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Humanitarian Intervention at the Margins: An Examination of Recent Incidents

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Humanitarian Intervention at the Margins: An Examination of Recent Incidents

Peter Tzeng*

ABSTRACT

Scholarship on humanitarian intervention is plentiful, but actual examples of state practice and opinio juris are sparse. Thus, critics conclude, the doctrine of humanitarian intervention has no legal basis in international law. This Article challenges this viewpoint. It does so by departing from the traditional framework of international law and adopting an alternative framework of analysis: the study of incidents. Through an examination of seven incidents over the past decade, this Article reveals that the doctrine of humanitarian intervention, though not yet an established norm of international law, functions to widen traditional exceptions to the prohibition on the use of force.

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I. INTRODUCTION

For over five years, the Islamic State of Iraq and the Levant (ISIL) has been committing gross violations of human rights on Syrian territory.¹ As of August 2016, eleven states have submitted letters to the United Nations justifying military action against ISIL in Syria.²

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1. U.N. Human Rights Council, “*They Came to Destroy*”: *ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (June 15, 2016); Amnesty Int’l, *Rule of Fear: ISIS Abuses in Detention in Northern Syria*, AI Index MDE 24/063/2013 (Dec. 19, 2013); Frédéric Gilles Sourgens, *The End of Law: The ISIL Case Study for a Comprehensive Theory of Lawlessness*, 39 *FORDHAM INT’L L.J.* 355, 378–79 (2015).

2. Permanent Rep. of Belgium to the U.N., Letter dated June 7, 2016 from the Permanent Rep. of Belgium to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 9, 2016) [hereinafter Belgian Article 51 Letter]; Permanent Rep. of Norway to the U.N., Letter dated June 3, 2016 from the Permanent Rep. of Norway to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/513 (June 3, 2016) [hereinafter Norwegian Article 51 Letter]; Chargé d’affaires a.i. of the Permanent Mission of the Netherlands to the U.N., Letter dated Feb. 10, 2016 from the Chargé d’affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/132 (Feb. 10, 2016) [hereinafter Dutch Article 51 Letter]; Permanent Rep. of Denmark to the U.N., Letter dated Jan. 11, 2016 from the Permanent Rep. of Denmark to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/34 (Jan. 13, 2016) [hereinafter Danish Article 51 Letter]; Chargé d’affaires a.i. of the Permanent Mission of Germany to the U.N., Letter dated Dec. 10, 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015) [hereinafter German Article 51 Letter]; Permanent Rep. of Australia to the U.N., Letter dated Sept. 9, 2015 from the Permanent Rep. of Australia to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/693 (Sept. 9, 2015) [hereinafter Australian Article 51 Letter]; Permanent Rep. of France to the U.N., Identical letters dated Sept. 8, 2015 from the Permanent Rep. of France to the United Nations and to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/745 (Sept. 9, 2015) [hereinafter French Article 51 Letter]; Chargé d’affaires a.i. of the Permanent Mission of Turkey to the U.N., Letter dated July 24, 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, U.N. Doc.

All eleven letters invoke the right of self-defense under Article 51 of the Charter of the United Nations.³ Four of the letters additionally stress how the Syrian government is “unwilling or unable” to prevent attacks originating from the concerned territory.⁴ And two of the letters note that the Syrian government no longer exercises “effective control” over the territory in question.⁵ One justification, however, is notably missing from all eleven letters: the doctrine of humanitarian intervention.⁶

This story should sound strikingly familiar. In 1999, the North Atlantic Treaty Organization (NATO) proceeded, without express Security Council authorization, to bomb the Federal Republic of Yugoslavia for the purpose of ending widespread human rights violations in Kosovo. Although undoubtedly motivated by humanitarian concerns, the NATO states subsequently justified their actions before the International Court of Justice (ICJ) and the Security Council by making reference to Security Council resolutions.⁷ The

S/2015/563 (July 24, 2015) [hereinafter Turkish Article 51 Letter]; Chargé d'affaires a.i. of the Permanent Mission of Canada to the U.N., Letter dated Mar. 31, 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/221 (Mar. 31, 2015) [hereinafter Canadian Article 51 Letter]; Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Identical letters dated Nov. 25, 2014 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2014/851 (Nov. 26, 2014) [hereinafter U.K. Article 51 Letter]; Permanent Rep. of the United States of America to the U.N., Letter dated Sept. 23, 2014 from the Permanent Rep. of the United States to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) [hereinafter U.S. Article 51 Letter]. Some states have submitted more than one letter, but this discussion focuses on the first letter of justification submitted by each state.

3. U.N. Charter art. 51; *see generally supra* note 2.

4. Australian Article 51 Letter, *supra* note 2; Turkish Article 51 Letter, *supra* note 2; Canadian Article 51 Letter, *supra* note 2; U.S. Article 51 Letter, *supra* note 2.

5. Belgian Article 51 Letter, *supra* note 2; German Article 51 Letter, *supra* note 2.

6. For a definition of the term “humanitarian intervention” as used in this Article, see text accompanying *infra* note 59.

7. Legality of Use of Force (Yugoslavia v. Belg.), Verbatim Record, CR 99/15, at 15 (May 10, 1999) (“[L]e Royaume de Belgique est d’avis que l’intervention armée trouve un fondement sans conteste dans les résolutions du Conseil de sécurité que je viens de citer.”); Legality of Use of Force (Yugoslavia v. U.K.), Verbatim Record, CR 99/14, at 36 (May 10, 1999); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 45–47 (3d ed. 2008); Ian Johnstone, *When the Security Council is Divided: Imprecise Authorizations, Implied Mandates, and the ‘Unreasonable Veto’*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 227, 239–43 (Marc Weller ed., 2015); Vaughan Lowe & Antonios Tzanakopoulos, *Humanitarian Intervention*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, ¶ 32 (Rüdiger Wolfrum ed., 2012); Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 232, 235 (J.L. Holzgrefe & Robert O. Keohane eds., 2003). It should be noted that Belgium and the United Kingdom invoked humanitarian intervention to justify the Kosovo intervention, but they did so alongside their invocations of Security Council resolutions. *See infra* note 83.

words “humanitarian intervention” did not even appear in most of the states’ pleadings before the ICJ.⁸

What does this mean for the status of the doctrine of humanitarian intervention in international law? According to critics, if intervening states consistently refuse to invoke the doctrine when it would seemingly apply, the doctrine must not exist.⁹ Although a vibrant topic in academic scholarship, the doctrine does not have the requisite state practice and *opinio juris* to support its existence in international law.¹⁰ In order for such a doctrine to exist, these critics argue, states need to expressly rely on it as a legal justification for a military intervention.¹¹

This Article challenges this viewpoint. It does so by departing from the traditional framework of customary international law based on state practice and *opinio juris*. Instead, this Article adopts a modern framework of analysis: the study of incidents. By examining seven recent incidents, this Article concludes that the doctrine of humanitarian intervention, though not yet an established norm of international law, has been actively developing at the margins over the past decade. In particular, these incidents reveal that the doctrine of humanitarian intervention functions to widen traditional exceptions to the prohibition on the use of force.

This Article is organized as follows. Part II provides background on the prohibition on the use of force and the Responsibility to Protect. Part III discusses the doctrine of humanitarian intervention, examines its history, and explains the reasons why a study of incidents is appropriate for its analysis. Part IV then examines seven incidents of humanitarian intervention over the past decade. Part V explains how

8. *E.g.*, *Legality of Use of Force (Yugoslavia v. Can.) (Yugoslavia v. Neth.) (Yugoslavia v. Fr.) (Yugoslavia v. It.)*, Verbatim Record, CR 99/25 (May 12, 1999).

9. *See, e.g.*, Arman Sarvarian, *Humanitarian Intervention After Syria*, 36 LEGAL STUD. 20, 30 (2016); Tamás Hoffmann, *Dr. Opinio Juris and Mr. State Practice: The Strange Case of Customary International Humanitarian Law*, 47 ANNALES UNIVERSITATIS SCIENTIARUM BUDAPESTINENSIS DE ROLANDO EÖTVÖS NOMINATAE: SECTIO IURIDICA [ANNALES U. SCI. BUDAPESTINENSIS ROLANDO EÖTVÖ] 373, 381 (2006) (Hung.); Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231, 1238–39 (1999); Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT'L L. 883, 893 (1995); Lowe & Tzanakopoulos, *supra* note 7, ¶ 34.

10. State practice and *opinio juris* are the two components of customary international law. *See infra* notes 67–72 and accompanying text.

11. *See, e.g.*, Lowe & Tzanakopoulos, *supra* note 7, ¶ 34 (“The fact that intervening States have been so reluctant to rely explicitly on a right of humanitarian intervention means that there is great difficulty in finding any *opinio iuris* that can properly be counted towards the establishment of a right of humanitarian intervention.”); Charney, *supra* note 9, at 1238 (“[F]ew, if any, interventions can be found in which the intervening states have expressly based their actions on the right of humanitarian intervention. In the absence of such a linkage by the intervening states, the actions can hardly serve as *opinio juris* in support of such a right.”); Sarvarian, *supra* note 9, at 30 (“[T]he absence of publicly articulated legal positions by states that humanitarian intervention is lawful defeats [the] ultimate argument of legality.”).

these incidents reflect the development of the doctrine of humanitarian intervention at the margins. Finally, Part VI draws conclusions regarding humanitarian intervention in light of this study.

II. BACKGROUND

There is a growing tension between two fundamental notions of international law: state sovereignty and human rights.¹² Although both concepts are enshrined in the U.N. Charter,¹³ for several decades after 1945, the former took precedence over the latter. This phenomenon resulted, at least in part, from the relative clarity of the prohibition on the use of force enshrined in Article 2(4) of the U.N. Charter, and the relative lack of clarity of the normative force of fundamental human rights.¹⁴

A. *The Prohibition on the Use of Force*

Article 2(4) establishes the prohibition on the use of force in international relations.¹⁵ Not only has the prohibition been deemed a “cornerstone” of the U.N. Charter,¹⁶ but it is widely considered a *jus cogens* norm.¹⁷ There are only three widely accepted exceptions to the prohibition.¹⁸

12. W. Michael Reisman, *Problèmes actuels du recours à la force en droit international, Sous-groupe sur l'intervention humanitaire [Present Problems of the Use of Force in International Law, Sub-group on Humanitarian Intervention]*, 72 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL – SESSION DE SANTIAGO DU CHILI 238, 248 (2007) [hereinafter Reisman, *Present Problems of the Use of Force in International Law*].

13. See U.N. Charter art. 1, ¶ 3; U.N. Charter art. 2, ¶ 1.

14. See Reisman, *Present Problems of the Use of Force in International Law*, *supra* note 12, at 241.

15. U.N. Charter art. 2, ¶ 4.

16. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶ 148 (Dec. 19) (“The prohibition against the use of force is a cornerstone of the United Nations Charter.”); *Oil Platforms (Iran v. U.S.)*, Dissenting Opinion appended to Judgment, 2003 I.C.J. Rep. 219, ¶ 1.1 (Nov. 6) (“The principle of the prohibition of the use of force in international relations . . . is, no doubt, the most important principle in contemporary international law to govern inter-State conduct; it is indeed the cornerstone of the Charter.”).

17. Oliver Dörr, *Use of Force, Prohibition of*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (June 2011); *e.g.*, *Iran v. U.S.*, 2003 I.C.J. ¶ 1.1 (“The principle of the prohibition of the use of force in international relations . . . reflects a rule of *jus cogens* from which no derogation is permitted.”). *Jus cogens* norms, also called peremptory norms, are rules of international law from which no derogation is permitted. JAMES R. CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 389–90 (8th ed. 2012).

18. ANTONIO CASSESE, *INTERNATIONAL LAW* 305–20 (2001); Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VAND. J. TRANSNAT'L L. 643, 645 (2007) (“The Charter prohibits the use of force against any state, except with that state's consent, in self-defense, or as authorized by the Security Council under Chapter VII.”).

First, under Article 42 of the U.N. Charter, a state may use force if authorized by the Security Council under Chapter VII of the U.N. Charter in response to a threat to the peace, breach of the peace, or an act of aggression.¹⁹ Although Article 42 vests the authorization power solely in the Security Council, the General Assembly's *Uniting for Peace* resolution²⁰ and the ICJ's *Certain Expenses*²¹ and *Wall*²² advisory opinions recognize that the General Assembly may exercise Chapter VII powers if the Security Council proves to be paralyzed.²³

Second, under Article 51 of the U.N. Charter, a state may use force in individual or collective self-defense in response to an armed attack.²⁴ As the ICJ clarified in *Military and Paramilitary Activities* and later confirmed in *Oil Platforms*, only "the most grave forms of the use of force" constitute an "armed attack."²⁵ The Court in those cases also emphasized that the use of force in response to an armed attack must comply with the principles of necessity and proportionality.²⁶

Third, a state may use force if the host state consents.²⁷ Although this exception is not enshrined in the U.N. Charter, the ICJ, in *Military and Paramilitary Activities*, expressly accepted consent as an exception to the prohibition,²⁸ and, more recently, in *Armed Activities*, appeared to apply this principle in its analysis of the merits of the

19. U.N. Charter art. 42.

20. G.A. Res. 377 (V), at 10 (Nov. 3, 1950).

21. The Court in *Certain Expenses* held that Article 24 of the U.N. Charter grants the Security Council primary but not exclusive responsibility for the maintenance of international peace and security. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 163 (July 20). However, the Court also held that Article 11(2) of the U.N. Charter reserves the taking of enforcement action to the Security Council. *Id.* at 164–65.

22. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 26 (July 9) (affirming that the Security Council has primary but not exclusive responsibility for the maintenance of international peace and security, and that the General Assembly also has "the power, *inter alia*, under Article 14 of the Charter, to 'recommend measures for the peaceful adjustment' of various situations").

23. See Lowe & Tzanakopoulos, *supra* note 7, ¶ 36; Reisman, *Present Problems of the Use of Force in International Law*, *supra* note 12, at 242–43.

24. U.N. Charter art. 51.

25. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 191 (June 27); *Iran v. U.S.*, 2003 I.C.J. ¶ 51.

26. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 194; *Iran v. U.S.*, 2003 I.C.J. ¶ 43.

27. See Sean Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 109, 118 (Michael N. Schmitt ed., 2009); Michael Bahar, *Power Through Clarity: How Clarifying the Old State-Based Laws Can Reveal the Strategic Power of Law*, 30 U. PA. J. INT'L L. 1295, 1299 (2009); John Cerone, *Misplaced Reliance on the "Law of War"*, 14 NEW ENG. J. INT'L & COMP. L. 57, 59–61 (2007); Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1, 4 (2013); David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 209 (1996) ("That consent may validate an otherwise wrongful military intervention into the territory of the consenting state is a generally accepted principle.").

28. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 246.

case.²⁹ Moreover, the International Law Commission's Articles on State Responsibility recognize consent as a means of precluding the wrongfulness of an otherwise wrongful act.³⁰

Aside from these three traditional exceptions to the prohibition on the use of force, some scholars have asserted an exception of "protective intervention," which has not gained universal support.³¹ Under this theory, a state has the right to intervene militarily in the territory of another state for the purpose of protecting its civilians.³² Some argue that this exception is best assimilated into the exception of self-defense under Article 51,³³ whereas others posit that it does not constitute an exception to the prohibition on the use of force at all.³⁴

Humanitarian intervention is another proposed exception to the prohibition on the use of force. As a matter of *lex lata*, most scholars agree that humanitarian intervention does not have a legal basis in international law.³⁵ Indeed, whenever the ICJ has broached the prohibition on the use of force, it has not left any room for an exception based on humanitarian grounds. In *Corfu Channel*, the Court affirmed the mandatory nature of the prohibition, specifying that the inabilities of an international organization could not be invoked to justify

29. Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶¶ 92–105 (analyzing the situation as if consent were a valid exception to the prohibition on the use of force).

30. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, at 72, in Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001). Note, however, that the debates in the International Law Commission (ILC) indicate that most ILC members considered that the invocation of consent to preclude the wrongfulness of military intervention should be determined by the applicable primary rules, not by a secondary rule like Article 20. Gregory H. Fox, *Intervention by Invitation*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 7, at 821; Georg Nolte, *Intervention by Invitation*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 16 (Jan. 2010).

31. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Dissenting Opinion of Judge Morozov, 1980 I.C.J. Rep. 51, ¶ 8 (May 24) [hereinafter Morozov's Dissent]; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Dissenting Opinion of Judge Tarazi, 1980 I.C.J. Rep. 64 (May 24) [hereinafter Tarazi's Dissent]; CHARLES B. KEELY, HUMANITARIAN INTERVENTION AND SOVEREIGNTY 9 (1995); ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 109–10 (1993); U.K. FOREIGN & COMMONWEALTH OFFICE, IS INTERVENTION EVER JUSTIFIED?, FOREIGN POLICY DOCUMENT NO. 148, reproduced in *United Kingdom Materials on International Law 1986*, 57 BRITISH Y.B. INT'L L. 487, 618 (1986) [hereinafter U.K. FOREIGN & COMMONWEALTH OFFICE]; John R. D'Angelo, Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and Its Legality Under International Law*, 21 VA. J. INT'L L. 485, 487 (1981).

32. U.K. FOREIGN & COMMONWEALTH OFFICE, *supra* note 31, at 618.

33. *E.g., id.* at 617–18.

34. Morozov's Dissent, *supra* note 31, at ¶ 8; Tarazi's Dissent, *supra* note 31.

35. Nigel Rodley, 'Humanitarian Intervention', in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 7, at 775–76; Terry D. Gill, *Humanitarian Intervention*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 221, 227 (Terry D. Gill & Dieter Fleck eds., 2010); Eric A. Heinze, *Humanitarian Intervention: Overview*, in ENCYCLOPEDIA OF HUMAN RIGHTS 443, 452 (David P. Forsythe ed., 2009).

noncompliance.³⁶ In *Military and Paramilitary Activities*, the Court expressly held that humanitarian objectives cannot justify the use of force under international law.³⁷ In *Nuclear Weapons*, the Court seemed to confirm the exclusive nature of the aforementioned exceptions.³⁸ In *Oil Platforms*, the Court affirmed the narrowness of the exception of self-defense to the prohibition.³⁹ And, most recently, in *Armed Activities*, the Court held that even Security Council resolutions requiring states to bring peace and stability to a region could not justify the use of force.⁴⁰ In short, the ICJ's jurisprudence over the past seven decades has reaffirmed the importance and nearly absolute nature of the prohibition on the use of force.

B. *The Responsibility to Protect*

This is not to say, however, that concern for human rights has completely disappeared. In fact, there is no question that, over the past two decades, international human rights norms have gained considerable traction. This development can most easily be seen in the emergence of the Responsibility to Protect (R2P).

The history of R2P dates back to two tragic events in the mid-1990s. In 1994, the United Nations and the rest of the international community watched from the sidelines as the Hutu majority in Rwanda slaughtered approximately eight hundred thousand Rwandans over the course of a mere one hundred days.⁴¹ Then in 1995, the international community once again stood idly by as the Bosnian Serb Army of Republika Srpska massacred eight thousand Muslim Bosniaks in Srebrenica within a mere ten days.⁴² In a 2000 report, U.N. Secretary-General Kofi Annan asked, "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and

36. Corfu Channel (Alb. v. U.K.), Judgment, 1949 I.C.J. Rep. 4, 35 (Apr. 9).

37. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 268 ("The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States . . .").

38. Legality of the Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 38 (July 8).

39. *Iran v. U.S.*, 2003 I.C.J. ¶ 43.

40. *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. ¶ 152.

41. Rep. of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda (1999), transmitted by Letter Dated 16 December 1999 from the Secretary-General Addressed to the President of the Security Council, at 3, U.N. Doc. S/1999/1257 (Dec. 16, 1999).

42. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. and Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶ 278 (Feb. 26); *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); see generally U.N. Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, U.N. Doc. A/54/549 (Nov. 15, 1999) (describing the events that occurred in Srebrenica).

systematic violations of human rights that offend every precept of our common humanity?"⁴³

Five months later, the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS) in response to Secretary-General Annan's question. The following year, ICISS released its report, entitled *The Responsibility to Protect*, which, in a revolutionary fashion, argued that state sovereignty implies not only certain rights but also the responsibility of the state to protect its people.⁴⁴ Where a state fails to meet this responsibility, the ICISS report argued, military intervention for humanitarian purposes could be undertaken as "an exceptional and extraordinary measure."⁴⁵ The report, however, made it clear that such intervention would require (1) Security Council authorization, (2) General Assembly authorization under the *Uniting for Peace* procedure, or (3) *post hoc* Security Council authorization for intervention by a regional organization.⁴⁶

Although subsequent U.N. reports endorsed the notion of R2P, they took a more restrictive approach with regard to its application. For example, in 2004, the Secretary-General's High-Level Panel released the report *A More Secure World*, which restricted the application of R2P to gross violations of human rights, and specified that only the Security Council has the power to authorize military intervention:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.⁴⁷

The Panel, however, accepted the possibility of *post hoc* Security Council authorization in cases of intervention by a regional organization:

Authorization from the Security Council should in all cases be sought for regional peace operations, recognizing that in some urgent situations *that authorization may be sought after such operations have commenced*.⁴⁸

A few months later, the African Union, in a consensus document, agreed with the Panel on this latter point:

43. U.N. SECRETARY-GENERAL, WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY 48 (2000).

44. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, RESPONSIBILITY TO PROTECT XI (Dec. 2001).

45. *Id.* at XII.

46. *Id.* at XII–XIII.

47. High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2004) (emphasis added).

48. *Id.* ¶ 272(a) (emphasis added).

The African Union agrees with the Panel that the intervention of Regional Organisations should be with the approval of the Security Council; although in certain situations, *such approval could be granted "after the fact" in circumstances requiring urgent action.*⁴⁹

Nevertheless, subsequent reports did not address this question. In Secretary-General Annan's 2005 report, entitled *In Larger Freedom*, he stated:

[I]f national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. When such methods appear insufficient, *the Security Council may out of necessity decide to take action under the Charter of the United Nations*, including enforcement action, if so required.⁵⁰

This understanding that any humanitarian intervention would require Security Council authorization remained intact in the groundbreaking *World Summit Outcome Document* of 2005, which the General Assembly unanimously adopted. The document provided:

In this context, we are prepared to take collective action, in a timely and decisive manner, *through the Security Council, in accordance with the Charter, including Chapter VII*, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁵¹

Since 2009, Secretary-General Ban Ki-moon has published annual reports on the Responsibility to Protect. For the most part, they have reaffirmed the conclusions in the *World Summit Outcome Document*. For example, in his 2009 report *Implementing the Responsibility to Protect*, he stated:

The process of determining the best course of action, as well as of implementing it, must fully respect the provisions, principles and purposes of the Charter. In accordance with the Charter, *measures under Chapter VII must be authorized by the Security Council*. The General Assembly may exercise a range of related functions under Articles 10 to 14, as well as under the "Uniting for peace" process set out in its resolution 377 (V).⁵²

49. Executive Council, *The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus"*, at 6, AU Doc. Ext/EX.CL/2(VII) (Mar. 8, 2005) (emphasis added).

50. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005) (emphasis added).

51. G.A. Res. 60/1, ¶ 139, 2005 World Summit Outcome (Sept. 16, 2005) (emphasis added). The Security Council has on two occasions reaffirmed the conclusions reached in this paragraph. See S.C. Res. 1674 (Apr. 28, 2006); S.C. Res. 1894 (Nov. 11, 2009).

52. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 11(c), U.N. Doc. A/63/677 (Jan. 12, 2009) (emphasis added).

Nevertheless, in that very report, Secretary-General Ban Ki-moon recognized that the General Assembly could potentially authorize a Chapter VII enforcement action under the *Uniting for Peace* procedure:

[C]ollective enforcement measures, including through sanctions or coercive military action in extreme cases . . . could be authorized by the Security Council under Articles 41 or 42 of the Charter, *by the General Assembly under the "Uniting for peace" procedure . . . or by regional or subregional arrangements under Article 53, with the prior authorization of the Security Council.*⁵³

Since then, however, little emphasis has been placed on *Uniting for Peace*. In his 2012 report on R2P, Secretary-General Ban Ki-moon made it clear that “[o]nly the Security Council can authorize the use of force, under Chapter VII, Article 42, of the Charter.”⁵⁴ And, in his most recent report, released in July 2015, he once again suggested that only the Security Council may authorize a forceful intervention.⁵⁵

On the whole, the position of the U.N. Secretary-Generals on R2P—although not entirely consistent over time—contains three departures from the ICISS report. First, R2P applies only to gross violations of human rights. Second, only the Security Council can authorize military intervention.⁵⁶ And third, Security Council authorization must be given before the military intervention takes place, even for interventions by regional organizations.⁵⁷ Indeed, Secretary-General Ban Ki-moon’s 2009 report expressly rejected the possibility of *post hoc* authorization.⁵⁸

III. HUMANITARIAN INTERVENTION

Although R2P and humanitarian intervention share the same goal, they differ in one key respect: R2P requires the authorization of the Security Council, or, at the very least, the General Assembly under the *Uniting for Peace* procedure. Humanitarian intervention, on the other hand, does not.

Generally speaking, a humanitarian intervention is any intervention by a state, a group of states, or an international organization into the territory of another state for the purpose of ending human rights violations. This Article, however, employs the

53. *Id.* ¶ 56 (emphasis added).

54. U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, ¶ 32, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012).

55. U.N. Secretary-General, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect*, ¶¶ 13, 43, U.N. Doc. A/69/981-S/2015/500 (July 13, 2015).

56. The principal exception is Secretary-General Ban Ki-moon’s 2009 report. See *supra* note 53 and accompanying text.

57. The principal exception is the High-Level Panel’s 2004 report. See *supra* note 47 and accompanying text.

58. See *supra* note 52 and accompanying text.

term *humanitarian intervention*—as many other scholars do⁵⁹—to refer to the subset of humanitarian interventions that (1) involve the use of force, (2) aim to end gross violations of human rights, and (3) do not fall under any of the traditional exceptions to the prohibition on the use of force (i.e., Security Council authorization, self-defense, or consent of the host state). In other words, humanitarian intervention is the use of force by a state, a group of states, or an international organization in the territory of another state for the purpose of ending gross violations of human rights in the absence of a Security Council authorization, a claim of self-defense, or the consent of the host state.

As it is generally accepted that humanitarian intervention is unlawful as a matter of *lex lata*,⁶⁰ commentators have proposed two ways by which humanitarian intervention could become lawful conduct under international law. The first is through a reinterpretation of Article 2(4) of the U.N. Charter in light of state practice. Under Article 31(3)(b) of the Vienna Convention on the Law of Treaties, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be taken into account in the interpretation of a treaty.⁶¹ Therefore, if there is sufficient state practice showing that Article 2(4) should be interpreted to allow for humanitarian intervention, then that interpretation could hold.

The problem with this approach, however, is that there is a very high standard for what qualifies as “subsequent practice . . . which establishes the agreement of the parties.”⁶² According to the Appellate Body of the World Trade Organization, the subsequent practice would have to be a “concordant, common and consistent sequence of acts or

59. E.g., Aoife O'Donoghue, *Humanitarian Intervention Revisited*, 1 HANSE L. REV. 165 (2005); J. L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 15, 18 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); Daniel Wolf, *Humanitarian Intervention*, 9 MICH. Y.B. INT'L LEGAL STUD. 333, 334 n.3 (1988); Reisman, *Present Problems of the Use of Force in International Law*, *supra* note 12, at 241–42; Lowe & Tzanakopoulos, *supra* note 7, ¶ 3; GRAY, *supra* note 7, at 33–39. There are, of course, slight differences between the definition used in this Article and the definitions used by these scholars. In particular, some scholars use the term “humanitarian intervention” to include military interventions authorized by the Security Council, and therefore distinguish between “authorized” and “unauthorized” humanitarian interventions. This Article uses the term “humanitarian intervention” to refer only to unauthorized humanitarian interventions.

60. See Rodley, *supra* note 35.

61. Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331.

62. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 137 (2d ed. 1984); Mustafa Kamil Yasseen, *L'interprétation des traités d'après la convention de Vienne sur le droit des traités*, 151 RECUEIL DES COURS 1, 48 (1976).

pronouncements,”⁶³ which most certainly does not describe the infrequent “practice” of humanitarian intervention.⁶⁴

Moreover, even if Article 31(3)(b) could be invoked to reinterpret the *treaty* prohibition on the use of force, it could not facilitate the re-interpretation of the *customary* prohibition on the use of force, which the ICJ made clear in *Military and Paramilitary Activities* “retain[s] a separate existence” from the treaty norm.⁶⁵ Therefore, the possibility of a reinterpretation of Article 2(4) to allow for the doctrine of humanitarian intervention is implausible.

The second way for humanitarian intervention to become lawful conduct is through a new, supervening customary exception to the prohibition on the use of force.⁶⁶ It is to this possibility that this Article now turns.

A. Humanitarian Intervention as a Customary Exception

As set forth in Article 38 of the ICJ Statute,⁶⁷ and as the Court has repeatedly recognized in its jurisprudence,⁶⁸ a norm reflects customary international law if there is sufficient state practice accompanied by the requisite *opinio juris*—the belief that “this practice is rendered obligatory by the existence of a rule of law requiring it.”⁶⁹ There is no steadfast rule concerning the amount of state practice necessary to establish a rule of customary international law,⁷⁰ but the Court has noted that the practice must be “extensive”⁷¹ and “generally accepted.”⁷² Needless to say, the doctrine of humanitarian intervention does not meet this standard.⁷³

It must be recognized, however, that this formulation of customary international law makes proving the customary nature of certain rules much more difficult than others. In particular, it is extremely difficult under this formulation to prove the customary

63. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 13–14, WTO Doc. WT/DS8/AB/R (adopted Oct. 4, 1996); see Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶ 272, WTO Doc. WT/DS207/R (adopted Sept. 23, 2002).

64. See *infra* Sections III.B and III.C.

65. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 178.

66. *Lowe & Tzanakopoulos*, *supra* note 7, ¶ 26.

67. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

68. *E.g.*, *North Sea Continental Shelf (Ger./Neth.; Ger./Den.)*, Judgment, 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20); *Nicar. v. U.S.*, 1986 I.C.J. ¶¶ 183, 207.

69. *Ger./Neth.; Ger./Den.*, 1969 I.C.J. ¶ 77.

70. See Tullio Treves, *Customary International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 35–40 (2006).

71. *Ger./Neth.; Ger./Den.*, 1969 I.C.J. ¶ 74.

72. *Fisheries Jurisdiction (U.K. v. Ice.)*, Judgment, 1974 I.C.J. Rep. 3, ¶ 52 (July 25); *Fisheries Jurisdiction (Ger. v. Ice.)*, Judgment, 1974 I.C.J. Rep. 175, ¶ 44 (July 25).

73. See *infra* Sections III.B and III.C.

nature of an emerging exception to a customary prohibition, such as the doctrine of humanitarian intervention. The reason is twofold.

First, states are strongly disincentivized from acting in accordance with an emerging exception to a customary prohibition. The reason is that every instance of such state practice—until the exception definitively matures into a customary norm—would be a violation of international law. Consequently, even if a state believed that the exception *should* be law, it would still be discouraged from acting under the exception out of fear of the consequences of breaching the overarching norm. This phenomenon thus makes state practice of an emerging customary exception rarer than it would be for other emerging customary norms.

Second, even if a state acted in accordance with the exception, it would be strongly disincentivized from framing its act as falling under the exception, for the very same reason: the act would be considered a violation of international law. As a result, the state would be inclined to invoke other exceptions to the customary prohibition to justify its actions. This phenomenon makes identifying state practice very difficult.

Humanitarian intervention falls victim to both of these phenomena. It is a proposed exception to the customary, and arguably *jus cogens*⁷⁴ prohibition on the use of force. As a result, until a sufficient portion of the international community agrees that humanitarian intervention constitutes a customary norm, any act of humanitarian intervention will be a violation of the prohibition on the use of force. Consequently, states are strongly disincentivized to engage in humanitarian intervention.⁷⁵ And, in the rare cases that they do, they are strongly incentivized to disguise it as falling under one of the three traditional exceptions to the prohibition on the use of force: Security Council authorization, self-defense, or consent of the host state.

B. *The History of Humanitarian Intervention*

This dilemma is borne out by the history of humanitarian intervention. The pre-Charter⁷⁶ cases of humanitarian intervention

74. See *supra* note 17 and accompanying text.

75. See ERIC A. HEINZE, *WAGING HUMANITARIAN WAR: THE ETHICS, LAW, AND POLITICS OF HUMANITARIAN INTERVENTION* 74 (2009) (“Initial efforts to create new customary international law . . . are necessarily illegal at the time that they occur, which in the case of humanitarian intervention is to violate the prohibition on the use of force”); Rodley, *supra* note 35, at 794 (“We are left with the conundrum that a rule of *jus cogens*, a rule so important that it cannot be varied by treaty, has to be breached to pave the way for an alternative rule. Such a paradigmatic paroxysm should not be lightly presumed.”).

76. Being pre-Charter cases, the relevant norm of international law was not the prohibition on the use of force, but rather the principles of non-intervention and state sovereignty.

most commonly cited by commentators include the U.K., French, and Russian intervention in Ottoman Greece in 1827; the French intervention in Ottoman Syria from 1860 to 1861; and the U.S. intervention in Cuba in 1898.⁷⁷ Nevertheless, in each case, the intervening state or group of states never actually invoked humanitarian intervention as its legal basis for intervention, but rather relied on consent (Ottoman Greece⁷⁸ and Ottoman Syria⁷⁹), self-defense (Cuba⁸⁰), or other non-humanitarian grounds.⁸¹

Similarly, the post-Charter cases of humanitarian intervention most commonly cited by commentators are the Indian intervention in East Pakistan (Bangladesh) in 1971; the Tanzanian intervention in Uganda in 1978; the Vietnamese intervention in Democratic Kampuchea (Cambodia) in 1978; the French intervention in the Central African Empire (Central African Republic) in 1979; the U.S. intervention in Grenada in 1983; the U.S. intervention in Panama in 1989; the Economic Community of West African States' (ECOWAS) intervention in Liberia in 1990; the U.S., U.K., and French no-fly zone intervention in Iraq from 1991–2003; the ECOWAS intervention in Sierra Leone in 1997; and the NATO intervention in Kosovo in 1999.⁸² Yet, once again, in each case, rather than invoking solely humanitarian intervention as its justification, the intervening state, group of states, or international organization invoked, or at least could have invoked, one or more of the three traditional exceptions to the use of force: Security Council authorization (Iraq and Kosovo),⁸³ self-defense (East

77. See SIMON CHESTERMAN, *JUST WAR OR JUST PEACE: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 28–34 (2001); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 339–40 (1963); Lowe & Tzanakopoulos, *supra* note 7, ¶ 5.

78. See CHESTERMAN, *supra* note 77, at 29–32 (acknowledging that legal justification was not humanitarian intervention, but that historians have purported numerous motives to the action including “fear of unilateral intervention by Russia” and public opinion forcing government action).

79. *Id.* at 33.

80. *Id.* at 34.

81. BROWNLIE, *supra* note 77, at 339–40 (1963); see CHESTERMAN, *supra* note 77, at 28–34; Lowe & Tzanakopoulos, *supra* note 7, ¶ 5.

82. Legality of Use of Force (Yugoslavia v. Belg.), Verbatim Record, CR 99/15, at 16 (May 10, 1999); Lowe & Tzanakopoulos, *supra* note 7, ¶ 28.

83. Legality of Use of Force, Verbatim Record, CR 99/15, at 15 (May 10, 1999) (“[L]e Royaume de Belgique est d’avis que l’intervention armée trouve un fondement sans conteste dans les résolutions du Conseil de sécurité que je viens de citer.”) (Kosovo); Lowe & Tzanakopoulos, *supra* note 7, ¶ 30 (Iraq), ¶ 32 (Kosovo); GRAY, *supra* note 7, at 36 (Iraq), 42–43, 45–47 (Kosovo); Stromseth, *supra* note 7, at 235 (Kosovo); Johnstone, *supra* note 7, at 238–39 (Iraq), 239–43 (Kosovo). It should be noted that states have invoked humanitarian intervention to justify a military intervention on three occasions, but always alongside other justifications. First, in the Iraq case, the United Kingdom argued that its action was justified by a doctrine of humanitarian intervention. GRAY, *supra* note 7, at 37. However, the United Kingdom had first tried to bring its action under the implied authorization of a Security Council resolution, *id.* at 36, and later also invoked self-defense with respect to particular confrontations, *id.* at 37–38. Second, in the Kosovo case, the U.K. Permanent Representative to the United Nations put forth an

Pakistan, Uganda, Democratic Kampuchea, and Iraq),⁸⁴ and consent of the host state (Grenada, Panama, Liberia, and Sierra Leone).⁸⁵

The fact that the intervening states almost never actually invoked the doctrine of humanitarian intervention to justify their military interventions is critical. As the ICJ held in *Military and Paramilitary Activities*,

[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.⁸⁶

And, as the Court later held in the same judgment,

[t]he significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that

argument of humanitarian intervention at the Security Council. U.N. SCOR, 54th Sess., 3988th mtg, at 12, U.N. Doc. S/PV.3988 (Mar. 24, 1999) ("The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. . . . In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable."). Nevertheless, the Foreign Secretary and the Prime Minister of the United Kingdom had instead relied on Security Council resolutions as their legal justification. *Legality of Use of Force (Yugoslavia v. U.K.)*, Verbatim Record, CR 99/14, at 36 (May 10, 1999); Stromseth, *supra* note 7, at 236–37. Third, when the Kosovo case came before the ICJ, Belgium argued that humanitarian intervention justified NATO's intervention. *Legality of Use of Force (Yugoslavia v. Belg.)*, Verbatim Record, CR 99/15, at 16 (May 10, 1999) ("[L]e Royaume de Belgique estime que c'est une intervention humanitaire armée qui est compatible avec l'article 2, paragraphe 4 de la Charte qui ne vise que les interventions dirigées contre l'intégrité territoriale et l'indépendance politique de l'Etat en cause."). However, Belgium advanced this argument only after first arguing that the basis of the military intervention lied in Security Council resolutions. *Legality of Use of Force (Yugoslavia v. Belg.)*, Verbatim Record, CR 99/15, at 15 (May 10, 1999) ("[L]e Royaume de Belgique est d'avis que l'intervention armée trouve un fondement sans conteste dans les résolutions du Conseil de sécurité que je viens de citer.").

84. GRAY, *supra* note 7, at 33, 38 (East Pakistan, Uganda, Democratic Kampuchea, Iraq); Lowe & Tzanakopoulos, *supra* note 7, ¶¶ 29–30.

85. GRAY, *supra* note 7, at 49–50 (Liberia, Sierra Leone); Lowe & Tzanakopoulos, *supra* note 7, ¶ 31 (Grenada, Panama); Simon M. Meisenberg, *Sierra Leone*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 9 (2013) (Sierra Leone); Nolte, *supra* note 30, ¶¶ 4, 8 (Grenada, Panama, Liberia, Sierra Leone). Liberia and Sierra Leone have also been characterized by commentators as falling under a Security Council authorization, Lowe & Tzanakopoulos, *supra* note 7, ¶ 29, in particular a *post hoc* Security Council authorization, David Wippman, *Pro-Democratic Intervention*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 7, at 803–05 (Liberia, Sierra Leone); Rodley, *supra* note 35, at 775–76 (Liberia); Verena Wiesner, *Liberia*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 29–30 (2009) (Liberia); Meisenberg, *supra* note 85, ¶ 9 (Sierra Leone).

86. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 186.

States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.⁸⁷

Commentators have thus argued that, in light of the fact that the intervening states almost never actually invoked the doctrine of humanitarian intervention to justify their military interventions, the numerous “examples” of humanitarian intervention mentioned above cannot be used to support the existence of a customary norm of humanitarian intervention.⁸⁸ True examples of humanitarian intervention, these commentators argue, would be ones where the intervening state, group of states, or international organization actually invokes humanitarian intervention as its legal justification for intervening. With this understanding, the requisite state practice and *opinio juris* of humanitarian intervention would be sparse, if not completely absent.⁸⁹

C. Kosovo, Libya, and Syria

This traditional understanding of international law and humanitarian intervention, however, has not stopped the academy from publishing a plethora of articles on humanitarian intervention. Indeed, after NATO’s bombing of Kosovo, there was a massive outpouring of law review articles evaluating the merits of the doctrine.⁹⁰ Some scholars have even reached the conclusion that Kosovo represents the only modern example of humanitarian

87. *Id.* ¶ 207 (emphasis added).

88. See, e.g., Lowe & Tzanakopoulos, *supra* note 7, ¶ 34; Sarvarian, *supra* note 9, at 30; Charney, *supra* note 9, at 1238–39; Tyagi, *supra* note 9, at 893; Hoffmann, *supra* note 9, at 381.

89. See generally *supra* note 83.

90. E.g., William Moorman, *Humanitarian Intervention and International Law in the Case of Kosovo*, 36 NEW ENG. L. REV. 775 (2002); Jens Elo Rytter, *Humanitarian Intervention Without the Security Council: From San Francisco to Kosovo - and Beyond*, 70 NORDIC J. INT’L L. 121 (2001); Ove Bring, *After Kosovo: NATO Should Formulate a Doctrine on Humanitarian Intervention?*, 10 U.S. A.F. ACAD. J. LEGAL STUD. 61 (2000); Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683 (2000); Laura Geissler, *Law of Humanitarian Intervention and the Kosovo Crisis*, 23 HAMLINE L. REV. 323 (2000); Vaughan Lowe, *Commentary, International Legal Issues Arising in the Kosovo Crisis*, 49 INT’L & COMP. L.Q. 934, 939–41 (2000); Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743 (2000); Sean D. Murphy, *The Intervention in Kosovo: A Law-shaping Incident?*, 94 AM. SOC’Y INT’L L. PROC. 302, 302–04 (2000); Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 28–30 (1999); Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y.B. INT’L L. 141 (1999); Nico Schrijver, *NATO in Kosovo: Humanitarian Intervention Turns into Von Clausewitz War*, 1 INT’L L.F. D. INT’L 155 (1999).

intervention,⁹¹ despite the concerns critics raise regarding the lack of express invocations of the doctrine.⁹²

After Kosovo, however, the conversation on humanitarian intervention slowed down. Excitement about the prospects of this new purported doctrine of international law was tempered by pronouncements from Germany and the United States that the NATO bombing of Kosovo “must not become a precedent.”⁹³ And states did not invoke the doctrine of humanitarian intervention to justify subsequent engagements in military action.

Then came the Arab Spring, sparking instability and violence in Libya and Syria, among other states. All of a sudden, the question of humanitarian intervention came to the fore once again. In Libya, the Muammar Qaddafi government began engaging in indiscriminate massacres of civilians.⁹⁴ Many commentators thus saw Libya as a promising case for humanitarian intervention.⁹⁵ Nevertheless, the intervening states sought and ultimately received authorization from the Security Council, thereby making Libya yet another case where a military intervention fell under a traditional exception to the prohibition on the use of force.⁹⁶ The intervening states had no need to invoke the doctrine of humanitarian intervention.

A similar story could be told about Syria. At first, scholars clamored over how the doctrine of humanitarian intervention could be invoked to stop the Syrian government from committing atrocities against its own population.⁹⁷ Then, as ISIL gained influence in the region, commentators began supporting military action against the terrorist organization.⁹⁸ However, as described in Part I, all eleven

91. *E.g.*, GRAY, *supra* note 7, at 48–50; HEINZE, *supra* note 75, at 76–77; Heinze, *supra* note 35, at 452.

92. *See supra* note 83.

93. GRAY, *supra* note 7, at 47; *see* Klaus Kinkel, Minister of Foreign Affairs, Statement Before the Federal Parliament (Oct. 16, 1998), in *Deliberations of the Deutscher Bundestag, BT Plenarprotokolle* 13/248, at 23127, reproduced in HEIKE KRIEGER, *THE KOSOVO CONFLICT AND INTERNATIONAL LAW: AN ANALYTICAL DOCUMENTATION 1974-1999* 398–99 (2001).

94. *See infra* Section IV.B.

95. *See* Rachel E. VanLandingham, *The Stars Aligned: The Legality, Legitimacy, and Legacy of 2011’s Humanitarian Intervention in Libya*, 46 VALPARAISO U.L. REV. 859 (2012); Benjamin A. Valentino, *The True Costs of Humanitarian Intervention: The Hard Truth About a Noble Notion*, 90 FOREIGN AFF. 60, 60 (2011).

96. *See infra* Section IV.B.

97. *See, e.g.*, Michael Ignatieff, *How to Save the Syrians*, N.Y. REV. DAILY (Sept. 13, 2013), <http://www.nybooks.com/daily/2013/09/13/how-save-syrians/> [<https://perma.cc/QM6N-82F2>] (archived Feb. 4, 2017); Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013), <https://www.justsecurity.org/1506/koh-syria-part2/> [<https://perma.cc/E9YU-JJYX>] (archived Jan. 17, 2017).

98. *See, e.g.*, Sourgens, *supra* note 1, at 404; Milena Sterio, *The Applicability of the Humanitarian Intervention Exception to the Middle Eastern Refugee Crisis: Why the International Community Should Intervene Against ISIS*, 38 SUFFOLK TRANSNAT’L L.

states that have submitted letters to the United Nations justifying military action against ISIL in Syria have invoked the right of self-defense rather than the doctrine of humanitarian intervention.⁹⁹ Therefore, once again, the use of force falls under a traditional exception to the prohibition on the use of force. Proponents of humanitarian intervention are thus at a loss for true state practice and *opinio juris* to support humanitarian intervention.

Yet even critics would admit that it would be a grave mistake to disregard Kosovo, Libya, and Syria in a discussion on humanitarian intervention. It is true that the intervening states ultimately relied on a traditional exception to the use of force. But there is no question that humanitarian motives were present in all three cases. And it would be rational to surmise that humanitarian factors were a critical consideration when the intervening states made the decision to engage in forceful action. Indeed, in all three cases, commentators argued for military action based on the doctrine of humanitarian intervention. Therefore, although it would be inaccurate to cite these three cases as actual examples of state practice and *opinio juris* supporting the doctrine of humanitarian intervention, they are nonetheless incidents that contribute to our understanding of international law. This is why today it is not uncommon for commentators writing on humanitarian intervention to focus on Kosovo, Libya, and Syria.¹⁰⁰

D. *The Study of Incidents*

Once it is acknowledged that the scope of analysis is broadened beyond examples where intervening states expressly invoked humanitarian intervention, further analysis is required. Over the past decade, the international community has witnessed many incidents where a state, a group of states, or an international organization undertook or planned to undertake military intervention for humanitarian purposes. Like Kosovo, Libya, and Syria, none of these cases were clear examples of state practice and *opinio juris* supporting the doctrine of humanitarian intervention. But, as with Kosovo, Libya, and Syria, it would be unwise to completely ignore these incidents. Only through an examination of these incidents can one fully reflect on the current status of humanitarian intervention under international law.

REV. 325, 353–57 (2015); Jennifer Trahan, *Pesky Questions of International Law: What's the basis for Air Strikes in Syria?*, OPINIO JURIS (Sept. 23, 2014), <http://opiniojuris.org/2014/09/23/guest-post-pesky-questions-international-law-whats-basis-air-strikes-syria/> [https://perma.cc/MSH2-SFUW] (archived Feb. 4, 2017).

99. See *supra* note 2.

100. E.g., Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 976–1004 (2016); Ilan Fuchs & Harry Borowski, *The New World Order: Humanitarian Intervention from Kosovo to Libya and Perhaps Syria?*, 65 SYRACUSE L. REV. 303, 338–42 (2015).

Indeed, relying solely on state practice and *opinio juris* is an overly formalistic way of understanding international law. The two disincentives discussed above in Section II.A—the disincentive to engage in humanitarian intervention and the disincentive to frame acts as humanitarian interventions—must be taken into consideration. When a state engages in a military intervention for humanitarian purposes but invokes a traditional exception to the prohibition on the use of force (especially an exception that does not fit very well with the facts), it is still possible that the state was compelled to act by the emerging norm of humanitarian intervention. If the system makes state practice unlawful, how can one expect law-abiding states to engage in the requisite state practice to make it lawful?

This Article aims to break through the formalism that has impeded the acceptance of humanitarian intervention as a norm of customary international law. Rather than trying to accumulate examples of state practice and *opinio juris* to argue for the existence of the customary norm, this Article undertakes an examination of incidents.

First proposed by Professor W. Michael Reisman in 1984,¹⁰¹ the study of incidents is an alternative approach to understanding international law. Traditionally, international lawyers examine primary and subsidiary sources of international law (treaties, custom, general principles, judicial decisions, and scholarly writings)¹⁰² to identify the norms of international law and to determine whether a given act violates some preexisting norm. In the study of incidents, however, the lawyer focuses his or her attention on specific incidents—“overt conflict[s] between two or more actors in the international system”¹⁰³—and, more importantly, on the responses of key actors of the international community to those incidents. It is incidents, rather than the primary and subsidiary sources, that indicate and generate the norms of international law. The question is therefore not whether an act has violated some preexisting norm, but rather whether an act is considered permissible by key actors of the international community.¹⁰⁴

The benefits of examining incidents are manifold. First, the lawyer is no longer confined to the strict limits of the sources of international law. Just because a certain norm has not achieved the requisite state practice and *opinio juris*, or has not yet come before an international court or tribunal, does not mean that it is completely irrelevant. State conduct in conformity with the norm could still be considered permissible by key actors in the system, giving the norm

101. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1984).

102. ICJ Statute, *supra* note 67, art. 38(1).

103. Reisman, *supra* note 101, at 12.

104. *Id.* at 4.

some legal value. Second, the study of incidents is, in many ways, more attuned to reality. Traditional conceptions of customary international law and its formation obfuscate the dynamics of power, but an examination of the reactions of key actors in the system to specific incidents reveals these dynamics. Third, the study of incidents, in particular the study of recent incidents, can reveal rapid changes in international law that a study of the traditional sources of international law is unable to capture. And fourth, most importantly, the study of incidents allows for the expansion of the scope of research beyond mere instances of state practice and *opinio juris* to any action and/or reaction by states in international relations. This expansion allows scholars to consider incidents like Kosovo, Libya, and Syria, even if they are not, strictly speaking, cases of humanitarian intervention.

Once the unit of inquiry becomes incidents rather than state practice, the story of humanitarian intervention over the past decade changes significantly. Not only do Kosovo, Libya, and Syria become subjects of analysis, but many other incidents become critical for a more comprehensive understanding of humanitarian intervention.

IV. RECENT INCIDENTS OF HUMANITARIAN INTERVENTION

Over the past decade, there have been seven notable incidents of humanitarian intervention. This Part examines these seven incidents in turn. The purpose of this examination, unlike an examination of state practice and *opinio juris*, is *not* to identify an emerging customary norm of humanitarian intervention. Rather, the purpose is to use these incidents as a prism to observe the reactions of key actors in the international legal order, in order to ultimately determine what is permissible under modern international legal practice. Consequently, this Article makes no assertion that these incidents are representative of military interventions today, nor does it need to. It merely asserts that they provide a useful lens into how the international community perceives the emerging norm of humanitarian intervention.

For each incident, the Article proceeds as follows. It first provides the relevant background necessary to understanding the context of the intervention. It then narrates the intervention, explains the asserted legal justification for the intervention, and points out the problems with the justification. Finally, and perhaps most importantly, it focuses on the reactions of key actors in the international community to the intervention. After examining all seven incidents, Part V of the Article discusses the implications of the incidents for the doctrine of humanitarian intervention.

A. *The Proposed IGAD Intervention in Somalia (2005–2006)*

After the collapse of the Siad Barre regime in 1991, Somalia entered into what one U.S. government official called “the worst humanitarian crisis in the world.”¹⁰⁵ Within a mere two years, brutal warfare between sixteen rival warlords and their factions¹⁰⁶ caused an estimated three hundred thousand deaths, seven hundred thousand refugees, and severe malnutrition among 4.5 million Somalis.¹⁰⁷ In December 1992, the U.N. Security Council authorized the Unified Task Force (UNITAF) to “use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”¹⁰⁸ A series of early failures, however, led to the withdrawal of UNITAF in May 1993.¹⁰⁹

It was not until 2004 that significant progress was made towards restoring stability to the war-torn nation. Under the auspices of the then seven-nation Intergovernmental Authority on Development (IGAD), Somali leaders meeting in Nairobi established a Transitional Federal Parliament,¹¹⁰ which elected Abdullahi Yusuf as President in October 2004.¹¹¹ President Yusuf’s new Transitional Federal Government (TFG) had the support of the United Nations,¹¹² but the TFG’s status as the legitimate Somali government was questionable because, at the time of President Yusuf’s election, the TFG was still

105. *Humanitarian Tragedy in Somalia: Hearing Before the H. Select Comm. on Hunger*, 102nd Cong. 100 (1992) (statement of Andrew S. Natsios, Assistant Administrator, Bureau for Food and Humanitarian Assistance, U.S. Agency for International Development); see *Somalia: Beyond the Warlords*, HUM. RTS. WATCH (Mar. 1, 1993), <http://www.hrw.org/legacy/reports/1993/somalia/> [<https://perma.cc/EGQ5-E5TC>] (archived Jan. 17, 2017).

106. THEODROS DAGNE, CONG. RESEARCH SERV., RL30065, SOMALIA: BACKGROUND AND U.S. INVOLVEMENT THROUGHOUT THE 1990S 2 (1999).

107. U.N. Secretary-General, *Emergency Assistance for Humanitarian Relief and the Economic and Social Rehabilitation of Somalia*, ¶ 3, U.N. Doc. A/47/553 (Oct. 22, 1992); see Ioan Lewis & James Mayall, *Somalia, in UNITED NATIONS INTERVENTIONISM, 1991-2004* 120 (Mats Berdal & Spyros Economides eds., 2007).

108. S.C. Res. 794, ¶ 10 (Dec. 3, 1992).

109. See Lewis & Mayall, *supra* note 107, at 124–27.

110. U.N. Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 7, U.N. Doc. S/2004/804 (Oct. 8, 2004).

111. U.N. Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 2, U.N. Doc. S/2005/89 (Feb. 18, 2005).

112. See *UN Officials Welcome Election of New President of Somalia*, UN NEWS CENTRE (Oct. 11, 2004), <https://www.un.org/apps/news/story.asp?NewsID=12176&Cr=Somalia&Cr1#.WIF1kM6dLzKhttp://www.un.org/apps/news/story.asp?NewsID=12176&Cr=Somalia&Cr1#.WHyYrYrJE4> [<https://perma.cc/E7DK-KTU2>] (archived Jan. 17, 2017); Press Release, Secretary General, Secretary-General Says Inauguration of Transitional President of Somalia is Hopeful Development After Country’s Decade of Problems, U.N. Press Release SG/SM/9541-APR/1052 (Oct. 14, 2004).

based in Nairobi¹¹³ and non-state armed groups continued to roam Somali territory.¹¹⁴

Just eleven days after his inauguration, President Yusuf requested that the African Union (AU) Peace and Security Council (PSC) provide a Peace Support Mission (PSM) of fifteen to twenty thousand troops to help him reinstall the TFG in Somalia.¹¹⁵ As the AU worked to develop this PSM (later called AMISOM),¹¹⁶ the IGAD developed a plan to deploy its own PSM (later called IGASOM) to help the TFG relocate to Somalia. Plans for IGASOM moved much more quickly than those for AMISOM, so that, by May 2005, the AU PSC had authorized the deployment of Phase I of IGASOM with the mandate of, *inter alia*, protecting the TFG and facilitating its relocation to Somalia.¹¹⁷ At the same time, the AU PSC expressly requested that the Security Council lift the arms embargo on Somalia in order to allow the deployment of IGASOM forces.¹¹⁸

The lawfulness of IGASOM, however, was questionable. First, IGASOM did not have the unequivocal consent of the host state. Many Somali leaders—even some affiliated with the TFG—opposed the presence of foreign troops, especially troops from bordering states, on the territory of Somalia.¹¹⁹ Moreover, it would have been difficult to

113. *US Cheers Somali Govt's Relocation*, PANAPRESS (June 22, 2005), <http://www.panapress.com/US-cheers-Somali-govt-s-relocation--12-568147-32-lang1-index.html> [<https://perma.cc/VH2K-8FVD>] (archived Jan. 17, 2017).

114. *See Report of the Secretary-General on the Situation in Somalia*, *supra* note 111, ¶ 17.

115. *Id.* ¶ 16.

116. The African Union Peace and Security Council requested the African Union Commission to study President Yusuf's proposals and submit recommendations. Peace and Security Council, *Report of the Chairperson of the Commission on the Support of the African Union to the Transitional Institutions of Somalia*, ¶ 3, AU Doc. PSC/PR/2(XXII) (Jan. 5, 2005). On January 5, the Chairperson of the Commission expressed his support for the deployment of an African Union Peace and Support Mission (PSM) in Somalia to protect the TFG in its relocation to Somalia. *Id.* ¶ 17. The African Union Peace and Security Council accepted the deployment in principle, and requested the Commission to submit more concrete recommendations. Peace and Security Council, *Report of the Chairperson of the Commission on the Outcomes of the Fact-finding/Reconnaissance Mission to Somalia and the IGAD Military Planning Meetings*, ¶ 1, AU Doc. PSC/PR/2(XXIX) (May 12, 2005).

117. Peace and Security Council, *Communiqué of the Twenty-Ninth Meeting of the Peace and Security Council*, ¶ 4, AU Doc. PSC/PR/COMM(XXIX) (May 12, 2005) [hereinafter *Communiqué of the Twenty-Ninth Meeting of the Peace and Security Council*].

118. *Id.* ¶ 8.

119. U.N. Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶¶ 4, 9–10, 19, U.N. Doc. S/2005/392 (June 16, 2005); Peace and Security Council, *Report of the Chairperson of the Commission on the Outcomes of the Fact-finding/Reconnaissance Mission to Somalia and the IGAD Military Planning Meetings*, ¶ 46, AU Doc. PSC/PR/2(XXIX) (May 12, 2005); CECILIA HULL & EMMA SVENSSON, FOI, SWEDISH DEFENSE RESEARCH AGENCY, FOI-R--2596--SE, AFRICAN UNION MISSION IN SOMALIA (AMISOM): EXEMPLIFYING AFRICAN UNION PEACEKEEPING CHALLENGES 23 (2008); Terry Mays, *The Legitimacy of African Mandated Peacekeeping in Somalia*, 2 MIL. LEGITIMACY & LEADERSHIP J. 54, 61 (2010); *US Group Warns Choice of Peacekeepers*

assert that the TFG was the legitimate representative of the Somali people, as the TFG at the time was still located in Nairobi.¹²⁰ Indeed, commentators generally agree that consent by one faction in a civil war, especially if that faction does not control all of the territory, is insufficient to justify foreign military intervention.¹²¹

Second, neither the IGAD nor the AU ever sought Chapter VII authorization for the IGASOM intervention. That is not to say that they disregarded the United Nations entirely. When requesting the mandate for IGASOM from the AU, the IGAD had “expressed [its] hope that ultimately the mandate will be endorsed by the United Nations.”¹²² And when authorizing IGASOM, the AU PSC had called upon the United Nations to “provide support” for IGASOM.¹²³ Moreover, as mentioned above, when authorizing Phase I of IGASOM in May, the AU PSC had requested the U.N. Security Council to exempt IGASOM from the Somali arms embargo.¹²⁴ But neither the IGAD nor the AU ever expressly requested that the U.N. Security Council authorize the use of force by the IGAD under Chapter VII.

The reaction of the international community to IGASOM was, on the whole, not very positive. Although the AU and the IGAD had endorsed the deployment of IGASOM forces, Secretary-General Kofi Annan warned that, if IGASOM went “beyond peacekeeping and involve[d] peace enforcement, a Security Council approval must be sought.”¹²⁵ And although the European Union appeared to accept the deployment of IGASOM subject to certain conditions,¹²⁶ the United

to Somalia, PANAPRESS (Feb. 10, 2005), <http://www.panapress.com/US-group-warns-on-choice-of-peacekeepers-to-Somalia-12-563072-32-lang2-index.html> [<https://perma.cc/R4MH-DBX4>] (archived Jan. 17, 2017); *Somali MPs oppose involvement of frontline states in peacekeeping*, PANAPRESS (Mar. 15, 2005), <http://www.panapress.com/Somali-MPs-oppose-involvement-of-frontline-states-in-peacekeeping-12-564561-32-lang1-index.html> [<https://perma.cc/WT86-B2TG>] (archived Jan. 17, 2017).

120. U.N. Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 2, U.N. Doc. S/2005/392 (June 16, 2005).

121. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1645 (1984); GRAY, *supra* note 7, at 81; U.K. FOREIGN & COMMONWEALTH OFFICE, *supra* note 31, at 616; Nolte, *supra* note 30, ¶ 18.

122. Intergovernmental Authority on Development, *Communiqué of the IGAD Heads of State and Government on Somalia*, ¶ vi (Jan. 31, 2005), <https://igad.int/communique/1351-communique-of-the-28th-igad-extra-ordinary-summit-on-somalia> [<https://perma.cc/E5JP-A8SY>] (archived Mar. 5, 2017).

123. Peace and Security Council, *Communiqué of the Twenty-Fourth Meeting of the Peace and Security Council*, ¶ A(5), AU Doc. PSC/PR/COMM(XXIV) (Feb. 7, 2005).

124. *Communiqué of the Twenty-Ninth Meeting of the Peace and Security Council*, *supra* note 117, ¶ 8.

125. *U.S. Opposes Somalia Troops Deployment, Threatens Veto*, PANAPRESS (Mar. 17, 2005), <http://www.panapress.com/US-opposes-Somalia-troops-deployment,-threatens-veto-12-564668-32-lang1-index.html> [<https://perma.cc/GGP5-T9GG>] (archived Jan. 17, 2017) [hereinafter *U.S. Opposes Somalia Troops Deployment*].

126. See European Commission Press Release P/05/35, 7877/05, Council of the European Union, Declaration by the Presidency on behalf of the European Union on Somalia (Apr. 7, 2005), http://europa.eu/rapid/press-release_PESC-05-35_en.htm [<https://perma.cc/3ZLW-PYJV>] (archived Jan. 16, 2017); *EU Urges Consensus in Somali*

States suggested that it would veto any Security Council Resolution authorizing IGASOM, stating that, “[w]hile we appreciate IGAD’s intentions of stabilising Somalia, we do not understand the rationale behind the IGAD deployment plan”¹²⁷ The final verdict, however, came out in July 2005, when the Security Council rejected the AU PSC’s request to lift the arms embargo.¹²⁸ Although the Security Council had on paper “commend[ed]” the IGAD and “welcom[ed]” its planned deployment of IGASOM in Somalia,¹²⁹ its refusal to lift the embargo effectively prevented the deployment of IGASOM.

Over a year and a half later, in December 2006, the Security Council did finally exempt IGASOM from the embargo and authorize the mission under Chapter VII.¹³⁰ However, IGASOM never actually deployed because of internal Somali opposition, the lack of troops, and funding problems.¹³¹

B. *The NATO Intervention in Libya (2011)*

In February 2011, inspired by anti-government protests sweeping across the Middle East and North Africa, Libyans began organizing protests against the Muammar Qaddafi government.¹³² Qaddafi forces responded brutally with enforced disappearances and indiscriminate killings of civilians,¹³³ leading the U.N. Human Rights Council to conclude that the Qaddafi government had been committing “gross and systematic human rights violations” against its own civilians.¹³⁴

Peace Process, PANAPRESS (Apr. 11, 2005), <http://www.panapress.com/EU-urges-consensus-in-Somali-peace-process--12-565840-32-lang1-index.html> [<https://perma.cc/9MSU-4PQQ>] (archived Jan. 16, 2017).

127. *IGAD approves Ugandan, Sudanese peacekeepers for Somalia*, PANAPRESS (Mar. 18, 2005), <http://www.panapress.com/iGAD-approves-Ugandan,-Sudanese-peacekeepers-for-Somalia--12-564754-32-lang1-index.html> [<https://perma.cc/8PUN-2GCF>] (archived Jan. 16, 2017); *U.S. Opposes Somalia Troops Deployment*, *supra* note 125; Mays, *supra* note 119, at 56–57.

128. S.C. Pres. Statement 2005/32, at 2 (July 14, 2005).

129. *Id.*

130. S.C. Res. 1725, ¶ 3 (Dec. 6, 2006).

131. HULL & SVENSSON, *supra* note 119, at 24–25.

132. *The Battle for Libya: Killings, Disappearances and Torture*, AMNESTY INT’L, (AI Index MDE 19/025/2011), Sept. 13, 2011, at 7 [hereinafter *The Battle for Libya: Killings, Disappearances and Torture*].

133. See Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355, 372 (2012); see also, *The Battle for Libya: Killings, Disappearances and Torture*, *supra* note 132, at 7–8.

134. U.N. Human Rights Council, *Situation of Human Rights in the Libyan Arab Jamahiriya*, at 2, U.N. Doc. A/HRC/S-15/NGO/1 (Feb. 25, 2011).

By mid-March, the Arab League,¹³⁵ the Gulf Cooperation Council,¹³⁶ the Secretary-General of the Organisation of Islamic Cooperation,¹³⁷ and various states¹³⁸ had called on the U.N. Security Council to impose a no-fly zone over Libya. After the humanitarian situation significantly worsened in the first half of March, the U.N. Security Council—with China, Russia, Brazil, Germany, and India abstaining¹³⁹—adopted Resolution 1973. Resolution 1973 authorized U.N. Member States to take “all necessary measures . . . to protect civilians and civilian populated areas”¹⁴⁰ and “all necessary measures to enforce compliance with”¹⁴¹ a no-fly zone established to “help protect civilians.”¹⁴²

Two days later, the United States, the United Kingdom, and France commenced military operations in Libya, which NATO took over soon after.¹⁴³ The NATO forces destroyed the Libyan air defense and air force within days,¹⁴⁴ and carried out multiple attacks on Qaddafi’s control centers in Tripoli over the next couple of months.¹⁴⁵ By August 2011, the NATO forces had helped the Libyan rebels gain

135. See Letter from Yahya Mahmassani, Permanent Observer of the League of Arab States to the United Nations to the President of the Security Council, *The Implications of the Current Events in Libya and the Arab Position*, U.N. Doc. S/2011/137 (Mar. 14, 2011) (annexed) (calling upon the U.N. Security Council to “take the measures necessary to immediately impose a no-fly zone on Libyan military aircraft . . .”).

136. Wissam Keyrouz, *Gulf States Back Libya No-fly Zone*, AGENCE FRANCE PRESSE (Mar. 8, 2011) (“demand[ing] that the UN Security Council take all necessary measures to protect civilians, including enforcing a no-fly zone over Libya.”).

137. Press Release, Organisation of the Islamic Conference, Ihsanoglu Support No-Fly Decision at OIC Meeting on Libya, Calls for an Islamic Humanitarian Programme in and Outside Libya (Mar. 8, 2011), http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/arabspring/libya/Libya_15_Ihsanoglu_Support.pdf [<https://perma.cc/YX2X-W2CB>] (archived Feb. 4, 2017).

138. See *Libya: UK and French No-fly Zone Plan Gathers Pace*, BBC (Mar. 8, 2011), <http://www.bbc.com/news/world-africa-12672640> [<https://perma.cc/68FQ-6YT3>] (archived Jan. 23, 2017); S.C. Res. 85, ¶ 7 (Mar. 1, 2011).

139. Press Release, Security Council, Security Council Approves ‘No-fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, U.N. Press Release SC/10200 (Mar. 17, 2011).

140. S.C. Res. 1973, ¶ 4 (Mar. 17, 2011).

141. *Id.* ¶ 8.

142. *Id.* ¶ 6.

143. JEREMIAH GERTLER, CONG. RESEARCH SERV., R41725, OPERATION ODYSSEY DAWN (LIBYA): BACKGROUND AND ISSUES FOR CONGRESS, summary, 7, 17–18 (2011); Mikael Eriksson, *Towards Selective Regionalization?: The Intervention in Libya and the Emerging Global Order*, in REGIONAL ORGANIZATIONS AND PEACEMAKING: CHALLENGERS TO THE UN? 217, 228 (Peter Wallensteen & Anders Bjurner eds., 2015); Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355, 378–79 (2012).

144. See *Libyan Air Force ‘No Longer Exists’*, AL JAZEERA (Mar. 23, 2011), <http://www.aljazeera.com/news/africa/2011/03/201132316258646677.html> [<https://perma.cc/MVY9-5MSJ>] (archived Feb. 4, 2017).

145. See Payandeh, *supra* note 143, at 379.

control over Tripoli.¹⁴⁶ The legality of these actions, however, was questionable: commentators largely agree that NATO overstepped its mandate by pushing for regime change rather than simply civilian protection.¹⁴⁷

The reaction of the international community, aside from those who participated in the intervention, was also largely negative. Just days after the intervention began, the BRICS states (Brazil, Russia, India, China, and South Africa),¹⁴⁸ the Arab League,¹⁴⁹ the AU,¹⁵⁰ and other Latin American states¹⁵¹ began criticizing the Western powers for exceeding the Security Council mandate. In response, NATO Secretary General Anders Rasmussen,¹⁵² U.N. Secretary-General Ban Ki-moon,¹⁵³ and others argued that NATO operations had remained

146. Kareem Fahim & David D. Kirkpatrick, *Jubilant Rebels Control Much of Tripoli*, N.Y. TIMES, Aug. 21, 2011, at A1.

147. See Ramesh Thakur, *The Use of International Force to Prevent or Halt Atrocities: From Humanitarian Intervention to the Responsibility to Protect*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 815, 833–34 (2013) (“[T]he insistence by some NATO powers that they fully adhered to the UN-authorized ‘all necessary measures’ to protect civilians and civilian-populated areas, is not credible.”); Graham Cronogue, *Responsibility to Protect: Syria The Law, Politics, and Future of Humanitarian Intervention Post-Libya*, 3 J. INT’L HUMAN. LEGAL STUD. 124, 128, 144–45 (2012); Robert Naiman, *Surprise War for Regime Change in Libya is the Wrong Path*, FOREIGN POL’Y IN FOCUS (Apr. 4, 2011), http://fpif.org/surprise_war_for_regime_change_in_libya_is_the_wrong_path/ [https://perma.cc/ESE8-ZJB8] (archived Jan. 23, 2017).

148. Oliver Stuenkel, *The BRICS and the Future of R2P: Was Syria or Libya the Exception?*, 6 GLOBAL RESP. TO PROTECT 3, 17–18 (2014); Kenneth Rapoza, *No Obama Support from Brazil, Russia, China on Libya Front*, FORBES (Mar. 25, 2011), <http://www.forbes.com/sites/kenrapoza/2011/03/25/no-obama-support-from-brazil-russia-china-on-libya-front/> [https://perma.cc/RRM4-BLLF] (archived Feb. 4, 2017); Palash Ghosh, *Putin Downplays Alleged Tiff with Medvedev over Libya*, INT’L BUS. TIMES (Mar. 22, 2011), <http://www.ibtimes.com/putin-downplays-alleged-tiff-medvedev-over-libya-276727> [https://perma.cc/6HWR-Z84E] (archived Jan. 23, 2017); Chris Buckley, *China Intensifies Condemnation of Libya Air Strikes*, REUTERS (Mar. 21, 2011), <http://www.reuters.com/article/2011/03/21/us-china-libya-idUSTRE72K0LX20110321> [https://perma.cc/Z72P-ZMZ7] (archived Feb. 4, 2017).

149. See Martin Beckford, *Libya Attacks Criticised by Arab League, China, Russia and India*, THE TELEGRAPH (Mar. 21, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8393950/Libya-attacks-criticised-by-Arab-League-China-Russia-and-India.html> [https://perma.cc/BG6C-FTLX] (archived Feb. 4, 2017); Interview with Amr Moussa, *The Goal in Libya Is Not Regime Change*, N.Y. TIMES (Mar. 23, 2011), <http://www.nytimes.com/2011/03/24/opinion/24iht-edmoussa24.html> [https://perma.cc/GKQ6-63FF] (archived Feb. 4, 2017).

150. See *Libya: AU Opposes Foreign Military Intervention in Libya*, ALLAFRICA (Mar. 20, 2011) <http://allafrica.com/stories/201103200012.html> [https://perma.cc/ED6C-7AAF] (archived Feb. 4, 2017).

151. See *Latin American Leaders React to Libya Conflict*, AMERICAS Q. (Mar. 23, 2011), <http://www.americasquarterly.org/node/2341> [https://perma.cc/FKX4-6KTE] (archived Jan. 23, 2017).

152. *Questions and Answers at the Press Conference by NATO Secretary General Anders Fogh Rasmussen*, NATO (Apr. 15, 2011), http://www.nato.int/cps/en/natolive/opinions_108709.htm [https://perma.cc/X3JS-3H9E] (archived Mar. 5, 2017).

153. Louis Charbonneau, *U.N. Chief Defends NATO from Critics of Libya War*, REUTERS (Dec. 14, 2011), <http://www.reuters.com/article/us-libya-nato-un-idUSTRE7B>

infra legem the Resolution because the only way of “protecting civilians” was to topple the Qaddafi government.¹⁵⁴ Indeed, as early as April 2011, President Obama, President Sarkozy, and Prime Minister Cameron wrote a joint editorial recognizing the limits of Resolution 1973 but nonetheless stating that “it is impossible to imagine a future for Libya with Qaddafi in power” and that it is “unthinkable that someone who has tried to massacre his own people can play a part in their future government.”¹⁵⁵

Nevertheless, most commentators agree that NATO had gone beyond the mandate.¹⁵⁶ And it could be argued that the Libya intervention had a negative impact on the development of R2P. In a concept note sent to the U.N. Security Council in November 2011, Brazil stated that “there is a growing perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change.”¹⁵⁷

C. The UNOCI/French Intervention in Côte d’Ivoire (2011)

Another case where an intervening state allegedly overstepped a Chapter VII mandate can be seen in Côte d’Ivoire in 2011. A dispute over the results of presidential elections in November 2010 had led to a humanitarian crisis: supporters of the incumbent, Laurent Gbagbo, and supporters of the opposition candidate, Alassane Ouattara, engaged in violent clashes and committed widespread human rights abuses.¹⁵⁸ By March 2011, amidst the humanitarian crisis, forces loyal to Mr. Ouattara had taken over most of the country, but Mr. Gbagbo maintained control of the capital Abidjan.

On March 30, 2011 the U.N. Security Council unanimously adopted Resolution 1975. The Resolution reiterated the Security Council’s authorization for the U.N. Operation in Côte d’Ivoire (UNOCI) to “use all necessary means . . . to protect civilians under imminent threat of physical violence.”¹⁵⁹ Although the Resolution, as well as key sectors of the international community, had recognized Mr.

D20C20111214 (subscription required) [<https://perma.cc/Z5FG-JQV5>] (archived Mar. 5, 2017).

154. See Payandeh, *supra* note 143, at 387–89.

155. Barack Obama, David Cameron & Nicolas Sarkozy, Editorial, *Libya’s Pathway to Peace*, INT’L HERALD TRIB. (Apr. 15, 2011), <http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html> [<https://perma.cc/Z8F4-RV6M>] (archived Mar. 5, 2017).

156. See Thakur, *supra* note 147; see also Cronogue, *supra* note 147.

157. Permanent Rep. of Brazil to the U.N., Letter dated Nov. 9, 2011 from the Permanent Rep. of Brazil to the United Nations addressed to the Secretary-General, U.N. Doc. S/2011/701 (Nov. 11, 2011).

158. U.N. Secretary-General, *Twenty-seventh Progress Report of the Secretary-General on the United Nations Operation in Côte d’Ivoire*, ¶¶ 53, 61, U.N. Doc. S/2011/211 (Mar. 30, 2011) [hereinafter *Twenty-seventh Progress Report of the Secretary-General*].

159. S.C. Res. 1975, ¶ 6 (Mar. 30, 2011).

Ouattara as the victor of the elections,¹⁶⁰ the Resolution did not authorize the use of military force to ensure his accession to power.¹⁶¹

Heavy fighting broke out in Abidjan the following day and Mr. Gbagbo's forces began shelling civilians in pro-Ouattara areas of Abidjan, as well as U.N. forces, which UNOCI later considered as a "possible crime against humanity."¹⁶² A few days later, U.N. and French helicopters arrived, and began firing at pro-Gbagbo military installations.¹⁶³ On April 11, as forces loyal to Mr. Ouattara closed in on Mr. Gbagbo's bunker in the presidential residence, UNOCI and French attack helicopters targeted the heavy weapons used by his forces.¹⁶⁴ That afternoon, Mr. Ouattara's forces managed to enter the residence and arrest Mr. Gbagbo.

Once again, one can question the lawfulness of this final offensive operation. As in Libya, the Security Council Resolution only authorized the use of "all necessary means" to "protect civilians." As a result, the participation of UNOCI and France in the offensive attacks and final siege on Mr. Gbagbo's forces arguably went beyond the mandate.¹⁶⁵ And, as in Somalia, although Mr. Ouattara impliedly consented to UNOCI and French support, it is not clear whether Mr. Ouattara had the authority to authorize the intervention, given the divided state of the country at the time.

Nevertheless, the reaction of the international community was largely positive. At the meeting of the Security Council two days later, the Special Representative of the Secretary-General and head of UNOCI called the incident "a success story," and praised France for "its most helpful cooperation."¹⁶⁶ The Secretary-General in his subsequent report later argued, as NATO argued in Libya, that

160. The United Nations, the African Union, the Economic Community of West African States (ECOWAS), the European Union, the United States, France, and other states recognized Mr. Ouattara as the victor. See NICOLAS COOK, CONG. RESEARCH SERV., RS21989, *CÔTE D'IVOIRE POST-GBAGBO: CRISIS RECOVERY 1* (2011); *Twenty-seventh Progress Report of the Secretary-General*, *supra* note 158, ¶¶ 22–24.

161. The Resolution did, however, "[u]rg[e] all . . . parties . . . to respect . . . the election of Alassane Dramane Ouattara as President." S.C. Res. 1975, ¶ 1 (Mar. 30, 2011).

162. Pierre Schori, *ECOWAS and the AU in Cooperation with the UN: The Case of Côte d'Ivoire*, in REGIONAL ORGANIZATIONS AND PEACEMAKING: CHALLENGERS TO THE UN? 160, 169 (Peter Wallensteen & Anders Bjurner eds., 2015).

163. Adam Nossiter, *Strikes by U.N. and France Corner Leader of Ivory Coast*, N.Y. TIMES (Apr. 4, 2011), http://www.nytimes.com/2011/04/05/world/africa/05ivory.html?_r=1 [<https://perma.cc/R8BL-ZY8R>] (archived Jan. 23, 2017).

164. Schori, *supra* note 162, at 169.

165. Thabo Mbeki, *What the World Got Wrong in Cote d'Ivoire*, FOREIGN POL'Y (Apr. 29, 2011), <http://foreignpolicy.com/2011/04/29/what-the-world-got-wrong-in-cote-ivoire/> [<https://perma.cc/64VN-LNRX>] (archived Mar. 5, 2017); *Russia Lashes Out at UN Military Action in Cote d'Ivoire*, RUSSIA TODAY (Apr. 5, 2011), <https://www.rt.com/news/cote-ivoire-gbagbo-un/> [<https://perma.cc/J479-9LUE>] (archived Mar. 5, 2017).

166. U.N. SCOR, 66th Sess., 6513th mtg. at 2, U.N. Doc. S/PV.6513 (Apr. 13, 2011).

attacking Mr. Gbagbo's forces was necessary to protect civilians.¹⁶⁷ And the Chef de Cabinet of the Secretary-General pointed out: "[t]he impartiality of the United Nations does not mean neutrality. Its peacekeepers had a responsibility to act in the face of possible grave violations of human rights and international humanitarian law."¹⁶⁸

Support was not unanimous, however. The Russian Minister of Foreign Affairs¹⁶⁹ and the Chairman of the AU¹⁷⁰ argued that France had exceeded its mandate. As a BBC U.N. correspondent stated, "[w]hat is clear is that if the UN continues to sanction military interventions in national conflicts, there will be continuing questions about whether it is acting to protect civilians, or using humanitarian justifications as a smokescreen to force political change."¹⁷¹

D. *The French Intervention in Mali (2013)*

In January 2012, armed with an influx of weapons from Libya, Tuareg rebels in northern Mali began a military campaign against the Malian government.¹⁷² After a military coup in March 2012, the Tuareg rebels proclaimed the independence of Azawad,¹⁷³ a northern territory that comprises approximately sixty percent of Mali's total land area. The resultant political instability facilitated the rapid growth of armed Islamist groups in the region.¹⁷⁴ By July 2012, the Islamists had pushed out the Tuareg rebels and had taken over northern Mali.¹⁷⁵

Under Islamist control, the humanitarian situation in the region underwent a "drastic deterioration."¹⁷⁶ Several armed Islamist groups began imposing sharia law on the local population, punishing violators

167. U.N. Secretary-General, *Twenty-eighth Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, ¶¶ 5–9, U.N. Doc. S/2011/387 (June 24, 2011).

168. Schori, *supra* note 162, at 175.

169. *Id.* at 169.

170. *Id.* at 170.

171. Barbara Plett, *Did UN forces take sides in Ivory Coast?*, BBC (Apr. 7, 2011), <http://www.bbc.com/news/world-africa-13004462> [<https://perma.cc/87KW-6DJ5>] (archived Jan. 23, 2017).

172. See Scott Stewart, *Mali Besieged by Fighters Fleeing Libya*, STRATFOR (Feb. 2, 2012), <https://www.stratfor.com/weekly/mali-besieged-fighters-fleeing-libya> [<https://perma.cc/D6ED-SV3L>] (archived Jan. 23, 2017).

173. Stuart Casey Maslen, *Armed Conflict in Mali in 2013*, in *THE WAR REPORT: ARMED CONFLICT IN 2013* 147, 148 (Stuart Casey Maslen ed., 2014).

174. See *WORLD REPORT 2013, HUMAN RIGHTS WATCH* 134; U.N. Human Rights Council, *Report of the Independent Expert on the Situation of Human Rights in Mali, Suliman Baldo*, ¶ 9, U.N. Doc. A/HRC/25/72 (Jan. 10, 2014) [hereinafter *WORLD REPORT 2013*].

175. See Adam Nossiter, *Jihadists' Fierce Justice Drives Thousands to Flee Mali*, *N.Y. TIMES* (July 7, 2012), <http://www.nytimes.com/2012/07/18/world/africa/jihadists-fierce-justice-drives-thousands-to-flee-mali.html> [<https://perma.cc/EA49-J723>] (archived Mar. 5, 2017).

176. *WORLD REPORT 2013, supra* note 174, at 134.

through public beatings, floggings, and summary executions.¹⁷⁷ On July 17th, the Human Rights Council adopted a resolution condemning

the human rights violations and acts of violence committed in northern Mali, in particular by the rebels, terrorist groups and other organized transnational crime networks, including the violence perpetrated against women and children, the killings, hostage-takings, pillaging, theft and destruction of religious and cultural sites, as well as the recruitment of child soldiers, and calls for the perpetrators of these acts to be brought to justice . . . 178

In response, in November 2012, ECOWAS adopted a *Concept of Operations* for the deployment of an African-led International Support Mission in Mali (later called AFISMA), requested that the AU PSC endorse it, and “urge[d] the Security Council to examine the Concept with a view to authorizing the deployment of the international military force in Mali.”¹⁷⁹ In endorsing the Concept, the AU PSC likewise “urge[d] the UN Security Council . . . to authorize . . . the planned deployment of AFISMA.”¹⁸⁰ Pursuant to these requests, in December 2012, the U.N. Security Council unanimously adopted Resolution 2085, which authorized AFISMA to take “all necessary measures,” *inter alia*, to recover the northern territories of Mali from the rebels.¹⁸¹ The Resolution also “[u]rge[d] Member States . . . to provide coordinated support . . . and any necessary assistance [to AFISMA] in efforts to reduce the threats posed by terrorist organizations.”¹⁸²

For logistical and financial reasons, however, AFISMA could not be deployed immediately.¹⁸³ This proved problematic, as, within a few weeks of the Resolution, Islamist rebels made significant advances against government forces.¹⁸⁴ After the rebels captured the strategic town of Konna on January 10th, the Transitional Government formally requested that France come to its assistance.¹⁸⁵ That same day, the U.N. Security Council issued a press statement “reiterat[ing] their call to Member States to . . . provide assistance to the Malian Defence and

177. *Id.* at 136.

178. Human Rights Council Res. 20/17, ¶ 2 (July 17, 2012).

179. Economic Community of West African States (ECOWAS), *Final Communiqué of the Extraordinary Session of the Authority of ECOWAS Heads of State and Government*, ¶ 9 (Nov. 11, 2012).

180. Peace and Security Council, *Communiqué of the 341st Meeting of the Peace and Security Council*, ¶ 9, AU Doc. PSC/PR/COMM.2(CCCXLI) (Nov. 13, 2012).

181. S.C. Res. 2085, ¶ 9 (Dec. 20, 2012).

182. *Id.* ¶ 14.

183. See Abiodun Joseph Oluwadare, *The African Union and the Conflict in Mali: Extra-Regional Influence and the Limitations of a Regional Actor*, 6 J. INT’L & GLOBAL STUD. 106, 114–15 (2014); see also Jaïr van der Lijn & Xenia Avezov, *Peace Operations in Africa*, in SIPRI YEARBOOK 2014: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY 110, 114 (2014).

184. U.N. Secretary-General, *Report of the Secretary-General on the Situation in Mali*, ¶¶ 3–4, U.N. Doc. S/2013/189 (Mar. 26, 2013).

185. *Id.* ¶ 3.

Security Forces in order to reduce the threat posed by terrorist organizations and associated groups.”¹⁸⁶

The next day, France launched Operation Serval, a military operation aimed at ousting the Islamic militants. At a press conference, the French Minister of Foreign Affairs justified the legality of the intervention by invoking Security Council authorization, the consent of the Malian authorities, and Article 51 self-defense.¹⁸⁷ With regards to the self-defense justification, France’s Minister of Defense explained the following day that France was compelled to act because it could not allow “a terrorist state at the doorstep of France and Europe.”¹⁸⁸

Nevertheless, one can again question the validity of these justifications. First, although Resolution 2085 authorized military intervention, it expressly authorized only AFISMA, not France, to take “all necessary measures” to achieve the stated objectives. Second, although the Transitional Government had consented to the French intervention, it is unclear whether the Transitional Government had the authority to do so, as the Transitional Government exercised authority over less than half of the country’s territory at the time. And third, it is not clear that a fear of future terrorist attacks justifies a preemptive military strike in “self-defense” under Article 51 of the U.N. Charter.

Despite these ambiguities, the reaction of the international community to Operation Serval was overwhelmingly positive. The day after the French operations, the ECOWAS Commission “welcome[d]” the Security Council press statement “authorising immediate intervention in Mali to stabilise the situation.”¹⁸⁹ A few days later, according to the French delegation, the Security Council in a closed-door session unanimously supported the French intervention.¹⁹⁰ France also received the support of Secretary-General Ban Ki-moon,¹⁹¹

186. Press Release, Security Council, Security Council Press Statement on Mali, U.N. Press Release SC/10878 (Jan. 10, 2013).

187. See M. Laurent Fabius, Minister of Foreign Affairs, Press Conference, Embassy of France in Washington, D.C. (Jan. 11, 2013), <http://ambafrance-us.org/spip.php?article4216> [<https://perma.cc/VR5W-TKEZ>] (archived Feb. 5, 2017).

188. See Peter Beaumont et al., *Britain to Send Aircraft to Mali to Assist French Fight Against Rebels*, GUARDIAN (Jan. 12, 2013), <http://www.theguardian.com/world/2013/jan/12/mali-somalia-france-rebels-islamist-francois-hollande> [<https://perma.cc/9FPZ-CBMS>] (archived Feb. 5, 2017).

189. Press Release, ECOWAS, *Statement of the President of the ECOWAS Commission on the Situation in Mali* (Jan. 12, 2013) <http://reliefweb.int/report/mali/statement-president-ecowas-commission-situation-mali> [<https://perma.cc/UN7F-UABP>] (archived Mar. 5, 2017).

190. *Mali: Ban Welcomes Bilateral Assistance to Stop Southward Onslaught of Insurgents*, U.N. NEWS CENTRE (Jan. 14, 2013), <http://www.un.org/apps/news/story.asp?NewsID=43920#.WLzfHU2QyUk> [<https://perma.cc/W474-3KFS>] (archived Mar. 5, 2017) [hereinafter *Ban Welcomes Bilateral Assistance*]; Mark Doyle, *Mali Conflict: UN Backs France’s Military Intervention*, BBC (Jan. 14, 2013), <http://www.bbc.com/news/world-africa-21021132> [<https://perma.cc/QG4Z-4HC7>] (archived Mar. 5, 2017).

191. *Ban Welcomes Bilateral Assistance*, *supra* note 190.

as well as a large number of states of the international community.¹⁹² Nevertheless, not everyone was on board. President Morsi of Egypt, for example, expressed his disapproval of the French intervention.¹⁹³

E. *The Proposed U.S./U.K. Intervention in Syria (2013)*

In the context of the Arab Spring, nationwide protests in Syria against President Bashar Al-Assad erupted in March 2011. In April, the Syrian Army started launching a series of deadly military attacks on civilian populations. Not long after, the country descended into civil war, leading to “widespread, systematic and gross violations of human rights” committed by government officials.¹⁹⁴

At first, there was very little support for foreign military intervention.¹⁹⁵ In August 2012, however, President Obama stated at a news conference that “a red line for us is [when] we start seeing a whole bunch of [chemical or biological] weapons moving around or being utilized.”¹⁹⁶ Unconfirmed reports of the use of chemical weapons had surfaced as early as October 2012,¹⁹⁷ and states started seriously

192. Belgium, Canada, Chad, Denmark, Germany, the Netherlands, Spain, Sweden, the United Arab Emirates, the United Kingdom, and the United States all provided logistical and/or military support to the French operation. In addition, Israel, Colombia, and Chile publicly expressed their support for France. See Philip Podolsky, *Netanyahu Lauds French Intervention in Mali*, TIMES OF ISRAEL (Jan. 17, 2013), <http://www.timesofisrael.com/netanyahu-lauds-french-intervention-in-mali/> [https://perma.cc/5RDQ-J4ME] (archived Jan. 23, 2017); see also *Francia le Expresó a Santos Apoyo Frente al Proceso de Paz en Colombia*, AGENCE FRANCE PRESSE (Jan. 26, 2013), <http://www.eltiempo.com/archivo/documento/CMS-12552383> [https://perma.cc/7E9Q-5DYV] (archived Feb. 5, 2017).

193. *Egypt's Morsi Says France's Intervention in Mali is Creating a New Conflict Hotspot*, ASSOCIATED PRESS (Jan. 21, 2013), <http://www.foxnews.com/world/2013/01/21/egypt-morsi-says-france-intervention-in-mali-is-creating-new-conflict-hotspot.html> [https://perma.cc/RR87-D85P] (archived Mar. 5, 2017).

194. Human Rights Council Res. S-18/1, U.N. Doc. A/HRC/RES/S-18/1, ¶ 2(a) (Dec. 2, 2011).

195. Nada Bakri, *U.N. Official Urges World to Stand Up for Syrians*, N.Y. TIMES (Oct. 14, 2011), <http://www.nytimes.com/2011/10/15/world/middleeast/navi-pillay-of-the-un-calls-for-action-on-syria.html> [https://perma.cc/EX26-6R8D] (archived Jan. 22, 2017) (noting that the U.N. High Commission for Human Rights “stopped short of calling for military intervention” as of October 2011); Kareem Fahim, *Syrian Opposition Groups Aim for Unity*, N.Y. TIMES (Dec. 31, 2011), <http://www.nytimes.com/2012/01/01/world/middleeast/syrian-opposition-groups-aim-for-unity.html> [https://perma.cc/QT5M-35EP] (archived Jan. 22, 2017) (noting that the two largest Syrian opposition groups rejected foreign military intervention in December 2011); Opinion, *Syria's Horrors*, N.Y. TIMES (Feb. 24, 2012), <http://www.nytimes.com/2012/02/25/opinion/syrias-horrors.html> [https://perma.cc/VK7Y-FL22] (archived Jan. 22, 2017) (noting that most countries, including the United States, had ruled out military intervention by February 2012).

196. Mark Landler, *Obama Threatens Force Against Syria*, N.Y. TIMES (Aug. 20, 2012), <http://www.nytimes.com/2012/08/21/world/middleeast/obama-threatens-force-against-syria.html> [https://perma.cc/ZMJ8-RRBP] (archived Jan. 22, 2017).

197. UNITED NATIONS MISSION TO INVESTIGATE ALLEGATIONS OF THE USE OF CHEMICAL WEAPONS IN THE SYRIAN ARAB REPUBLIC, FINAL REPORT 7, reproduced in U.N. Secretary-General, Letter dated Dec. 13, 2014 from the Secretary-General addressed to

considering military intervention when the Syrian Revolutionary Command Council reported on August 21, 2013 that hundreds of civilians had been killed in a nerve gas attack in Ghouta.¹⁹⁸

Within a week, the United Kingdom and the United States deployed warships towards Syria.¹⁹⁹ A couple of days later, the United Kingdom circulated a Security Council Resolution authorizing “all necessary measures” to protect Syrian civilians.²⁰⁰ The next day, the United Kingdom published a “legal position” on the legality of military intervention in Syria, arguing that, even if a resolution by the Security Council were blocked, “the legal basis for military action would be humanitarian intervention.”²⁰¹ The statement clarified that such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).

All three conditions would clearly be met in this case²⁰²

On the very day the statement was published, however, the U.K. parliament voted against any British involvement in a military

the President of the General Assembly and the President of the Security Council, U.N. Doc. A/68/663–S/2013/735 (Dec. 13, 2013).

198. Liam Stack, *Video Shows Victims of Suspected Syrian Chemical Attack*, N.Y. TIMES: THE LEDE (Aug. 21, 2013), <http://thelede.blogs.nytimes.com/2013/08/21/video-and-images-of-victims-of-suspected-syrian-chemical-attack/> [<https://perma.cc/SSW5-5YXB>] (archived Jan. 22, 2017).

199. See Sam LaGrone, *U.S. and U.K. Move Ships Closer to Syria*, USNI NEWS (Aug. 26, 2013), <http://news.usni.org/2013/08/26/u-s-and-u-k-move-ships-closer-to-syria> [<https://perma.cc/5UXX-DSRS>] (archived Jan. 22, 2017).

200. U.K. Prime Minister’s Office, News Story, *Syria: UK to Put Forward United Nations Security Council Resolution*, GOV.UK (Aug. 28, 2013), <https://www.gov.uk/government/news/syria-uk-to-put-forward-united-nations-security-council-resolution> [<https://perma.cc/PWK8-ATHC>] (archived Jan. 22, 2017); Alan Colwell, *Britain to Press U.N. to Authorize ‘Necessary Measures’ in Syria*, N.Y. TIMES (Aug. 28, 2013), <http://www.nytimes.com/2013/08/29/world/middleeast/britain-syria.html> [<https://perma.cc/VSK4-ZS7J>] (archived Jan. 22, 2017).

201. U.K. Prime Minister’s Office, Policy Paper, *Chemical Weapon Use by Syrian Regime: UK Government Legal Position*, ¶ 2 (Aug. 29, 2013), <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version> [<https://perma.cc/96MM-WZBF>] (archived Jan. 22, 2017).

202. *Id.* ¶ 4.

intervention in Syria,²⁰³ thereby politically preventing the United Kingdom from acting.

Two days later, President Obama decided that “the United States should take military action against Syrian regime targets” even “without the approval of [the] United Nations Security Council,” but he planned to first seek authorization from Congress.²⁰⁴ Unlike Downing Street, the White House never explained the international legal basis for the intervention. One week later, a White House attorney acknowledged that military intervention “may not fit under a traditionally recognized legal basis under international law,” but she maintained that it would be “justified and legitimate under international law.”²⁰⁵

The reaction of the international community was divided. At the time, the United States asserted that nine other states had “publicly and explicitly expressed support for U.S. military action.”²⁰⁶ France, for example, agreed that “if the Security Council is blocked from acting, a coalition will form” to take military action.²⁰⁷ China, Russia, and Iran, however, all expressed opposition to foreign military intervention.²⁰⁸ In addition, the Joint Special Representative of the United Nations and the League of Arab States for Syria Lakhdar Brahimi insisted that Security Council authorization was absolutely necessary.²⁰⁹ Moreover, Secretary-General Ban Ki-moon also opposed military intervention without Security Council authorization.²¹⁰

203. Cassell Bryan-low, *U.K. Parliament Rejects Syria Action*, WALL ST. J. (Aug. 29, 2013), <http://www.wsj.com/articles/SB10001424127887324463604579042571741346530> [https://perma.cc/9R3C-EPCV] (archived Jan. 22, 2017).

204. Press Release, Press Secretary, Statement by the President on Syria (Aug. 31, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria> [https://perma.cc/3J7W-7P6T] (archived Jan. 22, 2017).

205. Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES, Sept. 8, 2013, at A1.

206. Those nine states were Australia, Albania, Canada, Denmark, France, Kosovo, Poland, Romania, and Turkey. *Daily Press Briefing*, U.S. DEP'T OF STATE (Sept. 5, 2013), <https://2009-2017.state.gov/r/pa/prs/dpb/2013/09/213851.htm> [https://perma.cc/U6ZM-PHQW] (archived Feb. 13, 2017).

207. Vincent Giret et al., *Réforme pénale, Syrie, pression fiscale... Hollande s'explique dans "Le Monde"*, LE MONDE (Aug. 30, 2013), http://www.lemonde.fr/politique/article/2013/08/30/hollande-au-monde-le-massacre-de-damas-ne-peut-ni-ne-doit-rester-impuni_3468851_823448.html [https://perma.cc/NS7Z-Z427] (archived Jan. 22, 2017) (“Si le Conseil de sécurité est empêché d'agir, une coalition se formera.”).

208. David Jolly et al., *U.S. Releases Detailed Intelligence on Syrian Chemical Attack*, N.Y. TIMES (Aug. 30, 2013), <http://www.nytimes.com/2013/08/31/world/middleeast/syria.html> [https://perma.cc/A5XE-7HRG] (archived Jan. 22, 2017).

209. See U.N. Secretary-General, Transcript of Press Conference by the Special Envoy for Syria (Aug. 28, 2013), <http://www.un.org/sg/offthecuff/index.asp?nid=2953> [https://perma.cc/EH6U-V8HV] (archived Jan. 22, 2017).

210. Rick Gladstone, *U.N. Chief Reaffirms Opposition to Force*, N.Y. TIMES (Sept. 3, 2013), http://www.nytimes.com/2013/09/04/world/middleeast/un-chief-reaffirms-opposition-to-strike-on-syria.html?_r=0 [https://perma.cc/M2S8-5VCS] (archived Jan 22, 2017).

In any case, the agitation for military intervention—at least as a response to the use of chemical weapons—abated after the United States and Russia concluded the *Framework for Elimination of Syrian Chemical Weapons*²¹¹ in September 2013.²¹²

F. *The U.S. Intervention at Mount Sinjar in Iraq (2014)*

In 2006, a number of Sunni insurgent groups in Iraq united to form the Islamic State of Iraq (ISI). By 2013, the ISI had expanded into Syria and renamed itself the Islamic State of Iraq and the Levant (ISIL). The following year, it rose to international prominence after a series of successful military operations in Iraq.²¹³ The goal of ISIL has been to establish a “unitary and worldwide Islamic state or caliphate” under sharia law.²¹⁴

Its governance, however, has involved indiscriminate killings of civilians, mass executions, religious persecution, ethnic cleansing, sexual violence, arbitrary detention, and other gross violations of human rights.²¹⁵ In August 2014, the Security Council in Resolution 2170 “condemn[ed] in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law”²¹⁶

One particular incident is notable for the purposes of humanitarian intervention: on August 3, 2014, ISIL attacked and captured Sinjar,²¹⁷ a town in northern Iraq inhabited primarily by Yazidis. As the Yazidi people do not practice Sunni Islam, ISIL had

211. Organisation for the Prohibition of Chemical Weapons (OPCW), *Framework for Elimination of Syrian Chemical Weapons*, OPCW Doc. EC-M-33/NAT.1 (Sept. 17, 2013).

212. CHRISTOPHER M. BLANCHARD ET AL., CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE 25–26 (2015); JAMES E. CRONIN, GLOBAL RULES: AMERICA, BRITAIN AND A DISORDERED WORLD 307 (2014).

213. See BLANCHARD ET AL., *supra* note 212, at 1.

214. *From the Battle of Al-Ahزاب to the War of Coalitions*, DABIQ, Sept. 2015, at 56, <http://clarionproject.org/docs/Issue%2011%20-%20From%20the%20battle%20of%20Al-Ahزاب%20to%20the%20war%20of%20coalitions.pdf> [https://perma.cc/4UDB-NCMH] (archived Mar. 19, 2017).

215. U.N. Security Council Res. 2170, ¶ 2 (Aug. 15, 2014); AMNESTY INT’L ETHNIC CLEANSING ON A HISTORIC SCALE: ISLAMIC STATE’S SYSTEMATIC TARGETING OF MINORITIES IN NORTHERN IRAQ 4 (2014); see *generally* REP. OF INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE SYRIAN ARAB REPUBLIC, RULE OF TERROR: LIVING UNDER ISIS IN SYRIA (2014) (giving specific examples of the human rights violations committed by ISIL).

216. S.C. Res. 2170, ¶ 1 (Aug. 15, 2014).

217. U.N. Office for the Coordination of Humanitarian Affairs (OCHA), *OCHA Flash Update: Iraq Crisis - Significant Displacement from Sinjar*, No. 2, ¶ 1 (Aug. 4, 2014) [hereinafter *OCHA Flash Update: Iraq Crisis - Significant Displacement from Sinjar*, No. 2].

called for their systematic destruction.²¹⁸ ISIL forces who entered the town threatened civilians to “convert or die.”²¹⁹ Of the approximately two hundred thousand civilians who fled the town,²²⁰ about forty thousand fled to Mount Sinjar, where they lacked water, food, and shelter, and were effectively surrounded by armed ISIL forces.²²¹ A humanitarian disaster was imminent.²²²

On August 7, 2014 the Security Council issued a press statement “call[ing] on the international community to support the Government and people of Iraq and to do all it can to help alleviate the suffering of the population affected by the current conflict in Iraq.”²²³ That day, President Obama authorized U.S. airstrikes “to break the siege of Mount Sinjar.”²²⁴ As Obama noted, “when many thousands of innocent civilians are faced with the danger of being wiped out, and we have the capacity to do something about it, we will take action.”²²⁵

The following day, when asked what the legal justification was for the airstrikes, a senior administration official invoked the consent of the host state, stating that “we believe that any actions we would take, to include airstrikes, would be consistent with international law, as we have a request from the Government of Iraq.”²²⁶ Nevertheless, as in Somalia, Côte d’Ivoire, and Mali, one might question the capacity of the host government to give consent, as the Iraqi government was

218. Office of the Press Secretary, *Statement by the President*, THE WHITE HOUSE (Aug. 7, 2014), <http://www.whitehouse.gov/the-press-office/2014/08/07/statement-president> [https://perma.cc/JL4E-E69Q] (archived Jan. 22, 2017).

219. Atika Shubert et al., *Convert or die: ISIS chief's former slave says he beat her, raped U.S. hostage*, CNN (Sept. 11, 2015), <http://www.cnn.com/2015/09/09/middleeast/al-baghdadi-isis-slave/> [https://perma.cc/8EE3-X6AA] (archived Jan. 22, 2017); Mohammed A Salih & Wladimir van Wilgenburg, *Iraqi Yazidis: 'If we move they will kill us'*, AL JAZEERA (Aug. 5, 2014), <http://www.aljazeera.com/news/middleeast/2014/08/iraqi-yazidis-if-move-they-will-kill-us-20148513656188206.html> [https://perma.cc/38VY-RWVW] (archived Jan. 22, 2017).

220. Tim Arango, *Sunni Extremists in Iraq Seize 3 Towns From Kurds and Threaten Major Dam*, N.Y. TIMES (Aug. 3, 2014), <http://www.nytimes.com/2014/08/04/world/middleeast/iraq.html> [https://perma.cc/QD9W-P3PU] (archived Jan. 22, 2017).

221. OCHA Flash Update: *Iraq Crisis - Significant Displacement from Sinjar*, No. 2, *supra* note 217, ¶¶ 2–3; Spencer Ackerman et al., *US carries out air drops to help Iraqis trapped on mountain by Isis*, GUARDIAN (Aug. 7, 2014), <http://www.theguardian.com/world/2014/aug/07/us-aid-iraqi-trapped-mountain-isis> [https://perma.cc/Q6DZ-4KJP] (archived Jan. 22, 2017).

222. KENNETH KATZMAN, CONG. RESEARCH SERV., RS21968, IRAQ: POLITICS, SECURITY, AND U.S. POLICY 17 (2015).

223. Press Release, Security Council, Security Council Press Statement on Iraq, U.N. Press Release SC/11515 (Aug. 7, 2014).

224. Office of the Press Secretary, *supra* note 218. President Obama also authorized airstrikes to protect U.S. personnel in a related but separate operation.

225. *Id.*

226. Office of the Press Secretary, *Background Briefing by Senior Administration Officials on Iraq*, THE WHITE HOUSE (Aug. 8, 2014), <http://www.whitehouse.gov/the-press-office/2014/08/08/background-briefing-senior-administration-officials-iraq> [https://perma.cc/M64J-QCSV] (archived Jan. 22, 2017).

arguably in the middle of a Civil War with ISIL, which had taken control over a large portion of Iraqi territory.

The reactions of other states to the U.S. airstrikes to save the Yazidis is not well documented in publicly available information, perhaps partly because the Iraqi Kurdish peshmerga ended up playing a large role in rescuing the Yazidis.²²⁷ Nevertheless, no strong objections were voiced against the U.S. airstrikes, and, significantly, the European Union and other states joined the United States in providing humanitarian relief to the Yazidis.²²⁸

G. *The U.S.-Led Intervention in Syria (2014–2016)*

Although the United States had, for the most part, refrained from intervening in Syria for the first three years of the conflict,²²⁹ on September 10, 2014, President Obama announced that the United States and its allies would aim to “degrade and ultimately destroy” ISIL not only in Iraq, but also in Syria.²³⁰ At least one of the principal purposes for doing so was humanitarian in nature. In his speech, President Obama noted:

In a region that has known so much bloodshed, these terrorists are unique in their brutality. They execute captured prisoners. They kill children. They enslave, rape, and force women into marriage. They threatened a religious

227. Dana Ford & Josh Levs, *'Heroic' mission rescues desperate Yazidis from ISIS*, CNN (Aug. 16, 2014), <http://www.cnn.com/2014/08/11/world/meast/iraq-rescue-mission/> [<https://perma.cc/8WFQ-DPJW>] (archived Jan. 22, 2017); *Kurds rescue Yazidis from Iraqi mountain*, AL JAZEERA (Aug. 10, 2014), <http://www.aljazeera.com/news/middleeast/2014/08/kurds-rescue-yazidis-from-iraq-mountain-201489135227783157.html> [<https://perma.cc/YEC7-8DBT>] (archived Jan. 22, 2017).

228. Jade Azim, *International help for Yazidis trapped by Islamic State on Mount Sinjar*, GUARDIAN (Aug. 13, 2014), <http://www.theguardian.com/world/2014/aug/13/international-help-yazidis-trapped-islamic-state-isis-iraq> [<https://perma.cc/94DH-KM66>] (archived Jan. 22, 2017); *Final resolution of Yazidi conference at European parliament issued*, EKURD DAILY (Nov. 20, 2014), <http://ekurd.net/mismas/articles/misc2014/11/kurdsiniraq288.htm> [<https://perma.cc/V677-93A9>] (archived Jan. 22, 2017).

229. Before September 2014, the United States had been providing some covert military support to Syrian rebels, although the exact extent of the support is unknown. See David S. Cloud & Raja Abdulrahim, *U.S. has secretly provided arms training to Syria rebels since 2012*, L.A. TIMES (June 21, 2013), <http://articles.latimes.com/2013/jun/21/world/la-fg-cia-syria-20130622> [<https://perma.cc/8XTY-KRTA>] (archived Jan. 22, 2017); Greg Miller & Karin DeYoung, *Secret CIA effort in Syria faces large funding cut*, WASH. POST (June 12, 2015), https://www.washingtonpost.com/world/national-security/lawmakers-move-to-curb-1-billion-cia-program-to-train-syrian-rebels/2015/06/12/b0f45a9e-1114-11e5-ade5-e82f8395c032_story.html [<https://perma.cc/7PGR-E5RV>] (archived Jan. 22, 2017).

230. Office of the Press Secretary, *Statement by the President on ISIL*, THE WHITE HOUSE (Sept. 10, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isis-1> [<https://perma.cc/QT5K-K4ZT>] (archived Jan. 22, 2017).

minority with genocide. And in acts of barbarism, they took the lives of two American journalists -- Jim Foley and Steven Sotloff.²³¹

On September 22, the United States, along with Bahrain, Jordan, Qatar, Saudi Arabia, and the United Arab Emirates, commenced airstrikes in Syria.²³² The following day, U.S. Ambassador to the United Nations Samantha Power sent a letter to Secretary-General Ban Ki-moon justifying the intervention. Rather than calling the operation a humanitarian intervention, however, she expressly invoked the “inherent right of individual and collective self-defence” under Article 51 of the U.N. Charter.²³³ Ambassador Power noted that Iraq was subject to “continuing attacks from ISIL coming out of safe havens in Syria . . . against Iraq’s people,”²³⁴ and referenced a letter from the Minister of Foreign Affairs of Iraq to the President of the Security Council, received three days earlier, expressly “request[ing] the United States of America to lead international efforts to strike ISIL sites” outside of Iraq’s borders.²³⁵ In light of the fact that Syria was “unwilling or unable to prevent the use of its territory for such attacks,” she argued, the United States had taken “necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq.”²³⁶

Two months later, the United Kingdom sent a similar letter to the Secretary-General and the President of the Security Council, invoking collective self-defense on behalf of Iraq under Article 51, but without the “unwilling or unable” language.²³⁷ As of August 2016, nine other

231. *Id.*

232. KENNETH KATZMAN ET AL., CONG. RESEARCH SERV., R43612, THE “ISLAMIC STATE” CRISIS AND U.S. POLICY 12 (2015); Jim Sciutto, *U.S. airstrikes hit ISIS inside Syria for first time*, CNN (Sept. 23, 2014), <http://www.cnn.com/2014/09/22/world/meast/u-s-airstrikes-isis-syria/> [<https://perma.cc/UA4L-W2EN>] (archived Jan. 22, 2017); News Release, *Airstrikes Continue Against ISIL in Syria, Iraq*, U.S. DEP’T OF DEF. (Oct. 31, 2014), <http://www.defense.gov/News-Article-View/Article/603566/airstrikes-continue-against-isis-in-syria-iraq> [<https://perma.cc/EM4A-5VLQ>] (archived Jan. 22, 2017); *US, Arab allies launch first wave of strikes in Syria*, FOX NEWS (Sept. 23, 2014), <http://www.foxnews.com/politics/2014/09/23/us-launches-first-wave-bombing-strikes-over-syria/> [<https://perma.cc/TRE6-BQ7V>] (archived Jan. 22, 2017).

233. U.S. Article 51 Letter, *supra* note 2.

234. *Id.*

235. Permanent Rep. of Iraq to the U.N., Letter dated Sept. 20, 2014 from the Permanent Rep. of Iraq to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2014/691 (Sept. 20, 2014).

236. U.S. Article 51 Letter, *supra* note 2.

237. U.K. Article 51 Letter, *supra* note 2. According to some commentators, however, Prime Minister Cameron has impliedly accepted and applied the “unwilling or unable” test. Ashley Deeks, *The UK’s Article 51 Letter on Use of Force in Syria*, LAWFARE (Dec. 12, 2014), <https://www.lawfareblog.com/uks-article-51-letter-use-force-syria> [<https://perma.cc/92V3-UFUB>] (archived Jan. 23, 2017); Ashley Deeks, *UK Air Strike in Syria (with France and Australia Not Far Behind)*, LAWFARE (Sept. 9, 2015), <https://www.lawfareblog.com/uk-air-strike-syria-france-and-australia-not-far-behind> [<https://perma.cc/4FUF-3B28>] (archived Jan. 23, 2017); Kevin Jon Heller, *A “Broad Consensus” — of Between Two and Four States*, OPINIO JURIS (Sept. 25, 2015),

states—Canada, Turkey, Australia, France, Germany, Denmark, the Netherlands, Norway, and Belgium—have sent similar letters to the United Nations, invoking individual and/or collective self-defense under Article 51.²³⁸ Canada, Turkey, and Australia employed the “unwilling or unable” formulation in their letters,²³⁹ whereas Germany and Belgium, in a similar fashion, noted that the Syrian government does not exercise “effective control” over the territory from which ISIL operates.²⁴⁰

The self-defense justifications offered by these eleven states raise the question, as France’s intervention in Mali did, of whether a foreign terrorist threat can justify a preemptive attack. Aside from a few exceptions, the international community on the whole appears to approve of these military interventions against ISIL in Syria. To begin with, many states have at some point in time participated in the airstrikes.²⁴¹ And the day after the United States and its Arab allies commenced the airstrikes, Secretary-General Ban Ki-moon issued the following statement:

<http://opiniojuris.org/2015/09/25/a-broad-consensus-of-between-two-and-four-states/> [<https://perma.cc/CD6D-7VJT>] (archived Jan. 23, 2017) (calling Deeks’s observation regarding the United Kingdom “correct[]”).

238. Australian Article 51 Letter, *supra* note 2; Belgian Article 51 Letter, *supra* note 2; Canadian Article 51 Letter, *supra* note 2; Danish Article 51 Letter, *supra* note 2; Dutch Article 51 Letter, *supra* note 2; French Article 51 Letter, *supra* note 2; German Article 51 Letter, *supra* note 2; Norwegian Article 51 Letter, *supra* note 2; Turkish Article 51 Letter, *supra* note 2.

239. Australian Article 51 Letter, *supra* note 2; Canadian Article 51 Letter, *supra* note 2; Turkish Article 51 Letter, *supra* note 2; see Kevin Jon Heller, *France Fails to Adopt “Unwilling or Unable” in Syria*, OPINIO JURIS (Oct. 11, 2015), <http://opiniojuris.org/2015/10/11/france-fails-to-adopt-unwilling-or-unable-in-syria/> [<https://perma.cc/V7KA-PPWQ>] (archived Jan. 23, 2017); see generally Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483 (2012) (providing a descriptive and normative analysis of the “unwilling or unable” test).

240. Belgian Article 51 Letter, *supra* note 2; German Article 51 Letter, *supra* note 2; see Marko Milanovic, *Belgium’s Article 51 Letter to the Security Council [UPDATED]*, EJIL: TALK! (June 17, 2016), <http://www.ejiltalk.org/belgiums-article-51-letter-to-the-security-council/> [<https://perma.cc/8DLA-J3RP>] (archived Jan. 23, 2017). Secretary-General Ban Ki-moon has also employed the “effective control” language. See *infra* note 242 and accompanying text. On the question of the relationship between the “unwilling or unable” standard and the “effective control” standard, Brian Egan, Legal Adviser to the U.S. Department of State, noted, “With respect to the ‘unable’ prong of the standard, inability perhaps can be demonstrated most plainly, for example, where a State has lost or abandoned effective control over the portion of its territory from which the non-State actor is operating.” Brian Egan, Keynote Address at the 2016 Annual Meeting of the American Society of International Law (Apr. 1, 2016); see Douglas Cantwell, “Unwilling or Unable” in the Legal Adviser’s ASIL Speech, LAWFARE (Apr. 12, 2016), <https://www.lawfareblog.com/unwilling-or-unable-legal-advisers-asil-speech> [<https://perma.cc/VY5J-JABE>] (archived Jan. 23, 2017).

241. KATHLEEN J. MCINNIS, CONG. RESEARCH SERV., R44135, COALITION CONTRIBUTIONS TO COUNTERING THE ISLAMIC STATE 7–10 (2016).

I am aware that today's strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand. I also note that the strikes took place in areas no longer under the effective control of that Government. I think it is undeniable – and the subject of broad international consensus – that these extremist groups pose an immediate threat to international peace and security.²⁴²

Nevertheless, not everyone was on board. Russia²⁴³ and Iran,²⁴⁴ for example, opposed the military intervention without the consent of the Syrian government or a Security Council authorization.

V. HUMANITARIAN INTERVENTION AT THE MARGINS

As discussed in Section III.B above, many commentators argue, in line with ICJ jurisprudence, that the classification of a case as a humanitarian intervention requires that the intervening power actually invoke humanitarian intervention as its legal justification.²⁴⁵ Under this definition, there has not been a single case of humanitarian intervention over the past decade. Even the U.K.-proposed intervention in Syria after the chemical weapon attacks in Ghouta would not count, as that incident did not result in an actual intervention. So, if one were to accept the point of view of these commentators, it would be disingenuous to argue that humanitarian intervention is an emerging norm.

Nevertheless, in light of the examination of these seven incidents, it would be equally disingenuous to argue that agitation for the norm of humanitarian intervention is entirely absent. Arguably, it has now become common for an intervening power to invoke a traditional exception to the prohibition on the use of force to justify a humanitarian intervention, even when the facts do not completely fit within the scope of the exception. And the international community has, on many occasions, though not on all occasions, approved of the intervention, thereby raising the possibility that the doctrine of

242. U.N. Secretary-General, Remarks at the Climate Summit Press Conference (Including Comments on Syria) (Sept. 23, 2014), <https://www.un.org/sg/en/content/sg/speeches/2014-09-23/remarks-climate-summit-press-conference-including-comments-syria> [https://perma.cc/HE2T-EBPH] (archived Jan. 23, 2017).

243. *Russia warns US against strikes on Islamic State in Syria*, BBC (Sept. 11, 2014), <http://www.bbc.com/news/world-middle-east-29154481> [https://perma.cc/LT42-HN9C] (archived Jan. 23, 2017).

244. *US-led airstrikes in Syria lack legal basis: Iran president*, IRAN FRONT PAGE (Sept. 23, 2014), <http://ifpnews.com/news/world/middle-east/2014/09/us-led-airstrikes-syria-lack-legal-basis-iran-president/> [https://perma.cc/GB57-UJXD] (archived Feb. 13, 2017); Thomas Barrabi, *Iran's Hassan Rouhani Condemns US Airstrikes Against ISIS In Syria As Illegal*, INT'L BUS. TIMES (Sept. 23, 2014), <http://www.ibtimes.com/irans-hassan-rouhani-condemns-us-airstrikes-against-isis-syria-illegal-1693566> (last visited Jan. 23, 2017) [https://perma.cc/XF38-3ARG] (archived Jan. 23, 2017).

245. See *supra* notes 86–89 and accompanying text.

humanitarian intervention, though not yet an established norm of international law, has some force at the margins.

This is not a new phenomenon. In the aftermath of ECOWAS's interventions in Liberia and Sierra Leone in the 1990s, commentators started asserting that the interventions were justified because of an emerging norm of *post hoc* Security Council authorization.²⁴⁶ And in subsequent publications, ICISS, the U.N. Secretary-General, and the AU all accepted the possibility that regional organizations could obtain *post hoc* authorization from the Security Council for humanitarian interventions.²⁴⁷ Although not expressly accepted by Secretary-General Ban Ki-moon's report of 2009,²⁴⁸ this development reflected humanitarian intervention at the margins: humanitarian intervention alone may not have been sufficient to justify a military intervention, but it allowed the intervening power to broaden the scope of traditional exceptions to the prohibition on the use of force.

Over the past decade, as evidenced in the seven incidents examined in this Article, three new paradigms of humanitarian intervention at the margins have emerged: (1) mission creep, (2) antiterrorism, and (3) partisan support.

A. Mission Creep

In the mission creep paradigm, the intervening power invokes a Security Council resolution as the legal justification for its humanitarian intervention, even though the intervention arguably falls outside the mandate of the resolution. When this is the case, the norm of humanitarian intervention may allow the intervening power to widen the mission authorized by the Security Council, a theory that some commentators have referred to as "implied authorization."²⁴⁹

The implementation of no-fly zones in Iraq after the First Gulf War, as well as NATO's intervention in the Kosovo war, could be seen as examples of mission creep. And, over the past decade, this trend has continued in Libya, Côte d'Ivoire, and Mali. In each case, the intervening power arguably exceeded its mandate. In Libya, NATO allegedly pursued "regime change" rather than "the protection of civilians" authorized under Resolution 1973. In Côte d'Ivoire, UNOCI and France similarly sought to depose Mr. Gbagbo, arguably going beyond their mandate to "protect civilians" under Resolution 1975. And in Mali, France launched Operation Serval against the Islamist militants, even though Resolution 2085 expressly authorized France only to "provide coordinated assistance . . . to the Malian Defence and Security Forces . . . in order to . . . reduce the threat posed by terrorist

246. See *supra* note 85.

247. See *supra* notes 46, 48–49 and accompanying text.

248. See *supra* note 53 and accompanying text.

249. See Johnstone, *supra* note 7, at 238–43.

organizations and associated groups”²⁵⁰ To be clear, this Article does not assert that these operations exceeded their Security Council mandates; rather, it simply notes that other states and commentators have made such assertions, and that such assertions are not without merit.

In two of the cases—Côte d’Ivoire and Mali—the international community appeared to have welcomed the intervention. Part of the reason, no doubt, was that the interventions had humanitarian objectives. The Gbagbo regime had been indiscriminately shelling civilian populations,²⁵¹ and the Islamist militants in Mali had been committing gross violations of human rights against innocent civilians.²⁵² Libya was another story: key members of the international community condemned NATO’s intervention in Libya. Nevertheless, it should not be overlooked that there were still a significant number of states—primarily Western, developed states—that supported the intervention.

One cannot draw sweeping conclusions from these three incidents of mission creep. But it would be fair to say that humanitarian intervention was at least operating at the margins.

B. Antiterrorism

In the antiterrorism paradigm, the intervening power invokes self-defense under Article 51 of the U.N. Charter as the legal justification for its humanitarian intervention, but its argument hinges on the acceptance of antiterrorism activities against a non-state actor as preemptive self-defense.²⁵³ The fact that the host state is “unwilling or unable” to suppress the threat itself may carry some weight in justifying this exercise of the right of self-defense, at least according to four states.²⁵⁴ And, according to two states, whether the host state exercises “effective control” over the territory in question may also strengthen this justification.²⁵⁵ Commentators have taken various viewpoints on the preemptive self-defense justification,²⁵⁶ and

250. S.C. Res. 2085, ¶ 9 (Dec. 20, 2012).

251. See *supra* note 162 and accompanying text.

252. See *supra* notes 176–178 and accompanying text.

253. Scholars also use the terms “anticipatory self-defense” and “preventive self-defense” alongside the term “preemptive self-defense.” For an attempt to distinguish and define these three terms, see Ashley S. Deeks, *Taming the Doctrine of Pre-emption*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 7, at 662–63.

254. See *supra* note 239.

255. See *supra* note 240.

256. See generally Deeks, *supra* note 253, at 661 (presenting various viewpoints on the question of anticipatory, preemptive, and preventive self-defense); GRAY, *supra* note 7, at 114 (“The law on self-defence is the subject of the most fundamental disagreement between states and between writers.”); Kevin Jon Heller, *France Fails to Adopt “Unwilling or Unable” in Syria*, OPINIO JURIS (Oct. 11, 2015),

it suffices to say that many still question the legality of such “antiterrorism” interventions.

Nevertheless, when there is a humanitarian crisis in the host state, military intervention under this theory appears to be more acceptable. Drawing examples from the past decade, the French intervention in Mali and the U.S.-led intervention against ISIS in Syria stand for this hypothesis. In Mali, France argued, *inter alia*, that its attack on the Islamist militant groups was partly justified out of self-defense, and states generally welcomed the French intervention. Similarly, in Syria, the United States was able to build a coalition of eleven states to launch airstrikes in Syria, and, although a few states have objected, most states that have voiced their opinions appear to support the intervention.

Once again, two incidents are insufficient for drawing any definitive conclusions. But it appears that a humanitarian motive may help widen the self-defense exception to accommodate antiterrorism operations.

C. Partisan Support

In the partisan support paradigm, the intervening power invokes the consent of the host state to justify its military intervention, but the host state is embroiled in a civil war and the intervening power only obtains the consent of one faction—often the faction with stronger international support. The problem here, as most commentators agree, is that intervention based on consent is prohibited in the context of a civil war, especially where control over state territory is divided.²⁵⁷ Indeed, at least one prominent commentator has criticized Russia’s airstrikes in Syria as unlawful because “a very large number of states have determined that the Assad government can no longer fully claim to represent the people of Syria.”²⁵⁸

Four of the seven incidents examined above reflect this paradigm: Somalia, Côte d’Ivoire, Mali, and Iraq. The TFG in Somalia consented to IGAD’s intervention, Mr. Ouattara’s forces impliedly invited UNOCI and France to help assault Mr. Gbagbo’s last stronghold, the Transitional Government in Mali formally invited France to come to its assistance, and Iraq invited the United States to strike the ISIS forces besieging Mount Sinjar. The common thread in all four cases is

<http://opiniojuris.org/2015/10/11/france-fails-to-adopt-unwilling-or-unable-in-syria/> [<https://perma.cc/23FZ-QP6C>] (archive Feb. 5, 2016) (arguing against an alleged “broad consensus” for the “unwilling or unable” standard).

257. GRAY, *supra* note 7, at 81; U.K. FOREIGN & COMMONWEALTH OFFICE, *supra* note 31, at 614; Nolte, *supra* note 30, ¶ 18.

258. Nick Robins-Early, *Russia Says Its Airstrikes In Syria Are Perfectly Legal. Are They?*, WORLD POST (Oct. 1, 2015), http://www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law_560d6448e4b0dd85030b0c08 [<https://perma.cc/BUU5-8A7W>] (archived Jan. 23, 2017).

that the inviting power—the alleged representative of the host state—did not have full authority over the state and was arguably in a state of civil war. As such, under traditional international law doctrine, it is questionable whether the inviting powers actually had the authority to consent to a military intervention.

Nevertheless, the international community's reactions to these interventions, aside from the IGAD's proposed intervention in Somalia, were largely positive. Consequently, one may suspect that a humanitarian cause may ease the restriction on the ability of one faction to consent to foreign military intervention in times of internal conflict.

* * *

Table 1 below summarizes which paradigms the seven incidents fall under, and whether the international community's reaction to the intervention or proposed intervention was largely positive or negative.

Table 1: Recent Incidents of Humanitarian Intervention

	Mission Creep	Antiterrorism	Partisan Support	International Reaction
The Proposed IGAD Intervention in Somalia (2005–2006)			X	negative
The NATO Intervention in Libya (2011)	X			negative
The UNOCI/French Intervention in Côte d'Ivoire (2011)	X		X	positive
The French Intervention in Mali (2013)	X	X	X	positive
The Proposed U.S./U.K. Intervention in Syria (2013)				divided
The U.S. Intervention at Mount Sinjar in Iraq (2014)			X	positive
The U.S.-Led Intervention in Syria (2014–2016)		X		positive

VI. CONCLUSION

One must be careful when drawing conclusions from a study of incidents. In selecting these seven incidents, no specific effort was made to choose a sample that is representative of the entire population of military interventions. There was also no attempt to isolate the independent variables that ultimately influenced how key actors in the international community reacted to the interventions. Indeed, in many cases, it is possible that international approval for the military intervention in question may have been the product of international politics rather than a reflection of attitudes towards humanitarian intervention. Each incident arises from its own unique political, legal, and factual context. Consequently, it would be inappropriate to generalize from these incidents.

Nevertheless, one cannot turn a blind eye to this agitation for humanitarian intervention at the margins. At least some, if not all of the seven incidents can only with difficulty be assimilated into one of the three traditional exceptions to the prohibition on the use of force. As a result, there must be an underlying element that not only compels the intervening power to intervene but also drives the international community to accept that intervention. This element is humanitarian intervention, and these incidents reveal that humanitarian intervention has developed considerably at the margins over the past decade.

It is true that genuine state practice and *opinio juris* of humanitarian intervention are still lacking. As a result, it would be erroneous to argue that a customary exception to the prohibition on the use of force based on humanitarian intervention exists as a matter of *lex lata*. There is no free ticket for a state to militarily intervene in another state for the purpose of ending gross violations of human rights. Nevertheless, the incidents discussed here reveal that the norm of humanitarian intervention is developing, and key actors in the international system are responding to this developing norm.

At the moment, it appears that the norm of humanitarian intervention, at the very least, serves as a tool for widening the traditional exceptions to the prohibition on the use of force. Although military intervention based on a Security Council resolution normally must stay within the limits of the resolution, there appears to be greater leeway when it comes to a humanitarian intervention. Although ambiguity remains in the legitimacy of preemptive self-defense, this exception to the prohibition on the use of force appears to widen when the intervention has humanitarian and antiterrorism purposes. And, although intervention based on the consent of the host state normally requires approval from a clear sovereign authority, if the intervention has humanitarian objectives, it appears that consent may also be given by a government that does not have control over all of its territory.

These are not firm rules that establish whether a state, intervening on humanitarian grounds, is in violation of international law. Rather, these are observations of the reactions of key actors in the international community to certain incidents of humanitarian intervention over the past decade.
