned the Assad regime and threatened United Nations sanctions).

<sup>135</sup> *Id.* (noting that the United States and Great Britain sought to convince the public of the need to engage in military strikes against Syria); *see also France’s Hollande Backs US on Syria Action*, BBC NEWS (Aug. 30, 2013, 12:57 PM), <http://www.bbc.co.uk/news/world-middle-east-23897775> (noting that the French President, Francois Hollande, has backed the United States’ proposal for military action in Syria).

<sup>136</sup> Lynch, *supra* note 5.

<sup>137</sup> Resolution 2118, *supra* note 4; *see also* Press Release, Security Council, Security Council Requires Scheduled Destruction of Syria’s Chemical Weapons, Unanimously Adopting Resolution 2118, U.N. Press Release SC/11135 (Sept. 27, 2013), <http://www.un.org/press/en/2013/sc11135.doc.htm> (noting that Resolution 2118 was unanimously adopted).

templates the removal and destruction of Syrian chemical weapons at secure sites.<sup>138</sup> If Syria does not comply with the imposed regime, the Security Council could adopt a second resolution regarding imposition of military or other actions against Syria under Chapter VII of the United Nation Charter.<sup>139</sup> A violation by the Assad regime of the inspection regime does not trigger an automatic military response by the Security Council, but presumably, Security Council member states would reunite and seriously discuss the possibility of authorizing force against Syria if Assad were to flaunt the inspection regime.

The inspection regime has temporarily removed the issue of humanitarian intervention from the Security Council's discussion table. Yet, should the Assad regime choose to disrespect the mandated inspection regime, the possibility of humanitarian intervention would fervently return to the center of discussion. Moreover, the inspection regime has only dealt with the issue of possession and use of chemical weapons by the Syrian government, but it has done nothing to resolve or alleviate humanitarian suffering within Syria. Should Security Council member states revisit the issue of military intervention in order to halt such suffering, or if the Assad regime failed to comply with the inspection regime, it is likely that paralysis would occur once again and veto-wielding nations such as Russia and China would block all possibilities of authorizing force in Syria. Thus, nations like the United States, which had contemplated using military force in Syria, may have to revisit this option in the near future in order to fully resolve the ongoing civil war in this explosive nation.

The section below explores the legality of any use of force against the Syrian regime exercised by the United States or another state or coalition of states outside of the confines of the United Nations Charter system.

#### IV. POTENTIAL ARGUMENTS FOR THE LEGALITY OF USE OF FORCE

Scholars and politicians have made numerous arguments as to why the proposed humanitarian intervention in Syria would be legal under international law. This Section briefly describes the

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

most frequently raised arguments and explains why none of them offers a solid legal basis for the proposed intervention.

President Obama famously claimed that Syrian President Assad crossed a “red line” when he allegedly used chemical weapons against his own civilian population.<sup>140</sup> According to President Obama, the crossing of this imaginary line through the use of prohibited and heinous weaponry against innocent civilians would serve as justification under international law for a military strike against Syria.<sup>141</sup> This argument adopts a novel view: that states may intervene against other states to prevent a humanitarian catastrophe if such other states are using dangerous weapons. This argument is different from that made in support of humanitarian intervention. Under the latter view, states are justified in intervening militarily against states that abuse human rights to a level causing a humanitarian catastrophe, regardless of which kinds of weapons the abusing state may be using.<sup>142</sup> In other words, it does not matter if the offending regime is using machetes, as in Rwanda, ground troops, as in Kosovo, or chemical weapons, as in Syria. The necessity to prevent humanitarian suffering enables all states to intervene, even if the offending regime did not cross any “red lines.” Many scholars have already made this argument regarding Syria: that the situation there has been catastrophic for two years and the use of chemical weapons to murder civilians is not any different than the use of traditional weapons toward the same end.<sup>143</sup> The legality of President Obama’s argument—that the use of chemical weapons somehow justifies an otherwise unauthorized military

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<sup>140</sup> See Glenn Kessler, *President Obama and the “Red Line” on Syria’s Chemical Weapons*, WASHINGTON POST (Sept. 6, 2013), <http://www.washingtonpost.com/blogs/fact-checker/wp/2013/09/06/president-obama-and-the-red-line-on-syrias-chemical-weapons> (quoting President Obama’s remarks to reporters on August 20, 2012: “We have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation.”).

<sup>141</sup> For an official explanation of President Obama’s position on Syria, see Karen Parrish, *Obama: Syria Strikes Justified, But Diplomacy May Work*, AMERICAN FORCES PRESS SERVICE (Sept. 10, 2013), <http://www.defense.gov/News/newsarticle.aspx?ID=120752>.

<sup>142</sup> See *supra* Part II for a discussion on humanitarian intervention.

<sup>143</sup> For a provocative discussion on the use of chemical weapons, see Kevin Jon Heller, *What’s So Terrible About Chemical Weapons?*, OPINIOJURIS (Aug. 27, 2013, 6:29 AM), <http://opiniojuris.org/2013/08/27/whats-terrible-chemical-weapons/>.

response by an outside nation, like the United States—is questionable. Moreover, President Obama’s argument mixes the rationale for humanitarian intervention with the *jus in bello* prohibition against the use of chemical weapons.<sup>144</sup> The combination of the two somehow, according to the Obama Administration, provides legal basis toward a military intervention.<sup>145</sup> It is true that chemical weapons have been prohibited via treaty law in international armed conflict and that, accordingly, the use of such prohibited weapons would constitute a violation of *jus in bello*.<sup>146</sup> However, it is legally incorrect to claim that the use of

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<sup>144</sup> For a critique of the Obama Administration position, see Kevin Jon Heller, *Obama’s Bizarre New Theory of Customary International Law*, OPINIO JURIS (Sept. 7, 2013, 7:53 PM), <http://opiniojuris.org/2013/09/07/obamas-bizarrenew-theory-customary-international-law/>. The term “*jus ad bellum*” refers to “the law governing the resort to force as enshrined in the United Nations Charter.” Laurie R. Blank, *After “Top Gun”: How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT’L L. 675, 679 (2012). The term “*jus in bello*” refers to law of war, otherwise known as international humanitarian law, which “applies to situations of armed conflict and governs the conduct of hostilities and the protection of persons during conflict.” *Id.* at 681.

<sup>145</sup> The U.S. Secretary of State, John Kerry, offered the following justification for the use of force against Syria:

What we saw in Syria last week should shock the conscience of the world. It defies any code of morality. Let me be clear. The indiscriminate slaughter of civilians, the killing of women and children and innocent bystanders by chemical weapons is a moral obscenity. By any standard, it is inexcusable. And despite the excuses and equivocations that some have manufactured, it is undeniable.

Heller, *supra* note 143. See also Krista Nelson, *Syria Insta-Symposium: The Significance of Chemical Weapons Use Under International Law*, OPINIO JURIS (Sept. 6, 2013, 1:30 PM), <http://opiniojuris.org/2013/09/06/syria-insta-symposium-significance-chemical-weapons-use-international-law/> (noting that “[t]he administration suggests that the use of chemical weapons links the Syrian conflict to U.S. national security interests”).

<sup>146</sup> The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (“Chemical Weapons Convention”), which entered into force in 1997, prohibits State Parties from using, producing, and transferring chemical weapons. Article 1 provides as follows:

Each State Party to this Convention undertakes never under any circumstances: (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) To use chemical weapons; (c) To engage in any

chemical weapons is prohibited in internal warfare, such as in Syria, and that such use of chemical weapons in a civil war provides a basis for the use of force by an external actor under *jus ad bellum*.<sup>147</sup> In other words, the use of chemical weapons in noninternational armed conflict is not a violation of *jus in bello* per se, and even if it were, such violations of *jus in bello* do not legitimize the use of force for the purposes of *jus ad bellum*. President Obama's argument is flawed from an international law standpoint regardless of how heinous the use of chemical weapons may be.

The extension of the above-mentioned argument, also made by the Obama administration, is that the alleged use of chemical weapons by President Assad poses a threat to American national security and that, accordingly, President Obama can deploy American troops to Syria without Congressional approval.<sup>148</sup>

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military preparations to use chemical weapons; (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. I, Jan. 13, 1993, 1974 U.N.T.S. 45, 32 I.L.M. 800. One of the four core principles of *jus in bello* is the principle of humanity, otherwise known as the principle of unnecessary suffering; this principle's purpose is to minimize suffering during armed conflict. Thus, "weapons that by their nature cause unnecessary suffering are outlawed." Blank, *supra* note 144, at 682–83; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 35(2), June 8, 1977, 1125 U.N.T.S. 3. It follows that using prohibited weapons, such as chemical weapons, which have been outlawed in international armed conflict, is a violation of the principle of humanity and thus a violation of *jus in bello*. For a history of the negotiation of the Chemical Weapons Convention, *see Genesis and Historical Development*, ORG. FOR THE PROHIBITION OF CHEMICAL WEAPONS, <http://www.opcw.org/chemical-weapons-convention/genesis-and-historical-development/> (last visited Sept. 12, 2014).

<sup>147</sup> Most scholars would agree that treaty law does not prohibit the use of chemical weapons in noninternational armed conflict; many would also agree that customary international law does not provide a clear ban on the use of chemical weapons in noninternational armed conflict. *See* Jillian Blake & Aqsa Mahmud, *A Legal Red Line?: Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA L. REV. DISCOURSE 244, 255–57 (2013) (noting that while the International Committee on the Red Cross has adopted the view that the use of chemical weapons is banned under both international and noninternational armed conflict, customary international law does not provide such a consistent norm or ban when it comes to the latter type of conflict).

<sup>148</sup> Parrish, *supra* note 141.

While this argument may or may not be correct, it poses a constitutional law question of when our President may use force without proper authorization by Congress.<sup>149</sup> In fact, the President, as Commander-in-Chief, has the inherent constitutional authority to use force without Congressional approval when there is a threat to the United States' national security.<sup>150</sup> In the case of Syria, President Obama, unwilling initially to seek Congressional authorization to use force abroad, claimed that because the Syrian situation posed a threat to American national security, he could decide in his sole presidential authority to use

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<sup>149</sup> Much has been written on this difficult legal issue. For example, Michael Dorf wrote that:

Because the Constitution allocates some military powers to Congress and others to the President, the line between what the President can do on his own, and what he can do only with Congressional authorization is often murky. Nonetheless, a general principle emerges that permits the President to act when delay would be risky. When the United States faces an actual or imminent attack, the President may respond with force without first waiting for Congressional authorization.

Michael C. Dorf, *Could the President Bomb Syria Even If Congress Says No?*, VERDICT (Sept. 9, 2013), <http://verdict.justia.com/2013/09/09/could-the-president-bomb-syria-even-if-congress-says-no#sthash.Jt0eYU3Z.dpuf>; see also Jon Greenberg, *Joe Lieberman Says Obama "Had the Legal Authority" to Strike Syria Without Congressional Approval*, POLITIFACT.COM (Sept. 10, 2013, 4:09 PM), <http://www.politifact.com/truth-o-meter/statements/2013/sep/12/joe-liberman/joe-liberman-says-obama-had-legal-authority-strik/> (discussing the President's constitutional authority to act as commander-in-chief and to commit forces for the purposes of limited military strikes without Congressional approval and noting that "the president has the authority to use force on his own when it comes to limited military strikes" and that "[t]here is ample precedent under many presidents to support that view."); Geoffrey Corn, *Syria Insta-Symposium: Geoff Corn—The President, Congress, Syria: What If?*, OPINIOJURIS (Sept. 7, 2013, 8:00 AM), <http://opiniojuris.org/2013/09/07/syria-insta-symposium-geoff-corn-president-congress-syria/>. Corn argues specifically, that had President Obama used force in Syria without seeking Congressional approval first,

he would have been on relatively solid constitutional turf. Invoking Justice Jackson's seminal Youngstown methodology for assessing the legality of exercises of executive power in relation to national security objectives, the absence of express congressional opposition following his overt assertion of inherent power and intent to initiate the attack would indicate congressional acquiescence at worst.

*Id.*

<sup>150</sup> Corn, *supra* note 149.

force against the Assad regime.<sup>151</sup> The constitutional law question of whether President Obama was correct in his assessment of presidential powers and when and whether those authorize the President to use force without Congressional approval is a complex and intriguing one. However, this complex question goes beyond the scope of this Article, which focuses on international law issues. Additionally, even if President Assad's actions—in using chemical weapons in Syria—did pose a national security threat to the United States, an American use of force against Syria would be legal domestically, but would potentially remain illegal internationally because of international law's reluctance in embracing humanitarian intervention as a new norm.

The second argument advanced to justify the use of force in Syria is that of self-defense. According to this argument, the use of chemical weapons by President Assad poses a threat to other nations, and powerful states like the United States, Great Britain, or France may intervene to collectively self-defend everybody threatened.<sup>152</sup> While self-defense and collective self-defense constitute valid exceptions to the general ban on the use of force, it is questionable whether nations located thousands of miles away from Syria may properly claim that Assad's actions are a threat rising to the level that would authorize the use of force in self-defense. Under the traditional view of self-defense, as announced by the International Court of Justice in the well-known Nicaragua case, "the exercise of this right is subject to the State concerned having been the victim of an armed attack."<sup>153</sup> The Syrian situation clearly does not satisfy the criteria of traditional self-defense because no other state has been a victim of an armed attack by the Assad regime. Thus, the paradigm of collective self-defense is inapplicable in the Syrian situation.

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<sup>151</sup> See Howard Fineman, *John Kerry: Obama Can Bomb Assad Even If Congress Votes No*, HUFFINGTON POST (Sept. 6, 2013, 3:10 PM), [http://www.huffingtonpost.com/2013/09/06/john-kerry-congress-syria\\_n\\_3881200.html](http://www.huffingtonpost.com/2013/09/06/john-kerry-congress-syria_n_3881200.html).

<sup>152</sup> For an elaboration of this argument, see for example, Jordan Paust, *US Use of Limited Force in Syria Can Be Lawful Under the UN Charter*, JURIST (Sept. 10, 2013, 11:00 AM), <http://jurist.org/forum/2013/09/jordan-paust-force-syria.php>.

<sup>153</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 195 (June 27).



Moreover, the Syrian case does not fulfill the criteria of the more novel self-defense theories, such as anticipatory or preemptive self-defense.<sup>154</sup> The Syrian situation does not satisfy the criteria of anticipatory self-defense because powerful states that have been the major proponents of intervention in Syria cannot claim that Assad's actions constitute a threat toward them. It appears that Assad has been targeting his own population and mainly, opponents of his regime.<sup>155</sup> It does not seem that Assad has made any threats against any other nations. If Assad had threatened other states, like Israel or Lebanon, and if such other states invited the United States or other Great Powers to help them in combatting Assad, then such military action could constitute a valid case of collective self-defense exercised in an anticipatory fashion.<sup>156</sup> For similar reasons, the Syrian case does not fulfill the criteria of preemptive self-defense because no state can claim that Assad's actions will pose a future threat toward them or their allies. Under its current regime, self-defense does not apply to situations where a state wishes to help the population of another state that is being abused by that other state. This situation can only fall under the above-mentioned paradigm of humanitarian intervention. Self-defense is not a valid legal argument regarding the proposed intervention in Syria.

The third argument that has been advanced centers around a specific interpretation of Article 2(4) of the United Nations Charter. As discussed above, this Article prohibits the use of force

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<sup>154</sup> See *supra* Part I.C for a discussion of anticipatory and preemptive self-defense.

<sup>155</sup> See *supra* Part III for a discussion of the Syrian situation.

<sup>156</sup> The ICJ has confirmed that the attacked state must invite other states to exercise collective self-defense on its behalf: "There is no rule in customary international law permitting another State to exercise the right of collective self-defense on the basis of its own assessment of the situation. Where collective self-defense is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack." *Military and Paramilitary Activities, in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 195 (June 27). Anticipatory self-defense is the use of force "by a state to repel an attacker before an actual attack has taken place, before the army of the enemy has crossed its border, and before the bombs of the enemy fall upon its territory." Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69, 72 (2003). It thus follows that states may exercise collective self-defense in anticipatory fashion, and that states threatened by the Assad regime could choose to invite a larger state, like the United States, to engage in collective self-defense in an anticipatory manner, to prevent the Assad regime from striking first.

against the “territorial integrity” and “political independence” of any state.<sup>157</sup> According to this argument, the proposed intervention in Syria would not undermine Syrian territorial integrity or political independence; instead, the intervention would simply aim to protect civilians and halt humanitarian suffering.<sup>158</sup> Moreover, this argument asserts that the United Nations Charter should be interpreted more broadly, in light of the Charter’s purposes and goals.

In the special context of an ongoing belligerency in Syria and significant outside recognition of the Syrian National Council (SNC) as the legitimate representative of the Syrian people, a limited use of force by the US against the Assad regime’s military capabilities in response to a criminal use of chemical weapons would not simplistically be against the territorial integrity of Syria or the political independence of the Syrian people. On balance, it would be consistent with major purposes of the Charter, such as the need to serve peace, security, self-determination of people, and human rights.<sup>159</sup>

Proponents of this argument claim that the Charter does not ban all uses of force and that those uses of force that serve the goal of preventing humanitarian suffering are fully consistent with the broader purposes of the Charter, such as preserving peace, security, and protecting self-determination.<sup>160</sup> It is dubious whether this argument is legally sound. Any time military force is used against a state, such use of force constitutes an encroachment of the state’s sovereignty. Sovereignty inherently implies territorial integrity—the notion that a state is free of intervention by any external actors.<sup>161</sup> Thus, any use of force for whatever purpose against a state is a violation of that state’s sovereignty. Similarly, any use of force against a state will undoubtedly undermine its political regime and leadership; thus, use of force inherently threatens a state’s political independence. Finally, while a broad interpretation of the Charter that takes into account its purposes may be embraced at some point in the

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<sup>157</sup> U.N. Charter art. 2(4).

<sup>158</sup> See, e.g., Paust, *supra* note 152.

<sup>159</sup> *Id.*

<sup>160</sup> See, e.g., *Id.*

<sup>161</sup> As Louis Henkin famously argued, states which negotiated the United Nations Charter agreed to forgo the use of force but were in turn assured “the enjoyment of their territory, their freedom—a kind of right to be left alone.” HENKIN, *supra* note 15, at 137.

future, under existing international law, the Charter has never been interpreted in this manner.<sup>162</sup>

The last argument that has been made is that a regional military action against Syria may constitute a valid use of force, despite the lack of Security Council authorization. Proponents of this argument cite the Kosovo precedent, a situation where NATO countries assembled their forces to launch a military offensive against the Federal Republic of Yugoslavia leadership, without Security Council involvement or approval.<sup>163</sup> Moreover, those advancing this argument cite the use of force in the Cuban Missile Crisis, pursuant to a resolution by the Organization of American States and without Security Council approval, as another historical example of a legally valid use of force through a regional organization approval.<sup>164</sup> This argument is legally flawed: most academics, politicians, and other actors have labeled Kosovo as legitimate but illegal.<sup>165</sup> Moreover, most international law experts would not cite the Cuban Missile Crisis as a valid exception to the firmly settled rules on the use of force under the United Nations Charter.<sup>166</sup> While the Organization of

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<sup>162</sup> The ICJ has confirmed the "traditional" interpretation of the United Nations Charter as banning all uses of force other than those in self-defense in the *Nicaragua v. United States* case and the Nuclear Weapons advisory opinion. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 195 (June 27); see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

<sup>163</sup> For a discussion on Kosovo and the role of NATO, see Nicola Butler, *NATO: From Collective Defence to Peace Enforcement*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP*, *supra* note 26, at 273–90.

<sup>164</sup> See Paust, *supra* note 152.

If NATO or the League of Arab States authorizes the use of force, Article 52 of the Charter would allow the use of "regional action" for the "maintenance of regional peace and security" when the Security Council is veto-deadlocked and is unable to control "enforcement action" under Article 53, as in the case of Kosovo under an authorization from NATO and during the Cuban Missile Crisis under an authorization from the OAS.

*Id.* For a full discussion of the Cuban missile crisis, see Marjorie M. Whiteman, 4 DIG. INT'L L. 501, 523–24 (1965).

<sup>165</sup> See *supra* Parts I.C and II.A for a discussion of the Kosovo case.

<sup>166</sup> See, e.g., Matthew C. Waxman, *What the Cuban Missile Crisis Teaches Us About Iran*, COUNCIL ON FOREIGN AFFAIRS (Oct. 25, 2012), <http://www.cfr.org/iran/cuban-missile-crisis-teaches-us-iran/p29357> (noting that the United States decided to base its decision to launch a quarantine on

American States resolution may have provided legitimacy toward the use of force against Cuba in this case, an isolated resolution by one of many regional organizations does not suffice to alter existing international law norms. The United Nations Charter does not contemplate any regional military action absent Security Council approval. The existence of regional mini-security councils was not envisioned by the Charter drafters, and while the existence of regional organizations and the work thereof is laudable, any use of military force by such bodies, absent a scenario of collective self-defense, would be illegal under international law.

The Syrian case illustrates the difficulty of applying any existing norms on the use of force to a situation of internal warfare coupled with a deadlocked Security Council, where nations able and willing to intervene toward resolving the humanitarian catastrophe may be legally and formally prevented from doing so. Part V below proposes and discusses a new framework for the legality of humanitarian intervention in a situation like Syria; such a new framework would attempt to advance novel rules of international law that may be helpful in addressing future situations of humanitarian suffering.

#### V. BETTER ANSWER: PROPOSED FRAMEWORK FOR LEGALITY

Any unilateral military action against Syria exercised without Security Council approval constitutes a use of force that can be best justified through the paradigm of humanitarian intervention: this concept is an emerging norm of customary law that could develop into binding law in the near future. The creation of any norm of customary law requires two elements: *opinio juris* and state practice.<sup>167</sup> The former refers to a conclusion that states are performing certain acts out of a sense of legal obligation, whereas the latter requires a finding of continuous and widespread state action.<sup>168</sup> State action and practice aimed at creating a new norm of customary law may in fact break an existing norm. In other words, states may have to engage in behavior that purposely violates existing rules in order to create new,

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Cuba in the Cuban Missile Crisis on a Resolution by the Organization of American States, but that this was at best “a very weak legal argument (since the OAS could not authorize a use of force that was prohibited by the U.N. Charter)” and that the American legal argument was “so thin”).

<sup>167</sup> DAMROSCH ET AL., *supra* note 38, at 59.

<sup>168</sup> *Id.*

presumably better rules. For the purposes of Syria, this implies that states may have to engage in military intervention without Security Council approval, and for a humanitarian purpose, thereby breaking the existing ban on the use of force, in order to establish a new customary norm of humanitarian intervention. States have, in the past, engaged in this type of law-challenging behavior. For example, states have supported self-determination-seeking groups outside of the decolonization context, potentially violating the existing norm of territorial integrity and *uti possidetis*, in order to create a new norm and new right of self-determination open to all peoples.<sup>169</sup> In the wake of 9/11, states have advanced a somewhat novel argument that force can be used in self-defense against nonstate actors.<sup>170</sup> In addition, states have attempted to alter the traditional notion of self-defense by advancing arguments such as anticipatory or preemptive self-defense.<sup>171</sup> Breaking the existing ban on the use of force, absent a self-defense scenario or Security Council approval, may constitute another instance of law-breaking and law-making behavior by powerful states if they chose to intervene in Syria for humanitarian purposes. The part below examines Harold Koh's proposed normative framework for humanitarian intervention and critically assesses the strengths of the proposal while suggesting minor additions and modifications. Finally, this part proposes a reconstructed legal framework for the legality of humanitarian intervention.

#### *A. Koh's Proposed Framework for Humanitarian Intervention*

In the context of Syria, the argument in favor of humanitarian intervention is solid. In the words of Harold Koh, "Syria is a law-making moment" because all the conditions seem to be met for the advancement of a novel legal argument: that humanitarian intervention should crystallize into a new binding norm of international law.<sup>172</sup> According to Koh, humanitarian intervention

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<sup>169</sup> For a discussion of states' support for various self-determination-seeking groups, see, for example, STERIO, *supra* note 47, at 57–70 (discussing the Great Powers' role in supporting or not supporting various self-determination-seeking groups).

<sup>170</sup> See *supra* note 51 and accompanying text.

<sup>171</sup> See *supra* Part II for a discussion of self-defense rules under international law.

<sup>172</sup> Koh, *Part II*, *supra* note 7.

could be legal under international law if the following conditions were met:

[1] If a humanitarian crisis creates consequences significantly disruptive of international order—including proliferation of chemical weapons, massive refugee outflows, and events destabilizing to regional peace and security of the region—that would likely soon create an imminent threat to the acting nations (which would give rise to an urgent need to act in individual and collective self-defense under Article 51);

[2] a Security Council resolution was not available because of persistent veto; and the group of nations that had persistently sought Security Council action had exhausted all other remedies reasonably available under the circumstances, they would not violate U.N. Charter Article 2(4) if they used

[3] limited force for genuinely humanitarian purposes that was necessary and proportionate to address the imminent threat, would demonstrably improve the humanitarian situation, and would terminate as soon as the threat is abated.<sup>173</sup>

Over the past few decades, humanitarian intervention has grown from a hawkish argument advanced by a few in the international community to a powerfully emerging norm of customary law. Evidence to support the emergence of this norm cannot be ignored; moreover, the emergence of such a norm is a necessity in the type of warfare today, where conflict is more often intra-state than inter-state and where civilians represent targets more frequently than soldiers.

First, both *opinio juris* and state practice have slowly been turning toward approval of humanitarian intervention as a new norm of customary law. In the context of Kosovo, in 1999, many states were ready and willing to participate in a NATO-led military intervention, outside of the confines of the United Nations Charter.<sup>174</sup> While some states, like the United States, attempted

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<sup>173</sup> *Id.*

<sup>174</sup> A total of thirteen states participated in the so-called Operation Allied Force, through which air strikes were carried out on the territory of the Federal Republic of Yugoslavia. These states included Belgium, Canada, Denmark, France, Germany, Italy, Netherlands, Norway, Portugal, Spain, Turkey, United Kingdom, and the United States. See *Operation Allied Force*, ALLIED JOINT FORCE COMMAND NAPLES, <http://www.jfc-naples.nato.int/page7196179.aspx> (last visited Sept. 12, 2014). The 1999 NATO-led air strikes functioned outside of the confines of the United Nations Charter because they were not authorized by the Security Council, and because

to paint this intervention as *sui generis* and not precedent-creating, others more openly admitted to their belief that this type of action was indeed justified under international law.<sup>175</sup> Moreover, even states that denied that Kosovo was any type of a new precedent-setting norm nonetheless participated in this military intervention.<sup>176</sup> State practice in the case of Kosovo points to the emergence of a new norm of customary law, namely, humanitarian intervention. As the Independent International Commission on Kosovo pointed out, “[t]he Kosovo ‘exception’ now exists, for better and worse, as a contested precedent that must be assessed in relation to a wide range of international effects and undertakings.”<sup>177</sup> In addition, in the aftermath of Kosovo, the then United Nations Secretary-General, Kofi Annan, has stated that he believed “[e]merging slowly . . . [was] an international norm against the violent repression of minorities that [would] and must take precedence over concerns of state sovereignty.”<sup>178</sup> Other examples of humanitarian intervention over the course of the last two decades include a 1991 intervention on behalf of the Kurds sanctioned by the United Nations and exercised against Iraq as well as the 2011 military intervention in Libya.<sup>179</sup> In ad-

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no particular NATO country could claim self-defense against the Federal Republic of Yugoslavia. See, e.g., Adam Roberts, *NATO's 'Humanitarian War' over Kosovo*, 41 SURVIVAL, no. 3, at 103–04 (Autumn 1999) (noting that the NATO intervention had not been approved by the Security Council).

<sup>175</sup> See Murphy, *supra* note 57; Duke, *supra* note 57 (discussing the United States’ position that Kosovo was *sui generis* and the United Kingdom government’s position that the Kosovo intervention was legal under international law).

<sup>176</sup> A prime example of this would be the United States—the main proponent of the NATO-led intervention in the Federal Republic of Yugoslavia and a state that refused to acknowledge that the Kosovo intervention could set any type of precedent in international law. See Ian Bancroft, *After Kosovo, the Deluge*, GUARDIAN (Mar. 17, 2008, 7:30 PM), <http://www.theguardian.com/commentis-free/2008/mar/17/afterkosovothedeluge> (observing that “the US secretary of state, Condoleezza Rice, insists that Kosovo constitutes a *sui generis* case due to the nature of the collapse of the former Yugoslavia and its associated wars”).

<sup>177</sup> KOSOVO COMM’N, *supra* note 56, at 175.

<sup>178</sup> See Kofi Annan, U.N. Secretary-General, Address to the Fifty-Fifth Session of the Commission on Human Rights (Apr. 8, 1999), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8047&LangID=E> [hereinafter Geneva Address].

<sup>179</sup> Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law—Part I*, 20 DENV. J. INT’L L. & POL’Y 305, 330–34 (1992) (discussing the

dition to such examples of humanitarian intervention, the international community has grappled with this issue, and many states have indicated their willingness to develop a new norm authorizing military action against rogue regimes.<sup>180</sup> Many such discussions have already occurred within the context of Responsibility to Protect.<sup>181</sup> While the existing document on Responsibility to Protect places any military intervention within the purview of the Security Council, many states' willingness to debate this issue and question the Security Council's monopoly in this area demonstrates an emergence of a new way of thinking.<sup>182</sup> Additionally, the theory of involuntary sovereignty waiver provides another example of progressive thought in proposing that humanitarian intervention be accepted as a sovereignty-breaking model of military action, where rogue regimes choose to disrespect their own sovereignty privileges under international law. Finally, humanitarian intervention has been present in the

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1991 intervention on behalf of the Kurds). While military intervention in Libya had been authorized through Security Council Resolution 1973, the action itself was exercised by a coalition of nineteen states and involvement by NATO. Although Libya does not represent an instance of humanitarian intervention absent Security Council authorization, it does illustrate the willingness of multiple states to participate in a military intervention to protect civilians from humanitarian suffering. *See, e.g., Qatar, Several EU States up for Libya Action: Diplomat*, EUBUSINESS (Mar. 19, 2011, 6:45 PM), <http://www.eubusiness.com/news-eu/libya-unrest-summit.95v/>; *see also Libya Example Shows UN Resolution on Syria Might Be Used to Justify Broad Intervention*, RT.COM (Sept. 24, 2013), <http://rt.com/op-edge/libya-un-broad-intervention-277/> (noting that Resolution 1973 "was presented as a humanitarian resolution").

<sup>180</sup> For example, the Independent International Commission on Kosovo wrote that it would be beneficial to "conceive of an emergent doctrine of humanitarian intervention." *See KOSOVO COMM'N*, *supra* note 56, at 187.

<sup>181</sup> For a full discussion of Responsibility to Protect, see *supra* Part II.B.

<sup>182</sup> In fact, some have argued that the Security Council has a moral and ethical duty to act in situations involving a humanitarian crisis. Kofi Annan argued the following in the aftermath of the Kosovo crisis:

When civilians are attacked and massacred because of their ethnicity, as in Kosovo, the world looks to the United Nations to speak up for them. . . . If, in the face of such abuses, we do not speak up and speak out, if we do not act in defense of human rights and advocate their lasting universality, how can we answer to that global constituency? . . . We will not and we cannot accept a situation where people are brutalized within national boundaries. . . . [A] United Nations that will not stand up for human rights is a United Nations that cannot stand up for itself.

Geneva Address, *supra* note 178.



public discussions of many states and on the agenda of the United Nations General Assembly.<sup>183</sup> The absence of consensus on this issue does not demonstrate that states do not wish to develop a new normative framework for humanitarian intervention; to the contrary, such lack of consensus indicates that states take this issue very seriously and may be in the process of cooperating toward the development of a new norm.

Second, modern-day warfare necessitates the development of a new norm authorizing military intervention in situations where the Security Council is deadlocked and where humanitarian suffering becomes intolerable. Most recent wars have been internal and have involved large civilian populations.<sup>184</sup> Unfortunately, Security Council politics have resulted in multiple vetoes, and only a small number of military actions have ever been authorized.<sup>185</sup> Civilian populations need the international community's protection, and such protection can only be offered if a normative framework for true humanitarian intervention is developed. Syria may be the perfect opportunity to do so. The framework proposed by Harold Koh in the context of Syria accomplishes the important task of legalizing humanitarian intervention under very strict, limited circumstances. The section below will critically appraise Koh's proposed framework while also developing additional criteria for legalizing humanitarian intervention.

### *B. A Critical Assessment of Koh's Proposed Framework*

Koh's framework first requires the existence of a humanitarian crisis of a significant proportion.<sup>186</sup> Thus, intervention would not be allowed for relatively minor conflicts and would only be condoned in the most serious situations. This requirement would

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<sup>183</sup> See *supra* Part II.A for a discussion of humanitarian intervention and *supra* Part II.B for a discussion of Responsibility to Protect. The latter reflects the United Nations', as well as its member states' willingness to discuss sovereignty-encroaching intervention, in order to protect populations from humanitarian suffering.

<sup>184</sup> See *e.g.*, Mayall, *supra* note 71, at 320 (noting that since the Gulf War, the majority of conflict that the United Nations was involved in were intrastate conflicts, necessitating Chapter VI intervention to provide humanitarian relief as well as peacekeeping functions).

<sup>185</sup> Security Council has authorized the use of force only a handful of times since its inception. See *supra* Part I.B, notes 34–37 and the accompanying discussion.

<sup>186</sup> Koh, *Part II*, *supra* note 7.

prevent states from staging frequent incursions into strategic areas to remove unfriendly political leaders or achieve other kinds of self-interested goals under the pretext of humanitarian intervention. The intervening state would have the burden of proving the magnitude of humanitarian suffering in order to justify its military involvement.

Second, Koh's framework calls for the existence of additional aggravating factors, such as the use of chemical weapons, the development of a refugee crisis, or the potential to destabilize regional peace and security, which would threaten acting nations.<sup>187</sup> The requirement of a threat to acting nations brings humanitarian intervention closer to a self-defense paradigm. The idea here is that the intervenor must have some link to the crisis and must demonstrate that the crisis is somehow hampering its own interests. This Article disagrees with Koh on this point. A true humanitarian intervention is distinct from self-defense, and arguably a nation that has a valid self-defense argument does not need to engage in a humanitarian intervention-type rationale in order to justify its use of force against another state. Humanitarian intervention is necessary precisely in those situations where the self-defense paradigm is inapplicable, like in Syria, Rwanda, or Kosovo. It is true that in some of these situations, neighboring and regional states could have made a self-defense argument and could have invited larger states, like the United States, to assist them by engaging in collective self-defense. However, in many instances, the collective self-defense argument is too tenuous either because the regional state is not really threatened by the rogue state or because the regional state has not explicitly "invited" the large external state to do anything. In such situations, developing a consistent legal framework for humanitarian intervention, without the existence of self-defense circumstances, is a preferable and more legally sound approach.

Third, Koh's framework calls for the Security Council's involvement by requiring that this organ be consulted first and that the intervenor nation attempt to secure a Security Council resolution prior to staging a unilateral intervention.<sup>188</sup> This system preserves the Security Council monopoly over use of force issues by engaging it first and giving it the opportunity to put

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

together a United Nations-led coalition in order to rectify a humanitarian crisis. Under this requirement, the intervenor nation must also exhaust all other remedies before resorting to a unilateral use of force; under this view, the use of force is a last resort, an option available only if all others have been utilized and if all other approaches are futile. This is an important requirement because it may prevent states from staging military action under the guise of a faux humanitarian intervention. In other words, because states must first involve the Security Council and ask it to act, they may feel embarrassed and become unwilling to present bogus requests for humanitarian intervention. This approach thus preserves the important role of the Security Council, ensures that it will not be bypassed, stifles potential, illegitimate requests for the use of force, and preserves unilateral humanitarian intervention as a limited last resort.

Fourth, Koh's proposal specifies that any force used against a state must be "limited" and "for genuinely humanitarian purposes," as well as that it must be necessary and proportionate in relation to any imminent threat.<sup>189</sup> This is an important requirement as well—Koh does not suggest that force used for humanitarian purposes may be of any kind. To illustrate this point, consider the following scenario. Let's assume that Syria had only used traditional weapons against its civilian population, but the humanitarian suffering caused thereby reached the level warranting an outside response and all the other requirements for humanitarian intervention, as delineated in Koh's proposal, were satisfied. The intervening state could then lawfully engage in humanitarian intervention against the Syrian regime, but could not use nuclear weapons. The use of nuclear weapons in such a scenario would not be necessary or proportionate relative to the threat posed by the Syrian regime. Similarly, any force used under this framework must be limited to preventing humanitarian suffering and only used toward that purpose. If humanitarian suffering could be halted without removing Assad as president of Syria, then presumably under this framework, the goal of a humanitarian intervention could not be the removal of the current leadership and instead, it would have to focus on simply halting the abuses. Any other use of force would no longer be limited and would not be used strictly for humanitarian purposes.

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<sup>189</sup> *Id.*

Finally, Koh's proposed framework calls for a political and military appraisal: any humanitarian intervention should strive toward improving the humanitarian situation and should terminate as soon as the humanitarian crisis is resolved.<sup>190</sup> The burden here would be on the intervening state or states to determine the exact scope and goal of a staged humanitarian intervention as well as to ensure that the action is truly helping matters on the ground. Thus, in the context of Syria, any humanitarian action would have to focus on alleviating humanitarian suffering and would have to end when this goal is achieved. The requirement for this kind of a calculus would seemingly prevent states from simply launching aerial attacks to neutralize the political leadership of a state if such action would not ease humanitarian suffering. This requirement would also obligate intervening states to terminate their involvement in an area as soon as the imminent crisis is resolved. Thus, prolonged political or military involvement in a strategic area could not be justified under this proposed framework for humanitarian intervention.

Koh concludes that if this framework is respected, the intervening state would not violate Article 2(4) and its ban on the use of force. I disagree with Koh, but also applaud his argument. International law currently bans any use of force except in self-defense or with Security Council approval.<sup>191</sup> Thus, force used to stage a unilateral humanitarian intervention would violate Article 2(4). Koh is wrong in his conclusion that the use of force under his proposed framework for humanitarian intervention would not violate the United Nations Charter. Nevertheless, Koh is correct in developing and advancing this argument. Customary norms of law emerge through novel legal arguments and through states' acceptance and usage of such arguments. The only way that humanitarian intervention can develop into a binding norm of customary law is through the writing of scholars, like Koh, which can then be espoused by political leaders and put into frequent use. Where I also agree with Koh is that humanitarian intervention is a necessity in today's world—modern-day conflicts often remain within a single state's boundary and cause tremendous humanitarian suffering. Because the Se-

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<sup>190</sup> *Id.*

<sup>191</sup> See *supra* Part I for a discussion of the current international law norms on the use of force.

curity Council often remains deadlocked over geo-political interests of its permanent members, it is essential that the international community become enabled to act without its explicit approval. The hope here is that humanitarian intervention can eventually morph from an emerging norm of international law into a binding one; that customary law will evolve and embrace this new norm; that the Security Council's structure of veto power can be overcome through such development of binding custom.

The emergence of a new customary norm of international law is a difficult proposition. How does one "prove" that customary law contains a new norm? How does one demonstrate the exact content of that norm? To quote Koh, it would be "a failure of lawyerly responsibility, which we would not accept in other legal situations," not to attempt to delineate the content of the new humanitarian intervention exception to the overall ban on the use of force.<sup>192</sup> Academics, politicians, judges, and arbitrators have already grappled with the idea of proving the existence and content of a customary law norm. They have looked to the traditional sources of international law: treaties, writings of scholars, judicial opinions, and general principles of law. They have reviewed United Nations sources, such as Security Council and General Assembly resolutions, soft law instruments, such as codes of conduct, guidelines, gentlemen's agreements, and various political statements. They have browsed through supporting and interpretative documents, such as *travaux préparatoires*, legislative history behind national statutes, and drafting history and drafters' statements linked to any international document. Anyone looking for the emergence of a new customary norm of humanitarian intervention would look in similar places. It is thus important that the proposed framework for the legality of humanitarian intervention becomes a part of the international legal discourse—that it continues to be discussed at academic forums and conferences, remains a subject of controversy on the Security Council and General Assembly agenda, and persists to occupy a sore subject of political and diplomatic negotiation. The development of any new legal rule requires tenacity and persistence. Developing a legal framework for humanitarian intervention will similarly require significant effort; it is too important of a task however to justify giving up.

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<sup>192</sup> Koh, *Part II*, *supra* note 7.

Koh's proposed framework has not been received without criticism. Many have both criticized Koh and pointed to various weaknesses of his proposed framework. Professor David Kaye has argued that Koh's interpretation of Article 2(4) of the United Nations Charter is incorrect because the protection of human rights cannot take precedence over the ban on the use of force.<sup>193</sup> "The ban on force forms part of the deep structure of the Charter and one of the core motivating premises of the United Nations."<sup>194</sup> In addition, Professor Kaye believes that the United Nations Charter only allows for one exception to the overall ban on the use of force, outside of the paradigm of a Security Council-approved intervention, which is self-defense.<sup>195</sup> Finally, Professor Kaye does not believe that the Kosovo intervention provides an appropriate instance of state practice embracing humanitarian intervention because of the State Department's refusal to bless the legality of the intervention.<sup>196</sup> Ultimately, Professor Kaye believes that instead of developing a normative framework for humanitarian intervention in general, it is a better approach if policy makers weigh specific considerations and factors for each situation, like Kosovo or Syria, against the existing norm banning the use of force.<sup>197</sup> Professor Carsten Stahn has argued that international law contains choices other than doing nothing over the Syrian crisis or using force, such as "accountability, deterrence or sanctioning of *jus in bello* violations, i.e. preventive diplomacy, lawful countermeasures, international criminal justice, sanctions etc."<sup>198</sup> Moreover, Professor Stahn has questioned whether the proposed intervention in Syria falls within the paradigm of humanitarian intervention, where force is used to prevent humanitarian suffering, as opposed to a situation where force is used to remove a military regime (Assad) or sanction the

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<sup>193</sup> David Kaye, *Harold Koh's Case for Humanitarian Intervention*, JUST SECURITY (Oct. 7, 2013 1:45 PM), <http://justsecurity.org/2013/10/07/kaye-kohs-case/>.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Carsten Stahn, *On 'Humanitarian Intervention', 'Lawmaking' Moments and What the 'Law Ought to Be'—Counseling Caution Against a New 'Affirmative Defense to Art. 2 (4)' After Syria*, OPINIOJURIS (Oct. 8, 2013, 4:03 PM), <http://opiniojuris.org/2013/10/08/guest-post-humanitarian-intervention-law-making-moments-law-counseling-caution-new-affirmative-del/>.

use of prohibited weapons.<sup>199</sup> Professor Stahn has also questioned the existence of firm rules in customary law authorizing humanitarian intervention as well as whether it would not be more beneficial to turn Syria into a law-making moment by engaging the Security Council and other bodies in the development of new norms on the prohibition on the use of chemical weapons, on “instruments of prevention, fact-finding and verification,” and on Responsibility to Protect rather than to conceive of Syria as a law-breaking moment, where nations are encouraged to break the ban on the use of force.<sup>200</sup> Finally, Kevin Jon Heller has argued that unilateral humanitarian intervention (“UHI”) is illegal under international law.<sup>201</sup>

[I]t is impossible to maintain that UHI is a slowly crystallizing norm of customary international law—much less that, as some (but not Koh) have argued, customary international law already accepts it. International law has for too long dismissed the voices of the Global South; we cannot let the West silence it concerning UHI. After all, the states of the Global South are “specially affected” by UHI—it is their territorial sovereignty and their political independence that UHI threatens, not the West’s. UHI will never be used against a Western state.<sup>202</sup>

Koh’s proposed framework already addresses many of the concerns and criticisms that have been raised. First, Koh’s proposed framework is detailed and well-constructed, but it requires any intervenor state to engage in a careful political and military calculus, as well as involve the United Nations, before it can legally claim that it is using force under the umbrella of humanitarian intervention. As analyzed above, this will appropriately involve policy-makers in the process of determining whether to use force in a given instance and whether a situation falls within the paradigm of humanitarian intervention, and it will hopefully prevent states from attempting to misuse the framework in order to justify pure military aggression. Additionally, under the proposed framework, states will have to carefully weigh and consider all nonmilitary options before resorting to the use of force.

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Kevin Jon Heller, *Four Thoughts on Koh’s Defense of Unilateral Humanitarian Intervention*, OPINIOJURIS, (Oct. 2, 2013, 8:26 PM), <http://opiniojuris.org/2013/10/02/four-thoughts-kohs-defense-unilateral-humanitarian-intervention/>.

<sup>202</sup> *Id.* (emphasis omitted).

Second, any law can be potentially misused, misinterpreted, or wrongly applied.<sup>203</sup> Humanitarian intervention can be a slippery slope—states may attempt to misuse this rationale to justify aggressive military action and the use of force for selfish, national interests under the guise of humanitarian assistance.<sup>204</sup> This is not an argument in favor of doing nothing. At best, it is an argument in favor of adding to Koh's proposed framework, thereby turning Syria into both a law-breaking and law-making moment. One such addition may be a requirement that any state engaged in a unilateral humanitarian intervention report back to the Security Council. Such a reporting mechanism already exists within the U.N. Charter for the exercise of self-defense;<sup>205</sup> it would be equally valid for the humanitarian intervention paradigm. Another addition may be a requirement that a state considering the use of force for humanitarian purposes attempt to build an international coalition. Although the

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<sup>203</sup> *Id.* (noting that “most norms of international law can be abused” and arguing that such norms do not cease to exist just because they may be abused). On states' compliance and lack of compliance with international law, see, for example, Harold Hongju Koh, *Why Do Nations Obey International Law?* (Yale L. Sch., Faculty Scholarship Series Paper 2101, 1997); see also LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

<sup>204</sup> Scholars have already pointed out the lack of a normative framework for humanitarian intervention. For example, Amos Guiora has argued as follows: “Humanitarian intervention is an inherently complicated proposition, because it clearly implies both that nation state ‘A’ is engaged in significant violations of the human rights of its own citizens, requiring nation state ‘B’ and/or the international community to recognize that intervention is essential. However, analysis of when intervention is deemed essential and criteria justifying intervention suggest an enormous lack of clarity and lack of objective standards and benchmarks.” Amos N. Guiora, *Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration*, 44 CASE W. RES. J. INT'L L. 251, 272 (2011) (citation omitted). Because of such lack of objective standards and clarity on the subject of humanitarian intervention, the development of an appropriate normative framework, such as the one proposed by Koh, would be a beneficial and much-needed development in international law because the existence of a firm framework could prevent misuse of the humanitarian intervention rationale for the use of force. In other words, states would no longer be able to use the rationale, for which there are currently no firm rules, to justify any use of force; instead, states would be obliged to demonstrate in each instance where force is used for an allegedly humanitarian purpose how such use of force corresponds to the normative framework on humanitarian intervention.

<sup>205</sup> U.N. Charter art. 51 (“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council.”).



Security Council may be paralyzed, it would nonetheless be possible for the intervenor state to seek allies. The United States attempted to do so when it first considered the possibility of using force against Syria—President Obama sought British and French assistance.<sup>206</sup> The Bush administration's response to the 9/11 terrorist attacks also centered on building an international coalition of states willing to combat terrorism.<sup>207</sup> And the Kosovo air strikes, conducted with a humanitarian goal, were led by a NATO coalition of states.<sup>208</sup> The existence of an international alliance, in most instances, demonstrates that multiple states are concerned with a given situation, that the humanitarian intervention is not "unilateral," and that multiple states consider that the use of force is appropriate. The requirement that states build or attempt to build an international coalition any time they wish to engage in humanitarian intervention could prevent individual states from staging military actions with nonhumanitarian goals under the pretext of humanitarian intervention.

Third, Koh himself has eloquently responded to the criticism by Professor Kaye regarding Koh's allegedly wrong interpretation of Article 2(4) and the Kosovo "precedent" for humanitarian intervention. As mentioned above, Professor Kaye believes that international law as elaborated in the United Nations Charter contains a *per se* prohibition on the use of force except for Security Council approval and self-defense.<sup>209</sup> Additionally, Professor Kaye has argued that Kosovo cannot be used as a precedent because of the State Department's refusal to acknowledge the legality of this military intervention.<sup>210</sup> Koh's response brilliantly summarizes the appeal and necessity of his proposed approach.

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<sup>206</sup> See *supra* note 135 and accompanying text.

<sup>207</sup> SARAH ANDERSON, PHYLLIS BENNIS & JOHN CAVANAGH, COALITION OF THE WILLING OR COALITION OF THE COERCED?: HOW THE BUSH ADMINISTRATION INFLUENCES ALLIES IN ITS WAR ON IRAQ (Feb. 26, 2003), available at <http://web.archive.org/web/20030405184556/http://www.ips-dc.org/COERCED.pdf> (describing the building of the "Coalition of the Willing" by the Bush Administration in the wake of 9/11).

<sup>208</sup> See, e.g., STERIO, *supra* note 47, at 116 (discussing the NATO air strikes against the Federal Republic of Yugoslavia aimed at protecting Kosovar Albanians).

<sup>209</sup> See Kaye, *supra* note 193.

<sup>210</sup> *Id.*

But why should the per se rule “remain the law,” particularly if it is so manifestly outmoded, and tolerant of gross human rights abuse? Whether or not Clinton’s lawyers were correct fourteen years ago not to follow the UK and state a legal rationale justifying Kosovo, why is such silence warranted now? . . . . But let’s also not make it easier for people of good will to do nothing by pretending that the law is so determinate and immutable in the face of compelling moral imperatives, that we must keep treating as illegal what may now be necessary to save lives or spur diplomacy to remove chemical weapons.<sup>211</sup>

As argued above, this Article believes that Koh is wrong in arguing that humanitarian intervention has crystallized into a new norm of international law as of today, and it thus takes the stance that Professor Kaye is correct in his assessment of Article 2(4) and the per se illegality rule. However, this Article agrees with Koh that a rule should not remain the law if it no longer corresponds to our world’s reality and the needs of various peoples around the planet. International law has never been stagnant, and it has evolved and changed drastically over the past century. Today, we may need it to evolve in a particular direction and to embrace the concept of humanitarian intervention under a newly developed normative framework. However, if in the future humanitarian intervention becomes an unnecessary, ill-used, cumbersome norm, international law players can act to change the norm. If rogue states misuse the norm and engage in reprehensible military actions under the pretense of humanitarian assistance, the international community can re-evaluate and re-interpret the norm or can pass treaty provisions to overturn the norm. International law has evolved because of changes in our society and the need to preserve international peace and security in a different manner. Similarly, international law can change in the future to respond to distinct future needs of our global community.

### *C. The Proposal Reconstructed*

In light of the above discussion, this Article proposes that humanitarian intervention should be legal under the following framework:

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<sup>211</sup> Koh, *Part III*, *supra* note 1.

if there is an ongoing humanitarian crisis of a significant proportion;

the Security Council is deadlocked because of persistent veto or threat of veto by one or more permanent members;

the intervening nation has exhausted all other nonmilitary remedies;

the intervening nation attempts to build an international or regional coalition of states willing to participate in the humanitarian military intervention;

the intervening nation reports, on an ongoing basis, to the Security Council and any other relevant organs of the United Nations about all stages of its military intervention; and

the intervening nation stages its humanitarian military action in a manner proportionate to the ongoing crisis, as well as necessary to the halting of such crisis.

The above-proposed framework is similar to Koh's in many respects. Like Koh, this Article believes that humanitarian intervention should only be justified in situations of serious magnitude, where the Security Council has been paralyzed and where the intervening nation has exhausted all other diplomatic, political, and economic options. Like Koh, this Article believes that any humanitarian intervention needs to be necessary and proportionate in scope to the crisis which it is attempting to resolve. However, this Article disagrees with Koh that the intervening nation should be threatened by the actions of the state or regime having caused the humanitarian crisis because this requirement creates too strong of a rapprochement between self-defense and humanitarian intervention. The purpose of humanitarian intervention by any intervening nation should be military assistance in situations where the Security Council is unavailable and where the self-defense paradigm is inapplicable. Thus, the framework proposed herein eliminates the requirement that the intervening nation's security be somehow threatened or compromised by the ongoing crisis.

Moreover, this Article takes the view that legitimizing humanitarian intervention involves bringing it as close as possible to an international, United Nations-approved action. When a nation stages a unilateral military action, without any kind of international consultation or assistance, such military action has the potential to appear self-interested, although its motives may

be purely altruistic, such as helping a foreign civilian population. If a nation, on the contrary, attempts to build a regional or international coalition, this in turn may demonstrate a common humanitarian interest among several nations in assisting a troubled people. A regionally or internationally led humanitarian intervention may satisfy the international community more easily about its motivation and goals. Similarly, if a nation is required to report its military actions to the Security Council or other appropriate organs of the United Nations, it will face political pressure to justify such action under existing international law, and it may therefore be dissuaded from engaging in faux humanitarian interventions, which may resemble aggression or another type of illegal use of force.

Thus, the proposal in this Article adds two requirements: the attempt to build a multilateral coalition by the intervening nation and the necessity to report back to the Security Council or other United Nations' organs about the ongoing military intervention. Finally, this Article disagrees with Koh that a carefully constructed humanitarian intervention under any proposed framework would not violate Article 2(4) of the United Nations Charter under existing international law. Thus, the proposal here eliminates this statement and is silent on this issue. Instead, this Article believes that if lawyers are sufficiently persuasive in presenting arguments that seek to develop a normative framework on humanitarian intervention, such arguments and proposals, it will lead toward the establishment of a new norm of international law legalizing humanitarian intervention in the near future.

This Article considers that it is the lawyers' duty to construct an appropriate normative framework for the legality of humanitarian intervention, which could some day be morphed into a binding norm through treaty or customary law. If a considerable number of states support legalizing humanitarian intervention, the hope is that these states would negotiate a multilateral treaty on this issue that would adopt the above-proposed framework or a variation thereto. In the absence of a treaty, it is also possible that the proposed framework could evolve into a binding norm of customary law. As mentioned above, a lawyer seeking to prove the existence of a customary norm, such as humanitarian intervention, would need to demonstrate the existence of state practice as well as *opinio juris*. Some state practice on hu-

manitarian intervention already exists, and if more states engage in this type of action in the future in a consistent and uniform manner, it may be possible to observe the emergence of state practice sufficient to support the existence of humanitarian intervention as a norm of customary law. If states engaged in the practice of humanitarian intervention couple their military actions with legal rationale—if they adopt a legal framework, such as the one proposed above, to justify their actions on a consistent legal basis, it may be possible to witness the emergence of *opinio juris* on this subject as well. It is my hope that, in the near future, scholarship such as this Article will have contributed toward the creation of a new norm of international law—humanitarian intervention, under carefully prescribed circumstances, leaving little room for abuse and much potential for improving tragic situations across our planet.

#### VI. APPLYING THE HUMANITARIAN INTERVENTION FRAMEWORK TO SYRIA

Could humanitarian intervention in Syria today satisfy the above-proposed framework for legality? Was President Obama correct in his somewhat precipitous conclusion that the unilateral use of force in Syria could be legally justified in light of President Assad's use of chemical weapons, the ongoing humanitarian crisis, the refugee situation that has been unsettling regional stability, and the Security Council's paralysis due to the veto threatened by Russia and China over any use-of-force-authorizing resolution?

The Syrian crisis has turned into a humanitarian catastrophe of a significant proportion, involving a massive flow of refugees as well as the use of dangerous weapons, threatening to destabilize the region. The Security Council has been involved, but remains deadlocked over the issue of the use of force. Thus, the first two requirements of the above framework appear satisfied. However, as of today, not all other nonmilitary remedies have been exhausted as the international community, through the Security Council, is still heavily involved in Syria, attempting to reach a nonmilitary solution. The Security Council recently passed a resolution calling for a United Nations-led inspection and destruction regime over Syrian chemical weapons.<sup>212</sup> The third requirement of the proposed regime (that the intervening

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<sup>212</sup> See *supra* notes 134–37 and accompanying text.

nation exhaust all nonmilitary options) is therefore not satisfied as of now. Should matters change and should Syria choose to disrespect the inspection regime, then a country like the United States could start building a solid legal case for humanitarian intervention under the proposed framework.

In addition, if the Assad regime were to violate the newly-imposed chemical weapons inspection and destruction regime, a potential intervenor nation, such as the United States, would have the burden of constructing the most adequate military response, which would be limited to resolving the humanitarian situation, necessary and proportionate vis-à-vis the Assad regime and which would end when the situation is resolved. In order to enhance legitimacy of this type of action, the intervenor nation would have to work with its allies to build an international coalition and report its actions to the Security Council and the General Assembly. Under this framework, the risk for abuse would be minimized while the necessary humanitarian response would remain justified. If a country, like the United States, engaged in this type of humanitarian intervention today, it would violate Article 2(4) of the United Nations Charter. As argued above, this Article disagrees with Koh on this point because his proposal argues that humanitarian intervention under carefully constructed circumstances would not violate international law. However, this Article believes that it is important for both state leaders and scholars to make this type of argument because new norms of international law can only emerge through persistent state action and the advancement of novel legal arguments. Because humanitarian intervention is a necessity in today's world of civil strife and violent internal conflicts, its legal framework needs to be developed and constructed through clever legal commentary and opinion.

#### CONCLUSION

Syria has the potential to constitute both a law-breaking as well as a law-making moment. Because of the ongoing humanitarian crisis in this volatile nation, countries that have contemplated the possibility of staging a humanitarian intervention, like the United States, could break the existing international law prohibition on the use of force outside of the two established exceptions, namely, Security Council approval and self-defense. More importantly, however, Syria could turn into a

law-making moment through the development of a new normative framework for humanitarian intervention, such as the one proposed by Harold Koh.

Everyone who has worked in government knows that arguing for an evolution in the law is a decision with which both policy-makers and government lawyers must grapple. Asking policy-makers to make a false choice between action and legality sends them the false message that when the law gets hard, or stands in the way of urgent action, lawyers are incapable of developing sound legal arguments that can achieve better results or better map current law onto modern reality. In my view, it is not our lawyerly responsibility simply to repeat that 'a rule is a rule is a rule,' particularly when the so-called 'rule' is not nearly as black and white as some may admit. While Syrian diplomacy unfolds, this is a moment not to consider this matter closed, but to look harder for a better legal answer.<sup>213</sup>

I wholeheartedly agree.

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<sup>213</sup> Koh, *Part III*, *supra* note 1.