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Humanitarian Intervention Post-Syria: A Grotian Moment

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HUMANITARIAN INTERVENTION POST-SYRIA: A GROTIAN MOMENT?

*Milena Sterio**

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I. INTRODUCTION

Grotian Moment is a term that signifies a “paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.”¹ A Grotian Moment is thus “an instance in which a fundamental change in the exiting international system happens, thereby provoking the emergence of a new principle of customary law with outstanding speed.”² Professor Richard Falk invented the term Grotian Moment in 1985. Since then, the term has been employed by experts in a variety of ways.³ Here, I will adopt the following meaning of Grotian Moment as proposed by Professor Michael Scharf: “a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.”⁴ This article will examine whether the concept of humanitarian intervention, developed over the past two decades, constitutes an instance of a Grotian Moment. In particular, this article will focus on Syria and the recent arguments in favor of humanitarian intervention in this region, and will pose the question of whether Syria constitutes a law-creating moment. This article will conclude that Syria may contribute to the shaping of a new Grotian Moment: the development of humanitarian intervention as a norm of customary law.

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1. Michael P. Scharf, *Seizing the “Grotian Moment” Accelerated Formation of Customary Int’l Law in Time of Fundamental Change*, 43 CORNELL INT’L L. J. 439, 439 (2010).

2. Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT’L L. & POL’Y 209, 211 (2011).

3. *Id.*

4. Scharf, *supra* note 1, at 444.

II. WHAT IS A GROTIAN MOMENT?

The term “Grotian” refers to Dutch scholar Hugo Grotius (1583–1645), who is hailed as the father of modern international law, and who, in his seminal work, *De Jure Belli ac Pacis* (The Law of War and Peace), “offered a new concept of international law designed to reflect that new reality.”⁵ Similar to how Grotius developed a novel understanding of international law in the seventeenth century, more modern events have constituted Grotian Moments over the last several decades. Thus, commentators have suggested that the creation of the Nuremberg Tribunal at the end of World War II was a Grotian Moment.⁶ Moreover, the establishment of the United Nations (U.N.) Charter could constitute another example of a Grotian Moment.⁷ Finally, the recent establishment of the International Criminal Court could provide an additional instance of a Grotian Moment.⁸

Over time, scholars have used other terms to convey the idea of a Grotian Moment. Professors Bruce Ackerman, Bardo Fassbender, Jenny Martinez, Leila Sadat, Anne-Marie Slaughter, and William Burke-White have all used the term “constitutional moment” to refer to different developments in American constitutional law and in international law.⁹ The term “international constitutional moment” may be distinguished from the concept of Grotian Moment as the latter reflects a wider-ranging

5. *Id.* at 443; see generally Hugo Grotius, *The Law of War and Peace*, LONANG.COM (May 2012), <http://www.lonang.com/exlibris/grotius> (last visited Jan. 31, 2014).

6. See generally Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT’L L. REV. 1, 9 (2004) (arguing that along the Peace of Westphalia, the Nuremberg Charter and the U.N. Charter include more recent Grotian moments).

7. *Id.*

8. Leila Nadya Sadat, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 474 (2000).

9. See generally BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984) (referring to the New Deal era as a “constitutional moment”); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529 (1998); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 463 (2003) (referring to the drafting of the U.N. Charter as a “constitutional moment” in the history of international law); Leila Nadya Sadat, *Enemy Combatants After Hamdan v. Rumsfeld: Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206–07 (2007) (referring to Nuremberg as a “constitutional moment”); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 2 (2002) (referring to 9/11 as a “constitutional moment” and arguing that the attacks reflect a change in the nature of threats facing the international community, justifying the development of new rules of customary law).

development affecting international law on the whole, and not merely subfields of international law.¹⁰

Finally, the notion of a Grotian Moment can also be distinguished from the concept of “instant customary international law.”¹¹ This theory argues that state practice may not be a necessary element in the establishment and creation of customary law if states’ *opinio juris* on an emerging norm can be clearly demonstrated through their General Assembly resolutions.¹² On the contrary, customary international law is formed through gradual, widespread, and lengthy state practice and a sense of legal obligation to comply with the emerging norm.¹³ Thus, the process of establishing such a norm of customary international law can take many decades or even centuries.¹⁴ The Grotian Moment theory is distinct from the theory of instant customary law because it looks beyond General Assembly resolutions and focuses on paradigmatic changes in international law caused by rapid and profound global developments.

The “Grotian Moment” concept contemplates accelerated formation of customary international law through widespread acquiescence or endorsement in response to State acts, rather than instant custom based solely on General Assembly resolutions.¹⁵ The Grotian Moment theory may rely on General Assembly resolutions to discover evidence of an emerging customary law norm, resulting from a period of fundamental change. However, General Assembly resolutions are one of the many tools utilized by scholars discovering a Grotian Moment.

[T]he “Grotian Moment” concept may be helpful to a court examining whether a particular General Assembly resolution should be deemed evidence of an embryonic rule of customary international law, especially in a case lacking the traditional level

10. Scharf, *supra* note 1, at 445 (describing that a Grotian Moment “makes more sense when speaking of a development that has an effect on international law at large”).

11. Sterio, *supra* note 2, at 212 (citing PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INT’L LAW* 45–46 (7th ed. 1997); B. Cheng, *United National Resolutions on Outer Space: “Instant” International Customary Law?*, 5 *INDIAN J. INT’L L.* 23 (1965)); Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 *TEMP. INT’L & COMP. L.J.* 333, 351 (1998); see generally Benjamin Lengille, *It’s “Instant Custom:” How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 *B.C. INT’L & COMP. L. REV.* 145 (2003).

12. Cheng, *supra* note 11, at 36.

13. Scharf, *supra* note 1, at 445.

14. See e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (The U.S. Supreme Court recognized in this case that the process of forming customary international law can take centuries.).

15. Scharf, *supra* note 1, at 446.

of widespread and repeated state practice. In periods of fundamental change—whether by technological advances, the commission of new forms of crimes against humanity, or the development of new means of warfare or terrorism—rapidly developing customary international law as crystallized in General Assembly resolutions may be necessary for international law to keep up with the pace of other developments.¹⁶

As mentioned above, historical examples of Grotian Moments include the creation of the Nuremberg Tribunal at the end of World War II, as well as the establishment of the U.N. in 1945.¹⁷ More recent examples include the creation of the International Criminal Court.¹⁸ Additionally, the terrorist attacks on the World Trade Center and Pentagon on September 11, 2001 have significantly impacted the international community's understanding of the laws of war.¹⁹ In the wake of the September 11 attacks, Security Council adopted Resolution 1368, which confirmed the right to use force in self-defense against non-state actors (al-Qaeda), thereby confirming the idea that international law authorizes states to use force in self-defense against non-state actors.²⁰

A lesser known Grotian Moment may consist of the situation when the United States and Soviet Union initially “developed the ability to launch rockets into outer space and place satellites in earth orbit.”²¹ Responding to this development, the U.N. General Assembly adopted Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, which confirmed that the U.N. Charter generally applies to outer space, as well as attempted to limit states' ability to lay territorial claims to parts of outer space.²² This Declaration was widely accepted as

16. Scharf, *supra* note 1, at 450.

17. Sterio, *supra* note 2, at 2011–12.

18. See generally *supra* notes 6–8 and accompanying text.

19. See e.g., *British Foreign Secretary Jack Straw, Order out of Chaos: The Future of Afghanistan, Address at the International Institute of Strategic Studies* (Oct. 22, 2001), quoted in Slaughter, Burke-White, *supra* note 9, at 2 (According to then British Foreign Secretary Jack Straw, “[f]ew events in global history can have galvanized the international system to action so completely in so short a time.”).

20. See generally U.N. SCOR, 56th Sess., 4370th mtg, U.N. Doc. S/RES/1368 (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 the 9/11 terrorist attacks.).

21. Scharf, *supra* note 1, at 450.

22. See generally Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1962 (XVIII), 1280th plen. mtg., U.N. Doc. A/RES/1962 (Dec. 13 1963).

law and reflected a time of change caused by accelerated technological developments, such as the possibility to launch rockets into outer space.²³

Finally, the development of humanitarian intervention at the very end of the twentieth century has been described as a Grotian Moment.²⁴ In 1999, North Atlantic Treaty Organization (NATO) forces intervened in Serbia to protect ethnic Kosovar Albanians from ethnic cleansing, instituted by the Federal Republic of Yugoslavia government.²⁵ The NATO campaign had not been authorized by the U.N., but the global consensus on this intervention was that it was “[unlawful] but legitimate.”²⁶ The international community responded to the intervention through a new doctrine called “Responsibility to Protect,” which authorizes humanitarian interventions in limited circumstances.²⁷ A growing number of scholars have agreed that humanitarian intervention has become an emerging norm of customary international law, and that it ought to be recognized in some extraordinary circumstances.²⁸ Thus, the notion of humanitarian intervention may have constituted a Grotian Moment. This is particularly relevant today in the context of Syria and the ongoing humanitarian crisis, which has sparked significant debate over the issue of humanitarian intervention.

23. See Sterio, *supra* note 2, at 214.

24. See Scharf, *supra* note 1, at 450.

25. Milena Sterio, *On the Right to External Self-Determination: “Selfistans,” Secession, and the Great Powers’ Rule*, 19 MINN. J. INT’L L. 137, 163–64 (2010).

26. This terminology was coined by the drafters of the Kosovo Report. See INDEP. INT’L COMM’N ON KOSOVO, KOSOVO REPORT: CONFLICT, INT’L RESPONSE, LESSONS LEARNED, ch. 6 (2000) [hereinafter KOSOVO COMM’N]. The position of the U.S. Government confirmed this view; a few days before the start of the NATO-led aerial strikes against the former Yugoslavia in 1999, a spokesman from the U.S. State Department 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 Murphy, *Contemporary Practice of the United States Relating to Int’l Law*, 93 AM. J. INT’L L. 628, 631 (1999); but see the position of the United Kingdom’s Government: “We are in 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.” DUKE, EHRHART & KARADI, *The Major European Allies: France, Germany, and the United Kingdom, in KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION* 128 (Schnabel & Thakur eds., 2000) [hereinafter KOSOVO AND THE CHALLENGE].

27. See generally THE INT’L COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited Feb. 22, 2014) [hereinafter ICISS REPORT]; see also Max W. Mathews, Note, *Tracking the Emergence of a New Int’l Norm: The Responsibility to Protect and the Crisis in Darfur*, 31 B.C. INT’L COMP. L. REV. 137 (2008).

28. See John Alan Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT’L L. 907, 941 (2006); MARC WELLER, *ARMED SAMARITANS* 20–22 (Counsel 1999).

III. SYRIA: A VIOLENT PAST, PRESENT, AND FUTURE?

Syria is a multi-ethnic nation, home to a majority of Arab Sunnis and many other minority groups such as Arab Alawites, Christians, Armenians, Assyrians, Druze, Kurds, and Turks.²⁹ It was a part of the Ottoman Empire from the 16th century until World War I.³⁰ After the War Syria was integrated into the French mandate in the Middle East.³¹ It gained independence from France in 1946, but its first decades as a sovereign nation were marred by violence and conflict.³² Following a regional war in 1970, Hafez al-Assad, current President Assad's father, rose to power and emerged as ruler of Syria.³³ Violence and warfare ensued throughout Hafez al-Assad's regime. In the late 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 tens of thousands of Syrians were killed by the Syrian army.³⁴ Hafez al-Assad died in 2000 and was replaced by his son, Bashar al-Assad, who ran unopposed for the presidential post.³⁵

Bashar al-Assad's election initially sparked hope for reform, but his regime quickly quashed any protest.³⁶ The current crisis began as part of the Arab Spring: A series of peaceful protests that took place in Syria in the spring of 2011, to be brutally quashed by the Syrian army.³⁷ 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.³⁸ According to some reports, as many as 100,000 people have been killed in this bloody conflict, whereas over 1.5 million Syrians have

29. See *Syria Profile*, BBC NEWS MIDDLE EAST (Dec. 12, 2013), <http://www.bbc.co.uk/news/world-middle-east-14703856> (last visited Feb. 22, 2014) [hereinafter *Syria Profile*].

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. See *Syria Profile*, *supra* note 29.

35. *Id.*

36. *Id.* ("Following 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.")

37. See generally *id.*

38. Kim Sengupta, *Syria's Sectarian War Goes Int'l as Foreign Fighters and Arms Pour Into Country*, INDEPENDENT.CO.UK (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> (last visited Jan. 31, 2014).

fled to the neighboring countries of Jordan, Turkey, Iraq, and Lebanon.³⁹ 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; as confirmed by U.N. inspectors.⁴⁰

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, all constitutional freedoms were suspended between 1963 and 2011 under an Emergency Law, because of the ongoing conflict with Israel over Golan Heights.⁴¹ Most human rights observers have expressed serious concern over Syria's human rights record, calling it one of the worst on the planet.⁴² The current conflict has only exacerbated an already volatile situation.

Syrian demographics have additionally fueled the ongoing conflict. A majority of Syrians (approximately 60%) are Sunni Arab; President Assad and his government belong to a minority Alawite group (approximately 12%); Christians constitute a 10% minority; other minority groups such as Turks, Kurds, and Assyrians constitute the remaining 18% of the population.⁴³ 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.⁴⁴ Most Christians have thus supported Assad throughout the conflict

39. Matthew Weaver, *Syria Crisis: Number of Refugees Tops 1.5 Million, Says UN*, THE GUARDIAN (May 16, 2003), <http://www.theguardian.com/world/2013/may/16/syria-crisis-refugees-million-un> (last visited Jan. 31, 2014).

40. *Syria Chemical Attack: What We Know*, BBC NEWS (Sept. 24, 2013), <http://www.bbc.co.uk/news/world-middle-east-23927399> (last visited Feb. 20, 2014); see also Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus, Aug. 21, 2013, U.N. Doc. A/67/997-S/2013/553, available at http://www.un.org/disarmament/content/slideshow/Secretary_General_Report_of_CW_Investigation.pdf (last visited Feb. 20, 2014).

41. *Syria's Emergency Law Lifted After 48 Years*, ENCYCLOPEDIA BRITANNICA BLOG (Apr. 19, 2011), <http://www.britannica.com/blogs/2011/04/syrias-emergency-law-lifted-48-years-editor> (last visited Feb. 20, 2014).

42. See *Freedom in the World 2011*, FREEDOMHOUSE.ORG (2011), <http://freedomhouse.org/report/freedom-world/freedom-world-2011?page=363&year=2011&country=8143> (last visited Feb. 20, 2014).

43. *Syria Demographics Profile 2013*, INDEXMUNDI.COM (2013), http://www.indexmundi.com/syria/demographics_profile.html (last visited Jan. 31, 2014) (citing CIA WORLD FACTBOOK).

44. *Syria's Christians Stand by Assad*, CBS NEWS (Feb. 6, 2002), http://www.cbsnews.com/8301-503543_162-57372175-503543/syrias-christians-stand-by-assad/ (last visited Feb. 20, 2014)

and have argued that if Assad were removed, the dominant Sunnis would install an Islamic-extremist government which would harm Christians and all other minority groups even further.⁴⁵ The presence of multiple ethnic groups in Syria, as well as their mutual alliances and skirmishes, have contributed to historical instability of the Syrian state and have exacerbated the present-day civil war.

In the wake of horrific violence and bloodshed in Syria, and in particular, the allegations of chemical weapons used by the Assad regime, the international community has grappled with the issue of whether to intervene with military in this volatile region. The U.N. 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.⁴⁶ 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.⁴⁷ The section below will explore the issue of humanitarian intervention post-Syria, and whether this emerging norm constitutes a Grotian Moment.

IV. A NEW GROTIAN MOMENT: HUMANITARIAN INTERVENTION?

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 is currently being crystallized into binding law. The creation of any norm of customary law requires two elements: *opinio juris* and state practice.⁴⁸ State action and practice aimed at the creation of a new norm of customary law may in fact break an existing norm. In other words, states may have to engage in behavior which purposely violates existing rules in order to create new, presumably better rules. For the

("Thousands of Christians are tied up in the regime's security apparatus and are employed in high-ranking government and military positions.").

45. *Id.* ("As a fellow minority, Christians have long supported the Alawite regime in order to ensure protection and rights for themselves.").

46. Louis Charbonneau & Michelle Nichols, *U.N. Security Council Powers Meet Again on Syria; No Outcome*, REUTERS (Aug. 29, 2013), <http://www.reuters.com/article/2013/08/29/us-syria-crisis-un-idUSBRE97S17R20130829> (last visited Jan. 31, 2014) (noting that Russia and China had vetoed three proposed resolutions that would have condemned the Assad regime and threatened United Nations sanctions).

47. *Id.* (noting that the United States and Great Britain sought to convince the public for the need to engage in military strikes against Syria); see also *France's Hollande Backs U.S. on Syria Action*, BBC NEWS (Aug. 30, 2013), <http://www.bbc.co.uk/news/world-middle-east-23897775> (last visited Feb. 20, 2014).

48. See Scharf, *supra* note 1, at 445.

purposes of Syria, this implies that states may have to engage in military intervention for a humanitarian purpose without Security Council approval, thereby breaking the existing ban on the use of force in order to establish a new customary norm of 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 lawmaking moment” because all the conditions seem to be met for the advancement of a novel legal argument: that humanitarian intervention has crystallized into a new binding norm of international law.⁴⁹ Thus, the emergence of humanitarian intervention as a new norm of customary law, as evidenced post-Syria, may constitute a Grotian Moment, similar to those described above. According to Koh, humanitarian intervention 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) [L]imited 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.⁵⁰

Over the past few decades, humanitarian intervention has grown from a hawkish argument, advanced by few, 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 today's type of warfare: where conflict is more often intra-state than inter-state,

49. See Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: Int'l Law and the Way Forward)*, JUSTSECURITY.ORG (Oct. 2, 2013, 9:00 AM), <http://justsecurity.org/2013/10/02/koh-syria-part2/> (last visited Feb. 20, 2014).

50. *Id.* (emphasis in original).

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 U.N. Charter. While some states, including the United States, attempted 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.⁵¹

Moreover, even states which denied that Kosovo was any type of a new precedent-setting norm nonetheless participated in this military intervention. 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.”⁵² In addition, then U.N. Secretary-General Kofi Annan has claimed, in the aftermath of Kosovo, that “[e]merging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty.”⁵³ Other examples of humanitarian intervention over the course of the last two decades include a 1999 intervention on behalf of the Kurds staged by the United States and exercised against Iraq, as well as the 2012 intervention in Libya.⁵⁴ In addition to such examples of humanitarian

51. Compare the United Kingdom’s position on Kosovo, arguing that the NATO intervention was legal under international law, with the position of the United States, which argued that the intervention was “legitimate.” See FREEDOM HOUSE, *supra* note 42; see also KOSOVO COMMISSION, *supra* note 26.

52. KOSOVO COMMISSION, *supra* note 26, at 175.

53. See Press Release, Human Rights Commission, Secretary-General Calls for Renewed Commitment in New Century to Protect Rights of Man, Woman, Child—Regardless of Ethnic, National Belonging, U.N. Press Release SG/SM/6949, HR/CN/898 (Apr. 7, 1999).

54. Sterio, *supra* note 25, at 156 (discussing the 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.COM (Mar. 19, 2011), <http://www.eubusiness.com/news-eu/libya-unrest-summit.95v/> (last visited Feb. 20, 2014); 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/> (last visited Feb. 20, 2014) (noting that Resolution 1973 “was presented as a humanitarian resolution”).

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.

Many such discussions have already occurred within the context of responsibility to protect. 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 to question the Security Council's monopoly in this area demonstrates an emergence or crystallization of a new way of thinking. Humanitarian intervention has been present in the public discussions of many states and on the agenda of the U.N. General Assembly. The absence of consensus on this issue does not demonstrate that states do not wish to develop a new normative framework for humanitarian intervention; however, 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.⁵⁵ Unfortunately, Security Council politics have resulted in multiple vetoes and only a small number of military actions have ever been authorized. 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 mentioned above, proposed by Harold Koh in the context of Syria, accomplishes the important task of legalizing humanitarian intervention under very strict, limited circumstances. This type of limited humanitarian intervention may constitute a new Grotian Moment.

Koh is correct in developing and advancing the argument in favor of humanitarian intervention. 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. I also agree with Koh that humanitarian intervention is a necessity in today's world—because, like in Syria, modern-day conflicts often remain within a single state's boundary and often cause tremendous humanitarian suffering.

55. See e.g., James Mayall, *The Concept of Humanitarian Intervention Revisited*, in KOSOVO AND THE CHALLENGE, *supra* note 26, at 320 (noting that since the Gulf War, the majority of conflict were intrastate conflicts, necessitating U.N. Chapter VI intervention to provide humanitarian relief as well as peacekeeping functions).

Because Security Council 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 someday morph from an emerging norm of international law into a binding one. That customary law will evolve and will embrace this new norm. That the Security Council structure of veto power can be overcome one day through such development of binding custom, and that we will witness the creation of a new Grotian Moment.

The emergence of a new customary norm of international law, and the creation of a new Grotian Moment, is of course a difficult proposition. How does one “prove” that customary law contains a new norm? How does one demonstrate the exact content of that norm? 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 U.N. 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 become a part of international legal discourse. That it continue to be discussed at academic forums and conferences. That it remain a subject of controversy on the Security Council and General Assembly agenda, and that it persist 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. With persistence and tenacity by states, scholars, and courts eager to develop a new norm of humanitarian intervention, we may soon become able to observe another fully-shaped Grotian Moment.

Last, I understand that humanitarian intervention can be a slippery slope—that 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. But any law can be potentially misused, misinterpreted, or wrongly applied. 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. 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; 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 Security Council may be paralyzed, it would nonetheless be possible for the intervener 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.⁵⁶ The Bush Administration's response to the 9/11 terrorist attacks also centered on building an international coalition of states willing to combat terrorism.⁵⁷ And the Kosovo air strikes, conducted with a humanitarian goal, were led by a NATO coalition of states.⁵⁸ The existence of an international alliance in most instances demonstrates that multiple states are concerned with a given situation and that multiple states consider the use of force 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 non-humanitarian goals under the pretext of humanitarian intervention.

Finally, it should be noted that international law is not stagnant and that it has evolved and changed drastically over the past century. Thus, if some day humanitarian intervention becomes an unnecessary, ill-used, cumbersome norm, international law players can act in order 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 reevaluate and reinterpret 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.

56. Syria Demographics Profile, *supra* note 43; *see also* Charbonneau & Nichols *supra*, note 46.

57. Sarah Anderson, Phyllis Bennis & John Cavanagh, *Coalition of the Willing or Coalition of the Coerced?*, INSTITUTE FOR POLICY STUDIES (Feb. 8, 2014), http://www.ips-dc.org/reports/coalition_of_the_willing (last visited Feb. 20, 2014) (describing the building of the Coalition of the Willing by the Bush Administration in the wake of 9/11).

58. *See e.g.*, Sterio, *supra* note 25, at 156 (discussing the NATO air strikes against the Federal Republic of Yugoslavia aimed at protecting Kosovar Albanians).

V. CONCLUSION

As scholars have acknowledged, “[c]ommentator’s and courts should exercise caution, however, in characterizing situations as Grotian Moments” as most instances of profound change may need to be more strictly scrutinized to determine if they truly qualify as Grotian Moments.⁵⁹ While the issue of humanitarian intervention certainly merits continuous attention and scrutiny on behalf of states, scholars, and courts, the development of this new norm of international law authorizing the use of force toward the goal of preventing humanitarian suffering would be a significant and worthy Grotian Moment. In the wake of the Syrian situation, we may be witnessing the development and creation of a new Grotian Moment: the emergence of a customary norm of international law authorizing humanitarian intervention.

59. Scharf, *supra* note 1, at 452.



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McGill Guide 9th ed.

Milena Sterio, "Humanitarian Intervention Post-Syria: A Grotian Moment" (2014) 20:2 ILSA J Intl & Comp L 343.

MLA 8th ed.

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