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How the War Against ISIS Changed International Law

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In an effort to destroy ISIS, beginning in August 2014, the United States, assisted by a handful of other Western and Arab countries, carried out thousands of bombing sorties and cruise missile attacks against ISIS targets in Iraq and Syria. Iraq had consented to the airstrikes in its territory, but Syria had not, and Russia blocked the UN Security Council from authorizing force against ISIS in Syria. The United States invoked several different legal arguments to justify its airstrikes, including the right of humanitarian intervention, the right to use force in a failed state, and the right of hot pursuit, before finally settling on self-defense. Use of force in self-defense has traditionally not been viewed as lawful against non-state actors in a third state unless they are under the effective control of that state, but the United States argued that in the aftermath of the 9/11 attacks by al Qaeda, such force can be justified where a government is unable or unwilling to suppress the threat posed by non-state actors operating within its borders. This view was not, however, initially accepted by Russia, China, or even the United Kingdom. But that changed in the aftermath of ISIS attacks against a Russian jetliner and a Paris stadium and concert hall in 2015, leading to the unanimous adoption of a UN Security Council resolution calling on States to use all necessary measures to fight ISIS in Syria without offering a legal basis for military action. This article examines the evolution of the right to use force in self-defense against non-state actors and makes the case that events in 2015 triggered a "Grotian Moment": a fundamental paradigm shift that will have broad implications for international law.

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I. INTRODUCTION

In 2014, a militant group calling itself the Islamic State (ISIS)[1] rapidly took over more than thirty percent of the territory of Syria and Iraq.[2] In the process, it captured billions of dollars worth of oil fields and refineries, bank assets and antiquities, tanks and armaments, and became one of the greatest threats to peace and

1. ISIS is also known as ISIL and Daesh.

2. Matthew G. Olsen, Director, National Counterterrorism Center, Remarks for the Brookings Institution (Sept. 3, 2014) *available at* http://www.nctc.gov/docs/2014-09-03_remarks_for_the_brookings_institution.pdf ("[t]oday, ISIL has more than 10,000 fighters and controls much of the Tigris-Euphrates basin—the crossroads of the Middle East—an area similar in size to the UK.").

security in the Middle East.[3] In an effort to "degrade and defeat" ISIS, beginning in August 2014 the United States, assisted by a handful of other Western and Arab countries, launched thousands of bombing sorties and cruise missile attacks against ISIS targets in Iraq and Syria.[4] While the Iraqi government has consented to foreign military action against ISIS within Iraq, the Syrian government did not.[5] Rather, Syria protested that the air strikes in Syrian territory were an unjustifiable violation of international law.[6]

The United States initially claimed the airstrikes against ISIS were justified variously by a right of humanitarian intervention, a right to use force in the territory of failed states, and a right of hot pursuit, before settling on the argument that the airstrikes in Syria were lawful acts of collective self-defense on behalf of the government of Iraq.[7] Use of force in self-defense has traditionally not been viewed as lawful against non-state actors in a third state unless they are under the effective control of that state,[8] but the United States has argued that since the 9/11 attacks such force can be justified where a government is unable or unwilling to suppress the threat posed by the

3. Janine Di Giovanni et al., *How does ISIS Fund its Reign of Terror?* NEWSWEEK (Nov. 6, 2014), *available at*, www.newsweek.com/2014/11/14/how-does-isis-fund-its-reign-terror-282607.html [https://perma.cc/3CV2-QVU5].

4. Claire Mills et al., *ISIS/Daesh: The Military Response in Iraq and Syria*, *House of Commons Briefing Paper No. 06995*, Sept. 11, 2015, at 4-7.

5. Ben Smith, *ISIS and the Sectarian Conflict in the Middle East, House of Commons Library Research Paper 15/16*, Mar. 19, 2015, at 55 (demonstrating that the United States did warn the Assad regime about the imminent launch of airstrikes in September 2014 but did not request the regime's permission).

6. *Id.*

7. Letter from Samantha J. Power, Representative of the United States of America to the United Nations, to Ban Ki-moon, Secretary-General of the United Nations (Sept. 23, 2014), *available at* https://www.justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/ [https://perma.cc/2Z37-LHPC].

8. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (merits), 1986 I.C.J. 14, ¶ 191 (June 26), http://www.icj-cij.org/docket/files/70/6503.pdf [https://perma.cc/J4LN-6EJP]; Oil Platforms (Iran v. U.S.) 2003 I.C.J. 161, ¶¶ 195-196 (Nov. 6), http://www.icj-cij.org/docket/files/90/9715.pdf [https://perma.cc/G6EX-745M][hereinafter *Oil Platforms*]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) 2005 I.C.J. 169 (Dec. 19), http://www.icj-cij.org/docket/files/116/10455.pdf [https://perma.cc/752C-HYG9] [hereinafter *Armed Activities*].

non-state actors operating within its borders.[9] This view was not, however, accepted by Russia, China, or even the United Kingdom, which initially refused to join the United States in bombing ISIS targets in Syria.[10]

Article 51 of the UN Charter provides for protection of a State's "inherent right" of self-defense.[11] Reference to an "inherent right" means the question is not one of treaty interpretation but rather discerning whether the evolving customary international law principles governing self-defense support the U.S. position. Usually, customary international law changes slowly over many decades.[12] But sometimes, world events are such that customary international law develops quite rapidly.[13] Some scholars call these transformative

9. *See* Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 487 (2012).

10. *See* Smith, *supra* note 5, at 58; Written Evidence from the Rt Hon Hugh Robertson MP, Minister of State, Foreign and Commonwealth Office to the Foreign Affairs Committee on humanitarian intervention and the responsibility to protect (Jan. 14, 2014), *available at* www.publications.parliament.uk/pa/cm201415/cmselect/cmdfence/582/58205.htm [https://perma.cc/4TBS-KAW8].

11. U.N.Charter art. 51.

12. Vincy Fon & Franscesco Parisi, *Customary Law and Articulation Theories: An Economic Analysis* 3, GEO. MASON UNIV. SCH. L., L. & Econ. Working Paper Series No. 2-24 (2000), http://www.law.gmu.edu/assets/files/publications/working_papers/02-24.pdf [http://perma.cc/E4HK-PJ3T] (explaining that historically, crystallization of new rules of customary international law was viewed as a protracted process that took decades, if not centuries, to complete. French jurisprudence generally required the passage of at least forty years for the emergence of an international custom, while German doctrine generally required thirty years) (last visited Feb. 22, 2014); *see* G.I. Tunkin, *Remarks on the Judicial Nature of Customary Norms in International Law*, 49 CALIF. L. REV. 419, 420 (1961); Manley O. Hudson, *Special Rapporteur on Article 24 of the Statute of the Int'l Law Comm'n, Ways and Means for Making the Evidence of Customary International Law More Readily Available*, Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/16 (Mar. 3, 1950) (the ILC, at the beginning of its work, demanded State practice "over a considerable period of time" for a customary norm to emerge).

13. North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), Merits, 1969 I.C.J. 3, ¶¶ 71, 73–74 (Feb. 20) (explaining that "Although the passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of customary international law . . . an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."); *Id.* ¶ 74(While

events and paradigm shifts[14] that accelerate the formation of customary international law "International Constitutional Moments,"[15] likening them to the rapid, radical transformation in American Constitutional Law that accompanied the New Deal.[16] But because these changes occur largely outside a constitution or treaty framework, elsewhere I have made the case that a more apt term for this phenomenon is "Grotian Moment," named for Hugo Grotius, the 15th Century Dutch scholar and diplomat whose masterpiece *De Jure Belli ac Pacis* helped marshal in the modern system of international law.[17] This article examines whether the use of force against ISIS in Syria is one of these so-called Grotian Moments, marking a rapid change in customary international law.

The article begins with background about the nature of the ISIS threat and the U.S. decision to launch airstrikes against ISIS in Syria

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recognizing that some norms can quickly become customary international law, the ICJ held that the equidistance principle contained in Article 6 of the 1958 Convention on the Continental Shelf had not done so as of 1969 because so few States recognized and applied the principle. At the same time, the Court did find that that Articles 1 and 3 of the Convention (concerning the regime of the continental shelf) did have the status of established customary law).

14. *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 150 (2d ed. 1970) (coining the phrase "paradigm shift").

15. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 463 (2003) (Martinez, for example, has written that the drafting of the United Nations (U.N.) Charter was a "constitutional moment" in the history of international law); Leila Nadya Sadat, *Enemy Combatants After Hamdan v. Rumsfeld: Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206–07 (2007) (Sadat has similarly described Nuremberg as a "constitutional moment for law.").

16. *See* BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW 19 (1984); *see also* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 385, 409 (1991) (coining the phrase "Constitutional moment").

17. *See generally* MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS (2014) [hereinafter *Grotian Moments*](noting that the term "Grotian Moment" was first coined by Princeton Professor Richard Falk). *See* INTERNATIONAL LAW AND WORLD ORDER 1265–86 (Burns H. Weston et al. eds., Thomson/West 4th ed. 2006) (Grotius (1583–1645) is widely considered to have laid the intellectual architecture for the Peace of Westphalia, which launched the basic rules of modern international law); HEDLEY BULL ET AL., HUGO GROTIUS AND INTERNATIONAL RELATIONS 1, 9 (1992) (explaining that while the results of Westphalia may have been simplified by the lens of history, and Grotius' role may have been exaggerated, Westphalia has unquestionably emerged as a symbolic marker and Grotius as an emblematic figure of changing historical thought."Grotian Moment" is thus an apt label for transformational events in customary international law).

in August 2014. Next, it discusses the principles and process of customary international law formation and the phenomenon of accelerated formation of customary international law. Finally, it explores the evolution of the legal rationales to justify use of force against ISIS in Syria that were espoused by the United States, and the international reaction to these arguments, in order to determine whether or how the airstrikes and the international response have altered international law.

II. BACKGROUND ON THE WAR ON ISIS

ISIS has its roots in the Sunni/Baathist-dominated Iraqi army of Saddam Hussein,[18] which was one of the largest armies in the world before the U.S.-led invasion of Iraq in 2003.[19] After the defeat of the Baathist regime, members of the Baathist party were banned from participating in the army or other government positions.[20] Dispossessed, marginalized, and subjugated under the U.S. occupation and subsequent Shi'ite-dominated Iraqi government of Iraqi Prime Minister Nouri al-Maliki, the former Sunni army personnel launched a protracted rebellion, with the insurgents taking on the name "al-Qaeda in Iraq" and later changing it to the "Islamic State of Iraq" (ISI).[21]

Meanwhile, the chaos in Syria, which began as protests against the Assad regime in 2011 and escalated to full-out civil war by 2014, presented ISI an opportunity to seize territory across the border.[22] In 2014 ISI established its "capital" in the captured Syrian town of al-Raqqah and changed the group's name yet again to the "Islamic State of Iraq and Syria" (ISIS).[23] Soon thereafter, ISIS seized nearby Syrian oil wells and refineries, providing it with vast financial resources.[24]

ISIS then turned its sights on Mosul, the second-largest city in Iraq, which fell to ISIS in 2014.[25] Following this, ISIS had access to

18. *See* Smith, *supra* note 5, at 1, 9.

19. John M. Broder & Douglas Jehl, *Iraqi Army: World's 5th Largest but Full of Vital Weaknesses*, LOS ANGELES TIMES (Aug. 13, 1990), *available at* http://articles.latimes.com/1990-08-13/news/mn-465_1_iraqi-army [https://perma.cc/E525-EHFE] (noting that the Iraqi army was the 5th largest in the world).

20. *See* Smith, *supra* note 5, at 9.

21. Smith, s*upra* note 5, at 1.

22. *Id.*

23. *Id.*

24. *Id.* at 17.

25. Martin Chulov, *Isis insurgents seize control of Iraqi city of Mosul*, THE GUARDIAN (June 10, 2014), *available at*

hundreds of millions of dollars from banks, as well as tanks and armaments that it captured from the Iraqi army which fled Mosul with almost no fight.[26] With these vast financial and military resources, ISIS began to capture city after city in Iraq and Syria with ease. Meanwhile, the Maliki government's continued suppression of the Iraqi Sunnis enabled ISIS to sweep through Sunni areas in Iraq without much resistance because of resentment toward the ruling regime.[27]

Experts believe the majority of top ISIS decision-makers are former members of Saddam Hussein's army, intelligence, and security forces.[28] But during 2014, the ranks of ISIS swelled with as many as 10,000 foreign fighters from across the Arab world and Western Europe who were attracted to its fundamentalist ideology and string of military successes.[29]

The name Islamic State reflects the group's avowed goal to establish an Islamic caliphate across the Eastern Mediterranean. In the lands it controls, ISIS has imposed repressive edicts and conditions on the inhabitants, similar to the Taliban's former rule in Afghanistan. ISIS has beheaded thousands of Christians, Kurds and Shi'ites and destroyed Shiite shrines and archeological sites in areas under its dominion in Syria and Iraq.[30]

ISIS's strategy of seizing and controlling territory in Iraq and Syria distinguishes it from the al-Qaeda network, which has focused on attacks on Western interests.[31] Due to ISIS's divergent aims, tactics, and its ongoing conflict with the al-Nusra group (which was seen as the primary representative of al-Qaeda in Syria), in 2013 central al-Qaeda leadership disowned ISIS.[32] The United States thus found itself with three adversaries in the Syrian conflict: The Assad government, the al-Nusra (al-Qaeda) group, and ISIS.

The first U.S. airstrikes against ISIS were in response to a humanitarian catastrophe unfolding in northern Iraq in August 2014. After capturing nearby Mosul, ISIS forces attacked a number of towns in the Sinjar area populated by a Kurdish minority known as the Yazadis – killing thousands of men and capturing hundreds of women

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http://www.theguardian.com/world/2014/jun/10/iraq-sunni-insurgents-islamic-militants-seize-control-mosul [https://perma.cc/RD3V-N6JU].

26. Smith, *supra* note 5, at 16-17.

27. *Id.*at 24.

28. *Id.* at 9.

29. *Id.* at 20.

30. *Id.* at 11.

31. Smith, *supra* note 5, at 12.

32. *Id.* at 14.

and children as slaves.[33] When some 30,000 Yazadis took refuge on 4,800-foot Mount Sinjar, the ISIS forces cut off their means of egress from the mountain.[34] At the time, Iraq had not yet given permission to the United States to use force in its territory against ISIS, but with the Yazadis' water and food supplies dwindling, President Obama authorized airstrikes on the ISIS forces in order to save their lives, saying, "When we have the unique capacity to avert a massacre, the United States cannot turn a blind eye."[35]

Meanwhile, under U.S. pressure, Iraqi Prime Minister Maliki stepped down a few days after the Yazadi operation, and was replaced by Haidar al-Abadi, who was seen as more moderate and more able to begin a reconciliation process with Sunnis.[36] At the request of al-Abadi, the United States launched operation "Inherent Resolve," consisting of widespread airstrikes on ISIS targets in Iraq in August 2014.[37] On September 19, 2014, France joined the United States in bombing ISIS in Iraq, and two weeks later the UK joined its two NATO allies in engaging in airstrikes in Iraq.[38]

Under international law, a State can use military force in another State's territory in three situations: (1) with the latter's consent, (2) with Security Council authorization, or (3) when acting in self-defense against an armed attack. Unlike Iraq, Syria has not consented to use of force against ISIS by foreign countries (other than Russia) in Syrian territory, and the U.S. State Department spokesman stated,

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33. Steve Hopkins, *Full horror of the Yazidis who didn't escape Mount Sinjar: UN confirms 5,000 men were executed and 7,000 women are now kept as sex slaves*, DAILY MAIL (Oct. 14, 2014, 11:22 AM), http://www.dailymail.co.uk/news/article-2792552/full-horror-yazidis-didn-t-escape-mount-sinjar-confirms-5-000-men-executed-7-000-women-kept-sex-slaves.html [http://perma.cc/99WH-GFYW].

34. Haroon Siddique, *20,000 Iraqis besieged by Isis escape from mountain after US air strikes*, THE GUARDIAN (Aug. 10, 2014, 9:12AM), http://www.theguardian.com/world/2014/aug/10/iraq-yazidi-isis-jihadists-islamic-state-kurds [http://perma.cc/2WAR-D7M3].

35. Helene Cooper & Michael D. Schear, *Militants Seize of Mountain in Iraq is Over, Pentagon Says*, N.Y. TIMES (Aug. 14, 2014), http://www.nytimes.com/2014/08/14/world/middleeast/iraq-yazidi-refugees.html?_r=0 [http://perma.cc/DP69-NY7D]; Helene Cooper, Mark Landler& Alissa J. Rubin, *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES (Aug. 7, 2014), http://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html?_r=0 [http://perma.cc/693E-LYVH].

36. Smith, *supra* note 5, at 24.

37. *See* Mills, *supra* note 4, at 6.

38. *See* Smith, *supra* note 5, at 51-52.

"We're not looking for the approval of the Syrian regime."[39] At the same time, with its permanent member veto, Russia blocked Security Council authorization to use force in Syria.[40] Russia has long been a strong ally of the Assad regime, which allows Russia to keep its only naval base outside the former Soviet Union at the Syrian Mediterranean port of Tartus.[41] Russia also seems motivated by the goal of frustrating U.S. policy in the Mideast.[42] The Russian Foreign Ministry has said that without a Security Council resolution, any strike against Syria would constitute an unlawful act of aggression.[43]

Nevertheless, without Syrian consent or Security Council authorization, on September 23, 2014, the United States began airstrikes on ISIS targets in Syria, supported by Bahrain, Jordan, Saudi Arabia, and the UAE.[44] Later, in February 2015 and April 2015, Jordan and Canada, respectively, joined the airstrikes against ISIS in Syria.[45] U.S. aircraft participating in the strikes included F-15, F-16, F/A-18, F-22 fighter aircraft and B-1 bombers, as well as Tomahawk missiles deployed from US naval vessels in the Red Sea and North Arabian Gulf.[46]

From August 2014 through August 2015, the U.S.-led coalition had conducted more than 5,500 airstrikes on ISIS targets in Iraq and Syria, resulting in the deaths of over 15,000 ISIS fighters.[47] Despite

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39. *See generally* Mills, *supra* note 4, at 55 (describing how the United States did warn the Assad regime about the imminent launch of airstrikes in September 2014 but did not request the regime's permission).

40. *Syria resolution authorizing military force fails in U.N. Security Council*, CBS NEWS (Aug. 28 2013, 4:48 PM), http://www.cbsnews.com/news/syria-resolution-authorizing-military-force-fails-in-un-security-council/ [http://perma.cc/3ZGZ-96HM].

41. Smith, *supra* note 5, at 42.

42. Smith, *supra* note 5, at 14.

43. Somini Sengupta, *A Host of Possible Objections to Expanded Airstrikes in Syria*, N.Y. TIMES (Sept. 17, 2014), http://www.nytimes.com/2014/09/18/world/middleeast/a-host-of-possible-objections-to-expanded-airstrikes.html?_r=0 [http://perma.cc/U5NT-ET95].

44. Julian E. Barnes & Dion Nissenbaum, *U.S., Arab Allies Launch Airstrikes Against Islamic State Targets in Syria*, WALL ST. J., http://www.wsj.com/articles/us-arab-allies-launch-airstrikes-against-islamic-state-targets-in-syria-1411436642 [http://perma.cc/HF7M-RGTJ].

45. Mills, *supra* note 4, at 10-11.

46. Smith, s*upra* note 5, at 53.

47. Jim Michaels, *15,000 Killed, but ISIS Persists*, USA TODAY (July 30, 2015, 5:55 PM), http://www.usatoday.com/story/news/world/2015/07/29/air-campaign-

American and British commanders' claims of success,[48] ISIS's forces reportedly grew to over 31,500 during the period of bombing, with a steady influx of recruits from around the world replacing ISIS casualties, suggesting that the war against ISIS is likely to be a lengthy one.[49]

Then, on October 31, 2015, ISIS bombed a Russian jetliner over the Sinai desert, killing 224 passengers, and followed that up on November 13, 2015, by attacking a rock concert and sporting event in Paris, killing 130 and injuring 368 people.[50] In response, on December 2, 2015, the U.N. Security Council unanimously adopted Resolution 2249, which determined that ISIS is "a global and unprecedented threat to international peace and security," and called for "all necessary measures" to "eradicate the safe haven [ISIS] established" in Syria.[51]

III. THE CONCEPT OF ACCELERATED FORMATION OF CUSTOMARY INTERNATIONAL LAW

Professor Myers McDougle of Yale Law School famously described the customary international law formation process as one of continuous claim and response.[52] To illustrate this process, consider the question of whether international law permits a State to use force to arrest a terrorist leader in another State without the latter's consent—a question that recently arose when the United States kidnapped an al-Qaeda leader from Libya in October 2013.[53] The

kills-15000-isis-militants-pentagon-iraq-syria/30750327/ [http://perma.cc/6P6X-WR9L].

48. *Id.*

49. *Id.*

50. *See* Armin Rosen, *ISIS pulled off 2 of its most alarming attacks in the space of less than a month*, FIN. TIMES (Nov. 18, 2015, 8:01 AM), http://www.businessinsider.com/isis-paris-plane-attacks-2015-11 [https://perma.cc/9M3M-3P9A] (last visited Dec. 19, 2015); Adam Chandler et al., *The Paris Attacks: The Latest*, THE ATLANTIC (Nov. 22, 2015, 4:58 PM), http://www.theatlantic.com/international/archive/2015/11/paris-attacks/415953/ [https://perma.cc/NM9A-F695] (last visited Feb. 19, 2016).

51. *See* S.C. Res. 2249 (Nov. 20, 2015), *available at* http://www.un.org/press/en/2015/sc12132.doc.htm [https://perma.cc/4GZM-WEYC] (last visited Dec. 19, 2015).

52. *See generally* Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L. J. 648 (1955).

53. *See* Ernesto Londoño, *Capture of Bombing Suspect in Libya Represents Rare 'Rendition' by U.S. Military*, WASH. POST (Oct. 6, 2013), http://articles.washingtonpost.com/2013-10-

claim may be express, such as demanding that its special forces be allowed to enter the territorial State to arrest the terrorist, or implicit, such as sending its special forces into the territorial State without its permission to apprehend the terrorist. The response to the claim may in turn be favorable, such as consenting to the operation or refraining from protesting the extraterritorial apprehension. In such case, the claim and response will begin the process of generating a new rule of customary international law. Some States may imitate the practice and others may passively acquiesce to it.

A "custom pioneer" (the first State to initiate a new practice) has no guarantee that its action will actually lead to the formation of a binding custom. Indeed, the response may be a repudiation of the claim, as in the case of Libya's protest of the un-consented apprehension of the al-Qaeda operative.[54] In such case, the repudiation could constitute a reaffirmation of existing law, which is strengthened by the protest. Or, the claim and repudiation could constitute a stalemate, which could decelerate the formation of new customary international law. The reaction of third States is also relevant. Out of this process of claim and response, and third party acquiescence or repudiation, rules emerge or are superseded. Just "as pearls are produced by the irritant of a piece of grit entering an oyster's shell, so the interactions and mutual accommodations of States produce the pearl—so to speak—of customary law."[55] Usually, this process of customary international law formation takes many decades.[56] But sometimes, world events are such that customary international law develops quite rapidly.[57]

06/world/42771116_1_kerry-terrorism-suspects-libyan-government [http://perma.cc/KYV5-H8UF] (last visited Feb. 22, 2014).

54. *Id.*

55. MAURICE H. MENDELSON, THE FORMATION OF CUSTOMARY INTERNATIONAL LAW 190 (1998).

56. Fon & Parisi, *supra* note 12 (affirming that historically, crystallization of new rules of customary international law was viewed as a protracted process that took decades, if not centuries, to complete. French jurisprudence generally required the passage of at least forty years for the emergence of an international custom, while German doctrine generally required thirty years); *see* Tunkin, *supra* note 12, at 420; Manley O. Hudson, *Special Rapporteur on Article 24 of the Statute of the Int'l Law Comm'n, Ways and Means for Making the Evidence of Customary International Law More Readily Available*, U.N. Doc. A/CN.4/16 (Y.B. Int'l L. Comm'n, Working Paper, 1950) (stating that the ILC, at the beginning of its work, demanded State practice "over a considerable period of time" for a customary norm to emerge).

57. The Court stated: "Although the passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of customary international law . . . an indispensable requirement would be that within the period in question, short though it might be, State practice,

In domestic law, we know what stages legislation needs to go through and how many votes are needed at each stage for a bill to become a law. Likewise for international conventions, we know what formalities must be undertaken for a text to become a treaty and the number of ratifications required to bring it into force. In contrast, there exists no agreed upon formula for identifying with precision how many States are needed and how much time must transpire to generate a rule of customary international law.[58]

Professor Maurice Mendelson, the Chair of the ILA's Customary International Law Committee, suggests that such a formula is unnecessary. Using the metaphor of building a house, he points out that it is often difficult or even impossible to say exactly when construction has reached the point that we can conclude a house has been created.[59] It is neither when the first foundation stone is laid nor when the last brush of paint has been applied, but somewhere between the two. As Mendelson puts it, "[d]o we have to wait for the roof to go on, for the windows to be put in, or for all of the utilities to be installed? So it is with customary law."[60] Rarely does a decision maker need to know the exact moment that a practice has crystallized into a binding rule, or as Mendelson puts it, "precisely when the fruit became ripe."[61] Instead, he concludes, "we are more interested in knowing, when we bite it, if it is now ripe or still too hard or sour."[62]

Mendelson's metaphor is apt, for example, in examining when the continental shelf concept became customary international law.

including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), Merits, 1969 I.C.J. 3, ¶¶ 71, 73–74 (Feb. 20, 1969) [hereinafter *North Sea Continental Shelf*]; While recognizing that some norms can quickly become customary international law, the ICJ held that the equidistance principle contained in Article 6 of the 1958 Convention on the Continental Shelf had not done so as of 1969 because so few States recognized and applied the principle. At the same time, the Court did find that that Articles 1 and 3 of the Convention (concerning the regime of the continental shelf) did have the status of established customary law. *Id.* at ¶ 74.

58. ANTHONY A. D'AMATO, CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88 (1971) (noting that there is no consensus as to how much time a practice must be maintained to evidence the existence of a custom); Tunkin, *supra* note 12, at 420 (arguing that the element of time is not dispositive as to whether a customary rule exists).

59. *See* MENDELSON, *supra* note 55, at 175.

60. *See* MENDELSON, *supra* note 55, at 175.

61. MENDELSON, *supra* note 55, at 176.

62. MENDELSON, *supra* note 55, at 176.

President Truman proclaimed the continental shelf concept in 1945; the 1958 Geneva Convention on the Continental Shelf recognized this entitlement on the part of coastal States, and in 1969 the ICJ acknowledged that the principle was part of customary international law in *North Sea Continental Shelf*.[63] Somewhere during those twenty-four years between 1945 and 1969, the coastal States' rights over the continental shelf had crystallized into customary international law, but it would be difficult to pinpoint the exact moment that occurred.

Sometimes courts or international organizations need to determine more definitively when an emerging norm has ripened into binding customary international law. The Cambodia Tribunal's determination of whether the Nuremberg trial established Joint Criminal Enterprise (JCE) liability as a principle of customary international law is illustrative.[64]

A. Nuremberg as a Grotian Moment

JCE is a form of liability somewhat similar to the Anglo-American "felony murder rule"[65] and the "Pinkerton rule,"[66] in which a person who willingly participates in a criminal enterprise can be held criminally responsible for the reasonably foreseeable acts of other members of the criminal enterprise even if those acts were not part of the plan. Although few countries around the world apply principles of co-perpetration similar to the felony murder rule or Pinkerton rule, since the decision of the Appeals Chamber of the International

63. *North Sea Continental Shelf*, 1969 I.C.J. 3; White House News Release, President Truman's Proclamations on U.S. Policy Concerning Natural Resources of Sea Bed and Fisheries on High Seas (Sept. 28, 1945), http://www.ibiblio.org/pha/policy/post-war/1945-09-28a.html [http://perma.cc/4MXC-FRSK].

64. *Case of Ieng Sary*, Ieng Sary's Motion against the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 28 July, 2008, ERN 00208225-00208240, D97 (The Defense Motion argued in part that JCE III as applied by the *Tadic* decision of the International Criminal Tribunal for the former Yugoslavia [ICTY] Appeals Chamber is a judicial construct that does not exist in customary international law or, alternatively, did not exist in 1975–79); Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise, Case of Ieng Sary, No. 002/19-09-2007-ECCC/OCIJ, 31 December 2008; *see also* Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC-OCIJ (Dec. 8, 2009) (recognizing JCE as customary international law applicable to the ECCC).

65. *See generally* David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J. L. & PUB. POL'Y 359 (1985).

66. *See generally* Matthew A. Pauley, *The Pinkerton Doctrine and Murder*, 4 PIERCE L. REV. 1 (2005).

Criminal Tribunal for the Former Yugoslavia in the 1998 *Tadic* case,[67] it has been accepted that JCE is a mode of liability applicable to international criminal trials. Dozens of cases before the Yugoslavia Tribunal, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Panels for the Trial of Serious Crimes in East Timor, and the Special Tribunal for Lebanon have recognized and applied JCE liability during the last ten years.

These modern precedents, however, were not directly relevant to the Cambodia Tribunal because the crimes under its jurisdiction had occurred some twenty years earlier. Under the international law principle of *nulem crimin sine lege* (the equivalent to the U.S. Constitution's *ex post facto* law prohibition), the Cambodia Tribunal could only apply the substantive law and associated modes of liability that existed as part of customary international law in 1975. Therefore, a critical question before the Cambodia Tribunal was whether the Nuremberg Tribunal precedent and the UN's adoption of the "Nuremberg Principles" were sufficient to establish JCE liability as part of customary international law following World War II.

The attorneys for the Khmer Rouge Defendants argued that Nuremberg and its progeny provided too scant a sampling to constitute the widespread state practice and *opinio juris* required to establish JCE as a customary norm as of 1975.[68] In response, the Prosecution brief maintained that Nuremberg constituted an instance in which there is such a fundamental change to the international system that a new principle of customary international law can arise with exceptional velocity. Despite the dearth of State practice, the Cambodia Tribunal ultimately found JCE applicable to its trials based on the Nuremberg precedent and UN General Assembly endorsement of the Nuremberg Principles.[69]

While the Nuremberg trials were not without criticism, there can be no question that Nuremberg represented a paradigm-shifting development in international law. The International Law Commission (ILC) has recognized that the Nuremberg Charter and Judgment gave birth to the entire international law paradigm of individual criminal

67. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

68. For the definition of "customary international law," *see North Sea Continental Shelf*, 1969 I.C.J. ¶ 77.

69. Decision on the Appeals Against the Co-Investigative Judges' Order on Joint Criminal Enterprise (JCE), Ieng et al. (002/10-09-2007-ECCC/TC), Trial Chamber (June 17, 2011) (discussing how in Case 002, the ECCC Pre-Trial Chamber later confirmed that JCE I and JCE II reflected customary international law as of 1976, but questioned whether JCE III was actually applied at Nuremberg, and therefore was not applicable to the ECCC trial).

responsibility.[70] Prior to Nuremberg, the only subjects of international law were States, and what a State did to its own citizens within its own borders was its own business. Nuremberg fundamentally altered that conception. As Anne-Marie Slaughter and William Burke-White observed, "[i]nternational law now protects individual citizens against abuses of power by their governments [and] imposes individual liability on government officials who commit grave war crimes, genocide, and crimes against humanity."[71] The ILC has described the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg as the "cornerstone of international criminal law" and the "enduring legacy of the Charter and Judgment of the Nuremberg Tribunal."[72]

Importantly, on December 11, 1946, in one of the first actions of the newly formed United Nations, the UN General Assembly unanimously affirmed the principles from the Nuremberg Charter and judgments in Resolution 95(I).[73] This General Assembly Resolution

70. Michael P. Scharf, *Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L. J. 439, 454 (2010), http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1765&context=cilj [http://perma.cc/UB8Y-7UZ8].

71. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L. J. 1, 13 (2002).

72. *See* Rep. of the Int'l Law Comm'n on the Work of its Forty-Eighth Session, 51st Sess., May 6–July 26, 1996, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10 (1996), http://documents-dds-ny.un.org/doc/UNDOC/GEN/N96/236/37/img/N9623637.pdf?OpenElement [http://perma.cc/L6QY-BRYK].

73. G.A. Res. 95 (I) A/236 at 1144, Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal (Dec. 11, 1946), http://www.un-documents.net/a1r95.htm [http://perma.cc/3FGH-LHQ6]; The Resolution states in whole:
The General Assembly,
Recognizes the obligation laid upon it by Article 13, paragraph 1, subparagraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification; Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;
Therefore,
Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal; Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context

had all the attributes of a resolution entitled to great weight as a declaration of customary international law: It was labeled an "affirmation" of legal principles; it dealt with inherently legal questions; it was passed by a unanimous vote; and none of the members expressed the position that it was merely a political statement.[74]

Despite the fact that Nuremberg and its Control Council Law #10 progeny consisted of only a dozen separate cases tried by a handful of courts over a period of just three years, the ICJ,[75] the International Criminal Tribunal for the Former Yugoslavia,[76] the European Court of Human Rights,[77] and several domestic courts[78] have cited the General Assembly Resolution affirming the principles of the Nuremberg Charter and judgments as an authoritative declaration of customary international law.

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of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal. *Id.*

74. *Id.*

75. Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 172, ¶ 89 (July 9).

76. Prosecutor v. Tadic, Case No. IT-94-1-I, Opinion and Judgment, Trial Chamber, ¶ 623 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶141 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

77. The European Court of Human Rights recognized the "universal validity" of the Nuremberg principles in *Kolk and Kislyiy v. Estonia*, which stated:
Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, *inter alia*, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission.
See Kolk & Kislyiy v. Estonia, App. No. 23052/04, 24018/04, Eur. Ct. H.R., 8 (2006).

78. *See R. v. Finta*, [1994] 1 S.C.R. 701 (Can.) (describing how the General Assembly resolution affirming the Nuremberg Principles has been cited as evidence of customary international law in cases in Canada, Bosnia, France, and Israel); *see generally* Leila Sadat Wexler, The *Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994-1995) (summarizing the Touvier and Barbie cases in French courts).

Nuremberg, then, constitutes a prototypical Grotian Moment. The Tribunal's formation was in response to the most heinous atrocity in the history of humankind—the extermination of six million Jews and several million other "undesirables" by the Nazi regime. From a conventional view of customary international law formation, the amount of State practice was quite limited, consisting only of the negotiation of the Nuremberg Charter by four States, its accession by nineteen others, the judgment of the Tribunal, and a General Assembly Resolution endorsing (though not enumerating) its principles.[79] Moreover, the time period from the end of the war to the General Assembly endorsement of the Nuremberg Principles was a mere year: a drop in the bucket compared to the amount of time it ordinarily takes to crystallize customary international law.Yet, despite the limited state practice and minimal time, the ICJ, European Court of Human Rights, and four international criminal tribunals have confirmed that the Nuremberg Charter and Judgment immediately ripened into customary international law.

The Grotian Moment concept rationalizes this outcome. Nuremberg reflected a novel solution to unprecedented atrocity in the context of history's most devastating war. Beyond the Nuremberg trial, there was a great need for universal implementation of the Nuremberg Principles. Yet, on the eve of the Cold War, it was clear that a widely ratified multilateral convention would not be a practicable near term solution. In fact, it would take half a century before the international community was able to conclude a widely ratified treaty transforming the Nuremberg model into a permanent international criminal court. It is this context of fundamental change and great need for a timely response that explains how Nuremberg could so quickly and universally be accepted as customary international law.

B. Other Examples of Grotian Moments since World War II

As the *Max Planck Encyclopedia of Public International Law* has observed, "recent developments show that customary rules may come into existence rapidly."[80] The venerable publication goes on to explain:

> This can be due to the urgency of coping with new developments of technology, such as, for instance, drilling technology as regards the rules on the continental shelf, or space

79. *Grotian Moments*, *supra* note 17, at 67-68.

80. Tullio Treves, *Customary International Law*, Max Planck Encyclopedia of Public International Law ¶ 24 (2006), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?rskey=Vf48S0&result=4&prd=EPIL [http://perma.cc/3FGH-LHQ6].

> technology as regards the rule on the freedom of extra-atmospheric space. Or it may be due to the urgency of coping with widespread sentiments of moral outrage regarding crimes committed in conflicts such as those in Rwanda and Yugoslavia that brought about the rapid formation of a set of customary rules concerning crimes committed in internal conflicts.[81]

Let us examine each of these examples in turn, beginning with the rapid formation of the law of the continental shelf. In 1945, U.S. President Truman issued a proclamation that the resources on the continental shelf off the coast of the United States belonged to the United States.[82] This represented a major departure from the existing customary international law of the sea, under which the seabed outside of 12 nautical miles was considered free for exploitation by any State.[83] The Proclamation was driven by technological developments enabling exploitation of offshore oil and gas supplies and the intense post-war demand for such resources for a rebuilding world.[84] Though the United States recognized that it was acting as a custom pioneer,[85] it was careful to couch its justification in legal terms that would render the action easier to accept and replicate by other States. Despite the far-reaching change it represented, the Truman Proclamation was met with no protest;[86] rather, within five years, half of the world's coastal States had made similar claims to the resources of their continental shelves,[87] leading commentators to declare that the continental shelf concept had become virtually instant customary international law.[88] By 1969, the ICJ had confirmed that the Truman Declaration quickly generated customary international law binding on States that had not ratified the 1958 Law of the Sea Convention.[89]

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81. *Id.*

82. Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945), *available at* http://www.gc.noaa.gov/documents/gcil_proc_2667.pdf [http://perma.cc/T7QL-K6Q2].

83. BARRY BUZAN, SEABED POLITICS 8 (Praeger Publishers, 1976).

84. JAMES B. MORELL, THE LAW OF THE SEA: AN HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES 4 (McFarland & Co., 1992); *id.*at 7.

85. *Cf.* ANN L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 30 (Princeton Univ. Press, 1981) (citing Unpublished, National Archives Record Group 48) (analogizing President Truman's ingenuity).

86. BUZAN, *supra* note 83.

87. MORELL, *supra* note 84, at 2.

88. Hersch Lauterpacht, *Sovereignty Over Submarine Areas*, 27 Brit. Y.B. Int'l 376, 393 (1950).

89. *North Sea Continental Shelf* , 1969 I.C.J. 3, 33-34, ¶ 47.

Next, let us examine the formation of outer space law, which rapidly emerged from the great leaps in rocket technology in the 1960s, led by the Soviet Union and the United States, inaugurating the era of space flight. Rather than treat outer space like the high seas (open to unregulated exploitation), the international community embraced a unique set of rules to govern this new area as codified in the General Assembly Declaration on Outer Space, which was unanimously approved in 1963.[90] Though the amount of State practice was limited to a few dozen space flights launched by two States and the lack of protest by the States over which these rockets passed, States and scholars have concluded that the 1963 Declaration represented an authoritative statement of customary international law that rapidly formed in response to new technologies requiring a new international law paradigm.[91]

Finally, let us turn to the customary international law that rapidly emerged from the Yugoslavia Tribunal in the 1990s. The establishment of the Yugoslavia Tribunal was made possible because of a unique constellation of events at the end of the Cold War, which included the break-up of the Soviet Union, Russia's assumption of the Soviet seat in the Security Council, and the return of genocide to Europe for the first time since Nazi Germany. In its inaugural case, the Appeals Chamber of the Yugoslavia Tribunal rendered a revolutionary decision that for the first time held that individuals could be held criminally liable for violations of Common Article 3 and Additional Protocol II of the Geneva Conventions for war crimes committed in internal conflict.[92] This decision closed a gaping gap in the coverage of international humanitarian law and was soon thereafter affirmed by the Rwanda Tribunal[93] and Special Court for

90. G.A. Res. 18 (XVIII) A, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Dec. 13, 1962), http://www.un-documents.net/a18r1962.htm [http://perma.cc/EC7T-LQTN].

91. MANFRED LACHS, THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW-MAKING 138 (A.W. Sijthoff Int'l Publ'g Co. 1972).

92. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

93. U.N. Secretary-General, *Report of the Secretary General Pursuant to Paragraph 5 of Security Council Resolution 955*, ¶ 12, U.N. Doc. S/1995/134 (Feb. 13, 1995).

Sierra Leone.[94] It was codified in the 1998 Statute of the International Criminal Court, which has been ratified by 123 States.[95]

These case studies suggest that the Grotian Moment concept has several practical applications. It can explain the rapid formation of customary rules in times of rapid flux, thereby imbuing those rules with greater repute. It can counsel governments when to seek the path of a UN General Assembly resolution or non-binding Security Council resolution as a means of facilitating the formation of customary international law, and how to craft such a resolution to ensure that it is viewed as a capstone in the formation of such customary rules. It can, in apt circumstances, strengthen the case for litigants arguing the existence of a new customary international rule. It can also furnish international courts with the confidence to recognize new rules of customary international law in appropriate cases despite a relative paucity and short duration of State practice.

At the same time, one must approach the Grotian Moment concept with caution. As one author warns, "[i]t is always easy, at times of great international turmoil, to spot a turning point that is not there."[96] With this admonition in mind, the next section examines whether the customary international law governing use of force against non-state actors in self-defense has undergone rapid transformation since the terrorist attacks of September 11, 2001.

IV. THE CHANGING LAW OF SELF-DEFENSE AGAINST NON-STATE ACTORS

The United States' legal rationale for its military actions in Syria is encapsulated in the September 23, 2014 letter to the United Nations from the Permanent Representative of the United States. The letter states:

> Iraq has made clear that it is facing a serious threat of continuing attacks from ISIL coming out of safe havens in Syria. These safe havens are used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraq's people. For these reasons, the Government of Iraq

94. Statute of the Special Court for Sierra Leone 2002 Art. 3, http://www.rscsl.org/Documents/scsl-statute.pdf [http://perma.cc/Q77F-49RK].

95. Rome Statute of the International Criminal Court art. 8 ¶ 2(b)-(f)) (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002 (distinguishing between "international armed conflict" in paragraph 2(b) and "armed conflict not of an international character" in paragraphs 2(c)-(f)).

96. Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT'L L. REV. 1, 30 (2004).

> has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.
>
> ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders.[97]

As outlined in this communication, the United States has argued that it can attack ISIS targets in Syria without Syria's consent because (i) ISIS threatens Iraq, (ii) Iraq has requested the United States' assistance, (iii) ISIS has obtained safe havens in Syria, and (iv) the government of Syria has been unable to confront ISIS effectively.

Notably, the United States has not argued that Syria effectively controls ISIS, and as such its argument is a departure from the traditional view proclaimed by the International Court of Justice in the 1986 *Nicaragua Case* that victim States may not resort to force in response to attacks by non-State actors unless those actors were effectively controlled by the territorial State.[98] This section examines whether the systematic al-Qaeda terrorist attacks against the World Trade Center and Pentagon on September 11, 2001, the subsequent attacks by ISIS against the Russian airliner and Paris concert hall and stadium in October and November 2015, and the international community's political and tactical reactions to those attacks, generated a Grotian Moment, leading to a new rule of customary international law concerning use of force against non-state actors including ISIS.

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97. Letter from Samantha J. Power, *supra* note 7.

98. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27), http://www.icj-cij.org/docket/files/70/6503.pdf [https://perma.cc/N6MW-WZ5K].

A. Use of Force against Non-State Actors Prior to 9/11

Since the 1648 Peace of Westphalia, State sovereignty has been regarded as the fundamental paradigm of international law. Leading scholars have described the prohibition of the threat or use of force in Article 2(4) of the UN Charter as "the corner-stone of the Charter system."[99] The customary international law right to use force in self-defense as an exception to Article 2(4) is codified in Article 51 of the UN Charter. The Charter recognizes an important limit to that right, however, permitting use of force in self-defense only "if an armed attack occurs."[100] The UN Charter does not define "armed attack," but the International Court of Justice in the *Nicaragua Case* held that only the "most grave forms of the use of force" constitute an armed attack.[101]According to the ICJ, to qualify as an armed attack triggering the right of self-defense, the assault must reach a certain significant scale of violence above "mere frontier incidents."[102] However, the ICJ has also suggested that a string of small-scale attacks can in aggregate constitute an armed attack.[103] Assuming that the attack threshold is reached either by a particularly serious terrorist attack or by a series of attacks, two questions arise: first, whether the armed attack must be attributable to the State against whom the force will be used; and second, whether targeting terrorists before they launch a new attack is lawful.

1. State Attribution

The International Court of Justice has repeatedly held that unless the acts of non-state actors are attributable to the territorial State, use of force against non-state actors in that State is unlawful.[104] This is because when a rebel group or terrorist organization is physically located within the territory of another State that is not in effective control of its operations, the right of self-defense collides with two

99. JAMES L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 414 (Oxford Univ. Press, 6th ed. 1963); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 732 (Oxford Univ. Press, 7th ed. 2008).

100. U.N. Charter, art. 51.

101. Nicar. v. U.S., 1986 I.C.J. 14, at ¶ 191.

102. *Id.* at ¶ 195.

103. *See generally Id.*at ¶¶ 119-120, 130-132; *see also Armed Activities*, *supra* note 8, at ¶ 146 ("[E]ven if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC").

104. *See generally* Nicar. V. U.S., 1986 I.C.J. 14 (holding that the United States unlawfully used force against another state); *Armed Activities*, *supra* note 8, at ¶¶ 28-166 (holding unlawful use of force and violation of territorial sovereignty).

other fundamental principles of international law: the sovereign equality of States and the renunciation of force in international relations.[105] The rationale behind the attribution requirement is that a state cannot be held responsible for the acts of all whose activities originate in its territory.[106] "If it were otherwise, Colombia, for example, might be liable for the acts of international drug traffickers working from Colombia, or Russia might be held responsible for the international activities of the 'Russian Mafia.'"[107] Thus, under the ICJ's holdings in *Nicaragua*,[108] *Oil Platforms*,[109] *The Wall Advisory Opinion*,[110] and the *Congo* case,[111] to use force against a terrorist organization whose conduct is not imputable to the territorial State would itself constitute an unlawful armed attack, warranting justified use of force in response by the territorial State.

Under the International Court of Justice's jurisprudence, attribution requires that the territorial State have "effective control" of the non-state actors.[112] This standard comes from the *Nicaragua Case*, where the Court was presented with the question of whether the actions of Nicaragua in supporting rebels in El Salvador through the provision of weapons was sufficient to justify military action by the United States in collective self-defense with El Salvador.[113] The Court stated that sending "armed bands" into the territory of another State would be sufficient to constitute an armed attack, but "the supply of arms and other support to such bands cannot be equated with an armed attack."[114] In the same case, the ICJ found that the acts of the U.S.-assisted Nicaraguan rebel group called the "Contras" could not be attributed to the United States because there was no

105. U.N. Charter art. 2, at paras. 1, 4.

106. *Grotian Moments*, *supra* note 17, at 185.

107. Greg Travalio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT'L L. 97, 104 (2003).

108. Nicar. v. U.S., 1986 I.C.J. at ¶ 195.

109. *Oil Platforms*, *supra* note 8.

110. The Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) ("Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State….[T]herefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence").

111. *Armed Activities*, *supra* note 8, at ¶ 162-165.

112. *Grotian Moments*, *supra* note 17, at 185.

113. Nicar. v. U.S., 1986 I.C.J. at ¶ 229.

114. *Id.* at ¶ 247.

clear evidence that the United States had "exercised such a degree of control in all fields as to justify treating the Contras as acting on its behalf."[115] It is important to note here that the *Nicaragua* attribution requirement was not designed to answer the question of whether an attack by an independent non-state actor could trigger the right to use force in self-defense against that non-state actor, but rather the question of whether an attack by the non-state actor could be considered an armed attack by the State that sent the armed groups and therefore justify force in self-defense against that State.

2. Anticipatory Self-Defense under Customary International Law

Anticipatory self-defense is the use of force to stop an attack that has not actually commenced but which is reasonably believed to be imminent. The concept recognizes that "no State can be expected to await an initial attack which, in the present state of armaments, may well destroy the State's capacity for further resistance and so jeopardize its very existence."[116] Anticipatory self-defense has its customary international law origins in the notorious *Caroline* incident of 1837.[117]

During the *Caroline* incident, Canada (then part of the United Kingdom) faced an armed insurrection mounted from U.S. territory led by non-state actors.[118] The United Kingdom responded to the armed insurrection by attacking the insurgent's supply ship, the *Caroline*, while it was docked on the U.S. side of the Niagara River. In an exchange of diplomatic notes between the United States Secretary of State, Daniel Webster, and the British Foreign Minister, Lord Ashburton, the two sides agreed that a State would be justified in using force against non-state actors in another State where the "necessity for self defense" was "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[119] While courts and commentators often substitute the term "imminent" for the longer formulation, the *Caroline* definition is widely recognized as reflecting customary international law.

115. *Id.* at ¶ 109.

116. D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 191-92 (1958).

117. Anthony Clark Arend, *International Law and Preemptive Use of Military Force*, WASH. Q. 89, 90 (2003).

118. Hunter Miller, *British-American Diplomacy: The Caroline Case*, AVALON PROJECT (Sep. 26, 2015, 10:00 AM), http://avalon.law.yale.edu/19th_century/br-1842d.asp [https://perma.cc/X44G-Q7KR].

119. Letter from Daniel Webster, US Secretary of State, to Mr. Fox (April 24, 1841), 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (James Rigway & Sons 1857).

B. Did the 9/11 Attacks Alter the Paradigm?

When the rules governing use of force in self-defense were promulgated, most international conflicts were conducted by States utilizing large movements of military personnel and munitions.[120] In the past, non-state actors (pirates, guerrillas, drug traffickers, and terrorists) appeared less threatening to state security than the well-funded, well organized, and potent armed forces of an enemy State. To the extent that terrorists were a concern, it was because they were financed by State supporters, such as Iran, Sudan, and Syria.[121] The terrorist attacks of September 11, 2001, changed that perception by starkly illustrating that small groups of non-state actors, acting from failed States without direct government support, "can exploit relatively inexpensive and commercially available technology to conduct very destructive attacks over great distances."[122]

1. A Different Kind of Threat

In August 1996, Osama bin Laden, the multi-millionaire leader of a then little known group called al-Qaeda, issued a statement entitled "Ladenese Epistle: Declaration of War," in which he called for all Muslims to make holy war (jihad) against American forces in Saudi Arabia, and specifically advocated the use of terrorist with the goal of "great losses induced on the enemy side (that would shaken and destroy its foundations and infrastructures)."[123] In February 1998, bin Laden followed the Declaration of War by issuing a religious edict (fatwa) to all Muslims, declaring that "to kill the Americans and their

120. At the time of the adoption of the U.N. Charter, there had been only a handful of instances in which States pursued ongoing military operations against non-state actors in the territory of other States. A survey of such actions would include the American military expedition into Mexico in 1916, which was provoked by attacks on American territory by the armed bands of Franciso (Poncho) Villa; the American military attack on pirates using Spanish-held Amelia Island off the Florida coast as a base of operations in 1817; and the 1838 Caroline incident, in which Britain attacked a steamer in order to prevent an attack by non-State actors on Canada. *See* Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 2 n. 6 (2004).

121. *State Sponsors of Terrorism*, U.S. DEP'T ST., http://www.state.gov/j/ct/list/c14151.htm [https://perma.cc/Y4HZ-597S].

122. Olumide K. Obayemi, *Legal Standards Governing Pre-Emptive Strikes and Forcible Measures of Anticipatory Self-Defense under the U.N. Charter and General International Law*, 12 ANN. SURV. INT'L & COMP. L. 19, 24 (2006).

123. Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 26 (2003).

allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it."[124] The fatwa further called on "every Muslim who believes in God and wishes to be rewarded to comply with God's order to kill the Americans and plunder their money wherever and whenever they find it."[125]

Subsequent events proved that bin Laden's al-Qaeda was not a mere group of crackpots, making grandiose proclamations of war, but a well-funded, well-organized, and deadly new terrorist organization with franchise cells across the globe.[126] The targets of al-Qaeda attacks have included U.S. forces in Yemen in 1992, the U.S. embassies in Kenya and Tanzania in 1998, the U.S.S. Cole in Yemen in 2000, and the simultaneous attacks on the World Trade Center and Pentagon on September 11, 2001.[127] The death toll from September 11th was over 3,000, which is higher than that of the American casualties in the War of 1812, the U.S.-Mexican War, or the Japanese attack on Pearl Harbor in 1941.[128] Aside from the human casualties, the economic damage to the United States has been estimated at over $630 billion.[129] Al-Qaeda attacks after 9/11 have included the November 2003 truck bombings in Istanbul which injured 700 and killed 74 people, the March 2004 train bombings in Madrid which injured 1,800 and killed 191 people, and the July 2005 train and bus bombings in London which injured 700 and killed 56 people.[130]

The 9/11 attacks forced States to reevaluate the long-standing notion that only a State has the capacity to commit an armed attack against another State giving rise to the right to respond with force in self-defense. Post-9/11, terrorist threats come from stateless entities that possess many of the attributes of a state: wealth, willing forces, training, organization, and potential access to weapons of mass destruction. If such a non-state actor commits a series of attacks against a State, and the acts are of sufficient scale and effect to

124. *Id.*

125. *Id.*

126. Joshua Bennett, *Exploring the Legal and Moral Bases for Conducting Targeted Strikes outside of the Defined Combat Zone*, 26 NOTRE DAME J. L., ETHICS & PUB. POL'Y 549, 551 (2012).

127. Brown, *supra* note 123, at 26-27.

128. Brown, *supra* note 123, at 27.

129. Norman G. Printer, Jr., *The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. INT'L L. & FOREIGN AFF. 331, 353 (2003).

130. Paul Carsten, *Al-Qaeda attacks in Europe since September 11*, TELEGRAPH (Mar. 21, 2012, 1:30 PM), http://www.telegraph.co.uk/news/worldnews/al-qaeda/9157929/Al-Qaeda-attacks-in-Europe-since-September-11.html [https://perma.cc/JCK2-CXQT].

amount to an armed attack, then arguably force in self-defense should be permitted against the non-state actor that presents a continuing threat where the host State has manifested an inability or unwillingness to respond effectively to the threat.

2. The International Response to 9/11

The day after the 9/11 attacks, the United States informed the UN Security Council that it had been the victim of an armed attack and declared its intent to respond under Article 51 of the UN Charter.[131] The North Atlantic Treaty Organization (NATO) for the first time in its history invoked Article 5 of the North Atlantic Treaty, which treats an armed attack on one member as an armed attack on all of them.[132] The Organization of American States (OAS) took a similar stance in OAS Resolution 797. Invoking the 1947 Inter-American Treaty of Reciprocal Assistance, which provides that in the event of an armed attack on an American State, the Parties agreed that "each one of [them] undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense,"[133] the OAS called upon "the government of the member States and all other governments to use all necessary means at their disposal to pursue, capture, and punish those responsible for the attacks, and to prevent additional attacks."[134] Meanwhile the United States and Australia jointly invoked the collective defense article of the ANZUS Treaty, which provides for the parties to collectively "resist armed attack" and "act to meet the common danger."[135] In addition, the Japanese government took the position that the September 11th attack was an attack on the United States, and soon thereafter enacted legislation to enable Japan to deploy its forces in support of U.S. operations against al-Qaeda.[136]

131. U.N. SCOR, 56th Sess., 4730 mtg. at 7-8, U.N. Doc. S.PV. 4370 (September 12, 2001) (Statement of Ambassador James B. Cunningham, U.S. Deputy Representative to the United Nations on September 12, 2001).

132. Brown, *supra* note 123, at 28.

133. Inter-American Treaty for Reciprocal Assistance, Sept. 2, 1947, T.I.A.S. No. 1,838.

134. OEA/SER.G CP/RES. 797 1293/01(Sept. 19, 2001).

135. Security Treaty Between Australia, New Zealand and the United States of America, arts. II and IV, Sept. 1, 1951, T.I.A.S. 2493.

136. Brown, *supra* note 123, at 29 (citing Government of Japan, Ministerial Meeting Concerning Measures Against Terrorism and Press Conference of the Prime Minister (Sept. 19, 2001); Government of Japan, Basic Plan regarding Response Measures Based on the Anti-Terrorism Special Measures Law, Cabinet Decision of Nov. 16, 2001 (Provisional Translation)).

Consistent with these developments, the Security Council adopted Resolution 1368, which condemned the 9/11 attacks and "recognize[ed] the inherent right of individual or collective self-defense in accordance with the Charter."[137] This action was not a Chapter VII authorization to use force, but rather a confirmation that the United States could invoke its right to respond with force under Article 51 of the UN Charter, despite the fact that al-Qaeda was a non-state actor. Consistent with that right, on October 7, 2001, the United States informed the Council that it had launched Operation Enduring Freedom.[138] Air strikes were directed at camps allegedly belonging to al-Qaeda and other Taliban military targets throughout Afghanistan. There was no international protest or condemnation of the operation;[139] rather, through word and actions, a long list of States expressed support for the operation.[140]

Had al-Qaeda been a State, its attacks (both in the aggregate but also some of the most spectacular individual attacks) would have passed the "scale and effect" test of the *Nicaragua Case*. But as a non-state actor based in Afghanistan, under the *Nicaragua* precedent, use of force against al-Qaeda in Afghanistan would only be permissible if the Taliban government of Afghanistan had "effective control" of the terrorist organization.[141]

Many commentators believe that Afghanistan met the *Nicaragua* test of effective control because the Taliban and al-Qaeda were in effect partners.[142] Yet, the facts do not establish that al-Qaeda acted as an agent or instrumentality of the Afghan State, but rather that al-Qaeda pursued an independent agenda and acted autonomously

137. S.C. Res. 1368, ¶ 3 pmbl. (Sept. 12, 2001).

138. Permanent Rep. of the United States of America to the U.N., Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/UN/2001/946 (Oct. 7, 2001).

139. Rebecca Kahan, *Building a Protective Wall Around Terrorists – How the International Court of Justice's Ruling in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Made the World Safer for Terrorists and More Dangerous for Member States of the United Nations*, 28 FORDHAM INT'L L. J. 827, 844-845 (2005).

140. Benjamin Langille, *It's Instant Custom: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145, 155 (2003).

141. Nicar. v. U.S., 1986 I.C.J. 14, at ¶ 115.

142. *See* Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 35-36 (2002).

within Afghanistan.[143] Neither did the Taliban government of Afghanistan endorse the September 11th attacks.[144] Rather, Taliban officials denied that bin Laden had anything to do with the attack, asserting that "bin Laden lacked the capability to pull off large-scale attacks," and proclaiming their confidence that a U.S. investigation would find him innocent.[145]

On the other hand, the Taliban government knowingly harbored al-Qaeda, providing its members a place of refuge and allowing the organization to use Afghanistan as a base from which to plan, sponsor, and launch international terrorist operations.[146] The Taliban government repeatedly ignored the Security Council's demands to close down the terrorist training facilities in Afghanistan and extradite bin Laden, thereby enabling al-Qaeda to represent a continuing threat to the United States.[147]

3. The Bush Doctrine

A week after the terrorist attacks of 9/11, the United States announced the "Bush Doctrine" when President George Bush declared: "Our war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. . . . Either you are with us or you are with the terrorists."[148] The most important aspect of the Doctrine was encapsulated in Bush's statement that "we will make no distinction between the terrorists who committed these acts and those who harbor them."[149] In a speech before a joint session of Congress on

143. ALEX STRICK VAN LINSCHOTEN & FELIX KUEHN, AN ENEMY WE CREATED: THE MYTH OF THE TALIBAN-AL QAEDA MERGER IN AFGHANISTAN 1990-2010 (C. Hurst & Co., 2012).

144. *See* Bill Roggio, *Afghan Taliban claims it 'had no hand in the 9/11 incident'*, LONG WAR J. (SEPTEMBER 11, 2012), http://www.longwarjournal.org/archives/2012/09/afghan_taliban_claim.php [https://perma.cc/5NTW-F4CC] (writing that "The Afghan Taliban released a statement denying responsibility for the Sept. 11, 2001 attacks on the US and claimed the group would not allow Afghanistan to be "be used to harm anyone.").

145. Brown, *supra* note 123, at 11.

146. *See generally* Roggio, *supra* note 144.

147. S.C. Res. 1214, ¶ 13 (Dec. 8, 1998); S.C. Res. 1267, ¶ 1-2 (Oct. 15, 1999); S.C. Res. 1333 ¶ 1-3 (Dec. 19, 2000).

148. *Transcript of President Bush's address to a joint session of Congress on Thursday night, September 20, 2001*, CNN (Sept. 21, 2001, 2:27 AM), http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/ [https://perma.cc/HLF9-WT3M].

149. Brown, *supra* note 123, at 17 (*quoting* George W. Bush, *Address to the Nation on the Terrorist Attacks*, available at http://www.presidency.ucsb.edu/ws/?pid=58057 [https://perma.cc/3E9E-RPPV]).

September 20, 2001, President Bush said, "[f]rom this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."[150]

In the words of White House spokesman Ari Fleisher, the Bush Doctrine represented "a dramatic change in American policy."[151] Yet, in a five-day debate in the United Nations General Assembly, where State after State condemned the 9/11 attacks, not one objection was voiced to the newly announced U.S. policy.[152]

Although it represented a clear departure from the *Nicaragua Case*, the Bush Doctrine was rooted in historic provenance. The general affirmative obligation that every State not knowingly allow "its territory to be used for acts contrary to the rights of other States" was first articulated by the International Court of Justice in the 1949 *Corfu Channel Case*.[153] There, the ICJ held Albania liable for damage to British warships that struck mines in Albanian territorial waters.[154] Although Great Britain could not prove that Albania had laid the mines or had engaged another State to do so, the ICJ found that Albania must have known of the existence of the mines because Albania was known to have jealously guarded its side of the Corfu Strait, and this was enough to establish Albania's liability.[155]

This principle is analogous to the rules relating to neutrality adopted in the Hague Convention (V) some one hundred years ago.[156] According to the Hague Convention, "neutral powers" may not permit belligerents to move troops, munitions, or supplies across their territory, nor may they allow their territory to be used to form "corps of combatants" nor "recruiting agencies."[157] Should the neutral State prove unwilling or unable to uphold these proscriptions, the other belligerent State is justified in attacking the enemy forces in the territory of the neutral State.[158]

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150. Travalio & Altenburg, *supra* note 107, at 108 (quoting *Address to a Joint Session of Congress and the American People* (Sept. 20, 2001)).

151. *Id.* (*quoting* Statement of Ari Fleisher (Sept. 21, 2001)).

152. Travalio & Altenburg, *supra* note 107, at 109.

153. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, at ¶ 22 (April 9).

154. *Id.* at ¶ 26.

155. *Id.* at ¶ 19.

156. Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 5, Oct. 18, 1907, 36 Stat 2310.

157. *Id.* at arts. 2, 4, 5.

158. Deeks, *supra* note 9, at 497-501.

The application of this concept to terrorism was arguably confirmed by Security Council Resolution 1373, adopted shortly after September 11, 2001.[159] In reaffirming the right of self-defense in the context of the September 11 attacks while at the same time stating that States are prohibited from allowing their territory from being used as a safe haven for terrorist groups, the resolution suggests that allowing known terrorists to operate freely in their territory triggers the right to self-defense against the non-State actors located within the host State's territory.

Summing up what he considered to be the current state of international law, UN Special Rapporteur Philip Alston stated: "A targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty [where] the first, targeting State has a right under international law to use force in self-defense under Article 51 of the UN Charter, [and] the second State is unwilling or unable to stop armed attacks against the first State launched from its territory."[160] The fact that the "unwilling or unable" test has its roots in the customary law of neutrality anchors the test's legitimacy as applied to use of force in self-defense against non-state actors present in a foreign country.[161]

The extent of permissible military action used to combat terrorists in a country unwilling or unable to control them depends on the level of support provided by the harboring State. Consistent with the Hague Convention (V) discussed above, with its precept of proportionality, "[i]f a State does nothing but allow terrorists to operate from its territory, providing no meaningful support, the extent of the permissible military force is only that which is necessary to deal with the terrorist threat itself. Neither the military of the harboring State nor its infrastructure is a permissible target."[162] In such case, there is a distinction between using force in a State and using force against the state itself.[163] A swift, precision strike against terrorists or their training facilities in the territorial State (a so-called "in and out operation") represents a reasonably limited interference with the territorial integrity or political independence of the territorial

159. S.C.Res. 1373, U.N. Doc. (Sept. 28, 2001).

160. Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on Targeted Killings,* Human Rights Council, ¶ 35, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter *Study on Targeted Killings*].

161. *See* Deeks, *supra* note 9, at 497.

162. Travalio & Altenburg, *supra* note 107, at 112.

163. NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 36 (Vaughan Lowe, Dan Sarooshi & Stefan Talmon eds., 2010).

State under these circumstances.[164] The use of force against the non-state actor taken in self-defense is a lawful use of force, and the territorial State cannot therefore mount a forcible resistance in the name of its own self-defense.[165] If, on the other hand, the territorial State is implicated in the terrorist attack, then the victim State may have the right to use force against the territorial State and its agents, in addition to using it against the non-state actor.[166]

A more controversial aspect of the Bush Doctrine was its assertion of an expanded right of anticipatory self-defense against terrorist threats. In the National Security Strategy issued in the aftermath of 9/11, President Bush explained:

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue States and terrorists do not seek to attack us using conventional means … Instead, they rely on acts of terror and, potentially, the use of weapons of mass destructions – weapons that can easily be concealed, delivered covertly and used without warning. The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if the uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively. The United States will not use force in all cases to preempt emerging threats, nor should nations use preemption as a pretext for aggression. Yet in an age where the enemies of civilization openly and actively seek the world's most

164. In 1976, Israel conducted a raid on the Ugandan airport in Entebbe to rescue Israeli hostages held by Palestinian hijackers. The hijackers were killed. At the UN Security Council meeting, the Israeli representative argued that the operation was not against the territorial integrity or political independence of Uganda. *See* U.N. SCOR, 31st Sess., 1939th mtg. at ¶121, U.N. Doc. S/PV.1939 (July 9,1976).

165. LUBELL, *supra* note 163, at 41.

166. LUBELL, *supra* note 163, at 40.

> destructive technologies, the United States cannot remain idle while dangers gather.[167]

As depicted in the National Security Strategy, the Bush Doctrine did not just advocate anticipatory self-defense, (striking an enemy as it prepares an attack), but also "preventive self-defense" (striking an enemy even in the absence of specific evidence of an imminent attack). To that end, the Bush Administration implemented a policy of targeted killing of key al-Qaeda figures in Afghanistan, Pakistan, Iraq, Yemen, Somalia, and elsewhere.[168]

This expansion of the anticipatory self-defense concept was seen as warranted by the unique attributes of the continuing threat posed by the al-Qaeda terrorist organization.[169] "Al-Qaeda and its affiliates are well funded with access to deadly means, potentially including chemical, biological, and nuclear weapons. They attack without warning, target civilians indiscriminately, and employ suicide missions on a regular basis. They had committed a series of prior attacks against the United States and publicly announced an intention to continue to attack in the future."[170] Arguably under these circumstances, it is reasonable to deem an attack by such organizations as "continuing" or "always imminent" for purposes of the *Caroline* standard.[171]

"In implementing the Bush Doctrine, the United States began to employ newly developed technology in the form of unmanned Predator drones equipped with laser-guided Hellfire missiles controlled by operators located thousands of miles away."[172] Predator drones eliminate the risk to U.S. pilots. They are capable of remaining in the air ten times longer and cost about one-twentieth as much as combat

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167. National Security Council, The National Security Strategy of the United States of America, 15 (2002), http://www.state.gov/documents/organization/63562.pdf [https://perma.cc/6AZP-QAAV] [hereinafter *National Security Strategy*].

168. *Grotian Moments*, *supra* note 17, at 200.

169. *The National Defense Strategy of the United States of America*, U.S. DEP'T OF DEFENSE, 9 (2005), http://www.acq.osd.mil/cp/cbd_docs/references/nds2005.pdf [https://perma.cc/T5VR-GU3Q].

170. *Grotian Moments*, *supra* note 17, at 200.

171. Travalio & Altenburg, *supra* note 107, at 116. *Contra Study on Targeted Killings, supra* note 160, at ¶ 45 (characterizing preventive self-defense as "deeply contested and lack[ing] support under international law.").

172. *Grotian Moments*, *supra* note 17, at 200-01.

aircraft.[173] Because they are slow and vulnerable to signal jamming, the drones are not perceived to be a serious threat to an advanced military, but they are ideal for use against non-state actors in failed or struggling States.[174] The first drone strike outside Afghanistan occurred in 2002 in Yemen, killing alleged al-Qaeda leader Ali Aaed Senyan al-Harithi and four other men.[175]

When it came into office, the Obama Administration embraced the Bush Doctrine's "unable and unwilling" principle, and relied on it in significantly expanding the drone targeted killing program.[176] According to President Obama's CIA Director, Leon Panetta, due to their precision and effectiveness, drones have become "the only game in town in terms of confronting or trying to disrupt the al-Qaeda leadership."[177]

The Obama Administration's State Department Legal Adviser, Harold Koh, delivered a major policy speech at the Annual Meeting of the American Society of International Law on March 25, 2010, in which he provided the legal justification for the Administration's use of drones to fight terrorist groups around the world. Koh began by stressing that the attacks of 9/11 triggered the U.S. right of self-defense against al-Qaeda and other terrorist organizations. Echoing the Bush Administration's characterization of a "global war" against Al-Qaeda,[178] Koh asserted "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."[179] Some commentators have argued that the armed conflict with al-Qaeda must be limited to territory on which

173. Michael W. Lewis, *Drones and Boundaries of the Battlefield*, 47 TEX. INT'L. L.J. 293, 296-97 (2012).

174. *Id.* at 298.

175. Molly McNab & Megan Matthews, *Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law*, 39 DENV. J. INT'L L. & POL'Y 661, 672 (2011).

176. *Grotian Moments*, *supra* note 17, at 201.

177. *See* Andrew C. Orr, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law,* 44 CORNELL INT'L L.J. 729, 735 (2011) (quoting Ken Dilanian, *Panetta says CIA Operations in Pakistan Taking 'Serious Toll' on al Qaeda's Operations*, L.A. TIMES (Oct. 19,2010)).

178. Harold Hongju Koh, Legal Adviser, U.S. State Department, The Obama Administration and International Law, Remarks at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at http://go.usa.gov/3pah5 [https://perma.cc/MK2M-5T9N]).

179. *Id.*

the threshold of violence for an armed conflict is currently occurring, which at the time of this writing would include Afghanistan, parts of Pakistan, Yemen, Libya, Syria, and Iraq.[180] Koh's broader formulation recognizes that the limited approach would effectively create sanctuaries for terrorist organizations in failed and weak States such as Somalia and Sudan.[181]

Next, Koh argued that the right to use force in self-defense against al-Qaeda was continuous in light of the continuous threat presented: "As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks."[182] But then Koh walked back somewhat from the conception of preventive war enshrined in the Bush Doctrine, saying: "Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other States involved, and the willingness and ability of those States to suppress the threat the target poses."[183]

Two years later, U.S. Attorney General Eric Holder provided further details about the Obama Administration's criteria for authorizing a targeted killing. According to Holder, authorization would require three findings: "First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles."[184]

Until now, we've been examining principles related to *jus ad bellum* (the lawfulness of the resort to force). Attorney General Holder's statement reminds us that a forcible response to terrorists must also comply with the fundamental rules of *jus in bello* (the lawfulness of the means employed and target selected). In his speech before the American Society of International Law, Harold Koh described the applicable *jus in bello* principles as "first, the principle

180. Lewis, *supra* note 173, at 296, 309.

181. *Grotian Moments*, *supra* note 17, at 202.

182. Koh, *supra* note 178.

183. Koh, *supra* note 178.

184. *Contemporary Practice of the United States Relating to International Law*, 106 AM. J. INT'L L. 643, 675 (2012).

of distinction, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and second, the principle of proportionality, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated."[185]

Koh's description assumes that the high-level members of al-Qaeda themselves are lawful targets. Since they are not part of a military, the laws of war would treat al-Qaeda members presumptively as civilians who are immune from targeting unless they either "directly participate in the hostilities" or take on a "continuous combat function" within the group.[186] In May 29, 2009, the International Committee of the Red Cross published a study entitled "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law," whose aim was in part to define when targeted killings of members of terrorist groups would be consistent with International Humanitarian Law.[187] The Interpretive Guidance states that "individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities assume a continuous combat function."[188] The targeted killings to date appear to involve al-Qaeda figures that would meet this description.[189]

Meanwhile, there has been little protest as other States have begun to cite the U.S. response to al-Qaeda to justify their own acts against terrorist groups operating from neighboring States. Examples include:

- The April 2002 killing by Russian armed forces of "Chechen rebel warlord" Omar Ibn al Khattab.[190]

185. Koh, *supra* note 178.

186. Lewis, *supra* note 173, at 310-11.

187. Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 641 (2010).

188. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* 90 INT'L REV. RED CROSS 991, 1007 (2009).

189. *Grotian Moments*, *supra* note 17, at 204.

190. *See* Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 257 (2011) (discussing Russia's Pankisi Gorge crisis, saying that "the conflict indicates that other actors (for example, Russia) besides the usual suspects have begun to appropriate the United States' "unable or unwilling" standard to justify the use of force against state harboring terrorists."); Ian Traynor, *Russia Claims to have killed Arab warlord in*

- The February 2008 offensive by Turkish forces against PKK bases in northern Iraq.[191]

- The March 2008, airstrike by Colombia against a FARC terrorist camp just inside Ecuador's border, killing the FARC's second-in-command, Raul Reyes.[192]

- The December 2006 use of force by Ethiopian armed forces against the "Islamic Courts" terrorist group which had been conducting a series of cross-border attacks from Somalia.[193]

- The May 2011 mission by U.S. Navy Seals to kill Osama bin Laden at his secret compound in northern Pakistan on a mission to kill bin Laden.[194]

- The September 2011 Predator drone attack by the United States that killed U.S. national Anwar al-Awlaki in Yemen.[195]

- The October 2011 Kenyan incursion into Somalia in response to cross-border attacks by the Al-Shabaab terrorist group.[196]

C. A Grotian Moment that was Still One Case Away

Some scholars have opined that "the attack of September 11th and the American response represent a new paradigm in the international law relating to the use of force."[197] They base this conclusion on the statements of the United States, NATO, the OAS, and other States that 9/11 constituted an armed attack by al-Qaeda which warranted

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Chechnya, The Guardian (Apr. 25, 2002, 21:37 EDT), http://www.theguardian.com/world/2002/apr/26/chechnya.iantraynor [https://perma.cc/CMH7-9EPA].

191. Reinold, *supra* note 190, at 269.

192. Deeks, *supra* note 9, at 534.Unlike the other incidents listed above, in this case the OAS called the Colombian incursion "a violation of the sovereignty and territorial integrity of Ecuador," and declared that "the right of each State to protect itself … does not authorize it to commit unjust acts against another State." Reinold, *supra* note 190, at 274.

193. Awol K. Allo, *Ethiopia's Armed Intervention in Somalia: The Legality of Self-Defense in Response to the Threat of Terrorism,* 39 DENV. J. INT'L. & POL'Y 139, 139 (2010).

194. Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of Bin Laden*, 39 DENV. J. INT'L L.& POL'Y 569, 579-580 (2011).

195. Jordan J. Paust, *Propriety of Self-Defense Targeting of Members of Al Qaeda and Applicable Principles of Distinction and Proportionality*, 18 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 565, 574 (2012).

196. *The Kenyan Military Intervention in Somalia: Africa Report No. 184*, INT'L CRISIS GROUP, pgs. 1-2 (Feb. 15, 2012).

197. *See e.g.*, Brown, *supra* note 123, at 2.

force in self-defense; Security Council Resolutions 1368 and 1373 confirming the right to use self-defense in the context of the 9/11 attacks; the international community's positive reaction to the United States invasion of Afghanistan to dismantle al-Qaeda and topple its Taliban supporters; and finally the UN Special Rapporteur's conclusion that force in self-defense could be used against terrorist groups operating in the territory of States unwilling or unable to control them.[198] They argue that the reaction to 9/11 thus broke with the conception of Article 51 as a State-centered norm.

Moreover, the protracted quest of the international community to arrive at a consensus definition of terrorism got a substantial boost in 2011 when the Appeals Chamber of the Security Council-created Special Tribunal for Lebanon (STL)[199] concluded that "although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues, closer scrutiny reveals that in fact such a definition has gradually emerged."[200] Based on its extensive review of state practice and indicators of *opinio juris* (a sense of legal obligation), the Appeals Chamber declared that the customary international law definition of terrorism consists of "the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element."[201] The STL's definition of terrorism, together with the listing of terrorist groups and individuals by the Security Council's sanctions committee,[202] removed one of the

198. *Study on Targeted Killings*, supra note 160, at ¶ 40.

199. The Special Tribunal for Lebanon ("STL"), established in 2007 by the United Nations Security Council to prosecute those responsible for the 2005 bombings that killed former Lebanese Prime Minister Rafiq Hariri and twenty-two others, is the world's first international court with jurisdiction over the crime of terrorism. *See* Statute of the Special Tribunal for Lebanon, *appended to* S.C. Res. 1757 (May 30, 2007).

200. Ayyash et al., Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 83, ¶ 102 (Special Tribunal for Lebanon Appeals Chamber Feb. 16, 2011), *available at* http://www.stl-tsl.org/en/the-cases/stl-11-01/filings/main-case/orders-and-decisions/534-f0936 [https://perma.cc/F3MM-TUFK].

201. *Id.* at ¶ 85.

202. The UN Security Council adopted resolution 1267 on October 15, 1999 under chapter VII of the UN Charter, authorizing the Security Council's Sanctions Committee to establish a list of sanctioned individuals,

greatest obstacles to use of force against terrorists, namely the argument that "one man's terrorist was another man's freedom fighter."

As one commentator asserted, "the Bush Doctrine, first proclaimed by the U.S. in response to the terrorist attacks of September 11, 2011, became an instant custom during the days and weeks following the attacks."[203] Yet, 9/11 is better characterized as a Grotian Moment that was, until the 2015 ISIS attacks, still one step away from coming to fruition. The problem is that the Bush Administration's assertion that there is no difference between terrorists and States that harbor them,[204] and its assertion of a right to preventive self-defense against such States,[205] was unnecessarily broad and lacking nuance. A State may, for example, harbor a few terrorists or serve as the organization's headquarters. The terrorist group may be poorly armed or possess weapons of mass destruction. The State may provide the terrorists funding, passports, training, and intelligence, or may simply be acquiescing to their presence or too weak to quash them. The Bush Doctrine provides no guidance on how these different scenarios should be treated. Concern that the imprecision of the Bush Doctrine would lead to assertions by other States to justify aggression in the name of self-defense prompted pushback which came in the form of two post-9/11 cases decided by the International Court of Justice.

In its 2004 *Advisory Opinion on the Wall*, the ICJ rejected the Israeli claim to self-defense on the reasoning that self-defense under Article 51 is not available to Israel against non-state actors operating on territories under the control of Israel.[206] Then, in the 2005 *Armed Activities in the Congo Case*, the ICJ required the responsibility of the Congo for the attacks of Ugandan rebels operating from the Congolese territory in order to find Uganda's right to self-defense lawful.[207] These cases signaled the ICJ's "determination to counter a

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groups, and/or entities that were found to be associated with Al-Qaida and the Taliban. S.C. Res. 1267, ¶ 6 (Oct. 15, 1999).

203. Langille, *supra* note 140, at 154.

204. *National Security Strategy*, *supra* note 167, at 4.

205. *National Security Strategy*, *supra* note 167, at 4.

206. Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194 (July 9) [hereinafter *Legal Consequences*].

207. *See Armed Activities*, *supra* note 8, 2004 I.C.J. 168, 222-223 (holding that Uganda could not rely on self-defense to justify its military operation in the Congo because (1) Uganda did not immediately report to the Security Council following its use of force as required by Article 51, (2) Uganda's actions were vastly disproportionate to the threat, and (3) there was no evidence from which to impute the attacks against

more permissive reading of Article 51" brought on by the international community's reaction to 9/11.[208]

Scholars and certain members of the International Court of Justice have been highly critical of the ICJ's continued insistence after 9/11 that self-defense is only available in cases where the attack by non-state actors can be attributed to the territorial state. Scholars point out that the ICJ holdings are inconsistent with the wellspring of the customary law on self-defense, the *Caroline* case, which confirmed that anticipatory force in self-defense was lawful against non-State actors whose conduct was not attributable to a State.[209] Writing separately in the *Wall* case, Judge Higgins said, "There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defense is available only when an armed attack is made by a State."[210] Similarly, writing separately in the *Congo Case*, Judge Koojimans noted that in the era of al-Qaeda, it is "unreasonable to deny the attacked State the right to self-defense merely because there is no attacker State."[211] Judge Simma similarly concluded in his separate opinion in the *Congo* case that "Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as 'armed attacks' within the meaning of Article 51."[212]

While the International Court of Justice's *Wall* and *Congo* decisions may have put breaks on the rapidly crystallizing customary international law concerning use of force against non-state actors, they did not ultimately prevent the new rule from emerging. This is in part due to the fact that the situation in the *Wall* and *Congo* cases are distinguishable from that of a State using force against terrorists operating in a foreign State. In the *Wall C*case, the ICJ stressed that the right to self-defense under Article 51 of the UN Charter only applied to attacks emanating from another State and did not apply to attacks coming from within the Occupied Territories, because the area was controlled by Israel.[213] In *Congo*, as in *Nicaragua*, the use of force

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Ugandan villages by rebel groups operating out of the Congo to the government of Congo).

208. Reinold, *supra* note 190, at 261.

209. *See* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82-89 (1938) (quoting 61 Parliamentary Papers (1843)).

210. *Legal Consequences*, 2004 I.C.J. 136, at ¶ 31 (separate opinion of Judge Higgins).

211. Dem. Rep. Congo v. Uganda, 2005 I.C.J. 168, at ¶30 (separate opinion of Judge Koojimans).

212. Dem. Rep. Congo v. Uganda, 2005 I.C.J. 168, at ¶ 11 (separate opinion of Judge Simma).

213. *Legal Consequences*, 2004 I.C.J. 136, at ¶ 139.

was not limited to attacking the terrorist group itself, but involved widespread attacks throughout the territorial state.

The case study of use of force against non-state actors in the aftermath of 9/11 indicates how international courts are capable of setting back (as well as catalyzing) the formation of customary international law during a potential Grotian Moment. In light of these conflicting currents, the law could not be said to have been settled on the eve of the U.S. military action against ISIS in Syria in 2014. But, as described below, events during 2015 provided the tipping point necessary to crystallize the new approach to the right of self-defense.

D. 2014: The Initial U.S. justifications for bombing ISIS

How a custom pioneer describes a new rule of customary international law can greatly impact its international acceptance. Before settling on collective self-defense as its primary argument, the U.S. officials tried out a variety of alternative legal arguments to justify using force in Syria. None of these were well received by the international community.

1. Humanitarian Intervention

The first U.S. argument was that airstrikes against ISIS were justified under the right of humanitarian intervention in the context of efforts to save 30,000 Yazadis trapped on Mount Sinjar.[214] The United States could have cited as precedent for this the NATO airstrikes against Serbia in an effort to prevent ethnic cleansing of Kosovar Albanians in 1999. But, as explained below, the United States has been reluctant to advocate a general right of humanitarian intervention, and has instead argued that the NATO airstrikes were *sui generis*. The United States described its actions to save the Yazadis in similarly narrow terms.

Kosovo was a Serbian province where the population was ninety percent ethnic Albanian Muslims and ten percent Serbian Eastern Orthodox Christians.[215] In 1998, purportedly in response to the threat posed by Kosovar insurgents, Serb military and security forces launched a series of attacks that appeared intended to ethnically cleanse the region. In March[216] and October[217] 1998, the UN Security Council passed resolutions condemning Serb abuses in Kosovo, but

214. Helene Cooper &Michael D. Schear, *supra* note 35; Helene Cooper, Mark Landler & Alissa J. Rubin, *supra* note 35.

215. *See* Noel Cox, *Developments in the Laws of War: NATO Attacks on Yugoslavia and the Use of Force to Achieve Humanitarian Objectives*, 2002 N.Z. ARMED FORCES L. REV. 13, 17.

216. S.C. Res. 1160, ¶ 8 (Mar. 31, 1998).

217. S.C. Res. 1203, ¶¶ 1-3 (Oct. 24, 1998).

the Security Council resolutions did not authorize the use of force, and Russia made it clear that it would veto any attempt to do so.[218]

Nevertheless, after peace negotiations broke down in March 1999, NATO decided to launch a series of aerial attacks against military and strategic targets in Serbia with the intent to persuade the Serbian Government, headed by Slobodan Milosevic, to comply with the Security Council's Resolutions.[219] Following the massacres of Kosovars in Drenica, Gornje Obrinje, and Racak, the NATO States had come to the conclusion that unless action was taken a humanitarian catastrophe would unfold, potentially eclipsing that of Bosnia.[220] The bombing campaign, called "Operation Allied Force," involved 912 aircraft, which flew a total of 37,225 bombing missions.[221] A significant feature of the Kosovo incident is the purity of the actors' motives: "[t]here were no strategic or material interests of NATO nations in Kosovo."[222]

In explaining its decision to issue an Activation Order to use NATO force in the Kosovo crisis, the North Atlantic Council stated, "[T]he unrestrained assault by Yugoslav military, police and paramilitary forces, under the direction of President Milosevic, on Kosovar civilians has created a massive humanitarian catastrophe, which also threatens to destabilize the surrounding region … These extreme and criminally irresponsible policies, which cannot be defended on any grounds, have made necessary and justify the military action by NATO."[223]

In the early days of the bombing campaign, British Prime Minister Tony Blair explained the humanitarian justification for the action. "This is not . . . a battle for NATO; this is not a battle for territory; this is a battle for humanity. This is a just cause, it is a

218. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, EJIL 1999 at 1, 7, *available at* http://www.ejil.org/pdfs/10/1/567.pdf [http://perma.cc/JYB8-EVVK].

219. *NATO's role in relation to the conflict in Kosovo*, NATO (July 15, 1999), *available at* http://www.nato.int/kosovo/history.htm [https://perma.cc/K6JY-9AFY].

220. Steven Haines, *The Influence of Operation Allied Force on the Development of the Jus Ad Bellum*, 85 INT'L AFF. 477, 480 (2009).

221. Patrick T. Egan, *The Kosovo Intervention and Collective Self-Defense*, 8 INT'L PEACEKEEPING 39, 40 (2001).

222. Fernando R. Tesón, *Kosovo: A Powerful Precedent for the Doctrine of Humanitarian Intervention*, 2 AMSTERDAM L. F.42, 43 (2009).

223. Press Release, NATO, *The Situation in and around Kosovo: Statement Issued at the Extraordinary Ministerial Meeting of the North Atlantic Council held at NATO Headquarters, Brussels, on 12th April 1999*, Press Release M-NAC-1(99)51 (Apr. 12, 1999), http://www.nato.int/docu/pr/1999/p99-051e.htm [https://perma.cc/76H2-VZME].

rightful cause."[224] When pressed in parliament for the legal rationale for the NATO bombing campaign, Blair's Secretary for Defense, George Robertson, provided the following elucidation: "Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe. Those circumstances clearly existed in Kosovo. The use of force in such circumstances can be justified as an exceptional measure in support of purposes laid down by the Security Council, but without the Council's express authorization, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe."[225]

Similar statements were issued by the Canadian and Dutch Ambassadors. The Canadian Ambassador claimed that "'[h]umanitarian considerations underpin our action. We cannot simply stand by while innocents are murdered, an entire population is displaced, [and] villages are burned.'"[226] While, the Dutch Ambassador acknowledged:

> [T]hat his government would always prefer to base action on a specific Security Council resolution when taking up arms to defend human rights, but if 'due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur.' Rather, he concluded, "we will act on the legal basis we have available, and what we have available in this case is more than adequate."[227]

On March 25, Russia sponsored a draft resolution in the Security Council that sought to condemn the NATO action as an unlawful act in violation of the UN Charter.[228] According to the Russian Delegation, the vote was to be a choice between law and lawlessness.[229] The Independent International Commission on Kosovo, chaired by the former Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Richard Goldstone, would later

224. Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INT'L & COMP. L.Q. 330, 341 (2000) (quoting Stephen Farrell & Philip Webster, *Blair Pledge to Double Refugee Aid*, TIMES (London), at 1 (May 4, 1999)).

225. *Id.* at 341 (quoting 328 PARL. DEB., H.C. (1999) 616-17 (U.K.)).

226. Nicholas J. Wheeler, *Reflections on the Legality and Legitimacy of NATO's Intervention in Kosovo*, 4 INT'L J. HUM. RTS. 145, 153 (2007), http://www.tandfonline.com/doi/pdf/10.1080/13642980008406897 [http://perma.cc/SRT6-TC99].

227. *Id.*

228. U.N. Doc. S/1999/328 (Mar. 26, 1999).

229. Kristsiotis, *supra* note 224, at 347.

conclude that the 1999 NATO intervention was "illegal but legitimate."[230] But during the Security Council debate, the NATO States did not take the position that the airstrikes were illegal but morally justified. Rather, they argued that their action had the backing of international law.[231] In the end, the proposed resolution was defeated by twelve votes to three, with only China and Namibia joining Russia in support of the measure.[232] Voting in opposition were the five NATO members on the Security Council (the United Kingdom, Canada, France, the Netherlands, and the United States), joined by Argentina, Bahrain, Gabon, the Gambia, Malaysia, and Slovenia.[233] The sizable rejection of the draft resolution indicated that there was a broad base of support for the NATO action. Outside of the Council, NATO's intervention was endorsed by the European Union, the Organization of Islamic States, and by the Organization of American States.[234] Moreover, key States in the area, including Romania, Slovenia, and Bulgaria, granted NATO access to their air space for Operation Allied Force, transforming their support into action.[235] Other than Russia, China, and India, there was virtually no State protest of the NATO action across the globe.[236]

After seventy-eight days, the NATO bombing campaign ultimately succeeded in driving Milosevic back to the negotiating table, where he signed an agreement providing autonomy for Kosovo under the temporary administration of the United Nations and protection of NATO forces. Subsequently, the Security Council adopted Resolution 1244 of June 10, 1999, which some have interpreted as providing a sort of after-the-fact ratification of Operation Allied Force. The resolution "put in place the foundations for the international civil and security presence in Kosovo that accompanied the end of hostilities."[237]

In the 1986 *Nicaragua Case*, the International Court of Justice observed that "[r]eliance by a State on a novel right or an unprecedented exception to the principle [of non-intervention] might,

230. Independent International Commission on Kosovo, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000).

231. Wheeler, *supra* note 226, at 154.

232. Kritsiotis, *supra* note 224, at 347.

233. Kritsiotis, *supra* note 224, at 347.

234. Wheeler, *supra* note 226, at 158.

235. Kritsiotis, *supra* note 224, at 346.

236. Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards Legitimatization of Forcible Humanitarian Countermeasures in the World Community?,* 10 EUR. J. INT'L L. 23, 28 (1999).

237. Kritsiotis, *supra* note 224, at 348.

if shared in principle by other States, tend toward a modification of customary international law."[238] Prior to the 1999 NATO bombing campaign, there had been several cases where foreign intervention was employed to halt widespread atrocities without Security Council approval. Hence, India stopped the slaughter in East Pakistan in 1971, Tanzania ended Idi Amin's mass killing in Uganda in 1978, and Vietnam's intervention brought an end to Pol Pot's killing fields in Cambodia in 1979.[239] But unlike the 1999 Kosovo intervention, in these three cases, self-defense, rather than humanitarian concern, was the primary justification asserted.[240] The fact that the intervening States relied on self-defense, rather than asserting a right to humanitarian intervention, undermined arguments that the law had changed. Moreover, in the cases of India and Vietnam, only a Soviet veto prevented the Security Council from condemning the actions as violations of international law.[241]

In contrast to these situations, in the case of the 1999 NATO intervention in Serbia, a major application of armed force had taken place for humanitarian purposes without Security Council authorization but with widespread support by the international community. According to one scholar, the NATO intervention was "a case that expanded, rather than breached, the law, similar to the Truman proclamation about the continental shelf."[242] Others have described the NATO intervention as "a watershed event" and "an important transition point in the shift from one international order to the next."[243] Moreover, the NATO intervention led to the articulation of the Responsibility to Protect (R2P) doctrine, a concept that has been described as the "most dramatic normative development of our time"[244] and a "revolution in consciousness in international affairs."[245]

238. Nicar. v. U.S., 1986 I.C.J. 14, ¶ 207.

239. Simon Chesterman, *No More Rwandas No More Kosovos: Intervention and Prevention* (in Velaso & Daniel Ortega Nieto (eds.), THE PROTECTION OF HUMAN RIGHTS: A CHALLENGE IN THE 21ST CENTURY 175-200 (El Colegio de Mexico, 2007)).

240. *Id.*

241. *Id.*

242. Tesón, *supra* note 222, at 43 (2009).

243. Heiko Borchert & Mary N. Hampton, *The Lessons of Kosovo: Boon or Bust for Transatlantic Security?*, 46 ORBIS 369, 369 (2002).

244. Ramesh Thakur & Thomas G. Weis, *R2P: From Idea to Norm—and Action?,* 1 GLOBAL RESPONSIBILITY TO PROTECT 22, 23 (2009).

245. Jeremy Sarkin, *Is the Responsibility to Protect an Accepted Norm of International Law in the post-Libya Era?*, 1 CRONINGEN J. INT'L L. 11, 16 (2012).

The rapid acceptance of the R2P doctrine within a few short years of the NATO intervention renders this development a potential candidate for recognition as a Grotian Moment. The 2001 ICISS Report characterized the responsibility to protect as "an emerging principle of customary international law,"[246] and the 2005 High-level Panel Report described it as an "emerging norm,"[247] an assessment shared by the Secretary-General.[248] The R2P Doctrine was then unanimously endorsed at the 2005 World Summit by the Heads of State and Government of every UN Member State, and later by the United Nations Security Council.[249] Based on these developments, Professor Ved Nanda of Denver University School of Law argues that a government can no longer "hide behind the shield of sovereignty, claiming non-intervention by other States in its internal affairs, if it fails to protect the people under its jurisdiction from massive violations of human rights."[250] Yet, two roadblocks prevented humanitarian intervention outside the framework of the United Nations from actually ripening into a norm of customary international law.

The first impediment was the ambiguity of the initial manifestation of *opinio juris* that accompanied the acts of the NATO States. The participating NATO States were not comfortable with the idea that the bombing campaign would create a new rule of customary international law justifying a broad notion of unilateral humanitarian intervention. Thus, in July 1999, U.S. Secretary of State Madeleine Albright stressed that the air strikes were a "unique situation *sui generis* in the region of the Balkans," concluding that it

246. *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY (Dec. 2001), at ¶¶ 2.24, 6.17.,

http://responsibilitytoprotect.org/ICISS%20Report.pdf [https://perma.cc/2T6Y-FSDH] [hereinafter *Responsibility to Protect*].

247. High-level Panel on Threats, Challenges & Change, Letter dated Dec. 1, 2004 from the Chair of the High-level Panel on Threats, Challenges and Change addressed to the Secretary-General, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2004).

248. United Nations Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General*, ¶ 135, U.N. Doc. A/59/2005 (May 26, 2005).

249. See Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469, 475-76, (2010); S.C. Res. 1674, ¶ 4, (Apr. 28, 2006).

250. Ved Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm "Responsibility to Protect" Make a Difference?,* 35 DENV. J. INT'L L. & POL'Y 353, 373 (2007).

was important "not to overdraw the various lessons that come out of it."[251] UK Prime Minister Tony Blair, who had earlier suggested that humanitarian interventions might become more common,[252] subsequently retreated from that position, emphasizing the exceptional nature of the Kosovo operation.[253]

The reason for the reluctance of the United States and United Kingdom to acknowledge a precedent that could ripen into customary international law was explained by Michael Matheson, the Acting Legal Adviser of the U.S. Department of State at the time of the intervention, in the following terms:

> About six months before the actual conflict, at the time when NATO was considering giving an order to threaten the use of force, the political community of NATO got together and had a discussion about what the basis of such threat of force would be. At the end of the discussion, it was clear that there was no common agreement on what might be the justification. There were some NATO members who were prepared to base it on a new doctrine of humanitarian intervention; but most members of the NATO Council were reluctant to adopt a relatively open-ended new doctrine. So at the end of that week, the NATO political community said, here is a list of all of the important reasons why it is necessary for us to threaten the use of force. And at the bottom, it said that under these unique circumstances, we think such actions would be legitimate. There was deliberate evasion of making a "legal" assertion.
>
> And this same process occurred in the U.S. Government. There were some who wanted to articulate that humanitarian intervention in now the basis for U.S. action. There was another theory from the Department of Defense, which wanted to adopt sort of an expanded idea of self-defense based on the general interest of the United States in the region; but on reflection, nobody was really prepared to throw all the eggs into either of those baskets. So we ended up with a formulation similar to that of NATO, where we listed all of the reasons why we were taking action and, in the end, mumbled something about its being justifiable and legitimate but not a precedent. So in a sense, it was something less than a definitive legal rationale—

251. Secretary of State Madeleine K. Albright Press Conference with Russian Foreign Minister Igor Ivanov, July 26, 1999, U.S. DEP'T ST., *available at* http://secretary.state.gov./www/statements/1999/990726b.html [https://perma.cc/EGX5-GGEF].

252. Colin Brown, *Blair's Vision of Global Police*, INDEPENDENT, 23 April 1999.

253. 330 Parl. Deb., H.C. (1999) 30 (U.K.).

> although it probably was taken by large parts of the public community as something like that.[254]

When the principal State actors assert that their actions are *sui generis* and not intended to constitute precedent, this does not create a favorable climate for the cultivation of a new rule of customary international law.[255]

The formation of the new customary rule of humanitarian intervention hit a second obstruction when the 2004 High-Level Panel Report, which was endorsed by the UN Secretary-General, and the 2005 World Summit Outcome Document, which was endorsed by the General Assembly and Security Council, were written to reflect a much narrower conception in which humanitarian intervention is only lawful when authorized by the Security Council. [256]

It is for these reasons that the United States likely chose not to pursue the humanitarian intervention rationale beyond the rescue of the Yazadis from Mount Sanjar, despite the fact that, according to Security Council Resolution 2170 (2014), ISIS was engaged in the commission of "continued gross, systematic and widespread abuses of human rights."[257]

2. Failed State

A second U.S. argument was that airstrikes against ISIS "are in a part of Syria that is currently outside the authority of the Syrian government" and thus "in our eyes, a legal no-man's land."[258] The Chairman of the Joint Chiefs of Staff said ISIS has "to be addressed on both sides of what is essentially at this point a nonexistent border."[259] This proposition is based on the view that limited use of

254. MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS, THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 124-25 (Cambridge Univ. Press, 2010) (quoting remarks by Michael Matheson).

255. Simma, *supra* note 218, at 1.

256. U.N. Secretary-General, Report of the High-Level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility, ¶¶ 203, 256 UN Doc. A/59/565 (December 2, 2004).

257. S.C. Res. 2170, ¶ 2 (Aug. 15, 2014).

258. Firman DeBrabander, *Drones and the Democracy Disconnect*, N.Y. TIMES (Apr. 9, 2014, 7:30 PM), *available at* http://opinionator.blogs.nytimes.com/2014/09/14/drones-and-the-democracy-disconnect/?_r=0 [https://perma.cc/Q329-GTG3].

259. Dan Lamothe & Karen DeYoung, *Islamic State can't be beat without addressing Syrian side of border; top general says*, WASH. POST (Aug. 21, 2014), *available at* https://www.washingtonpost.com/news/checkpoint/wp/2014/08/21/pentagon-leaves-door-open-to-strikes-in-syria-to-curb-islamic-state/ [https://perma.cc/EDU7-WSNM].

force in the territory of a failed State would not violate the state's territorial integrity because a failed state by definition does not exercise meaningful control over its borders or territory.[260]

The U.S. argument constituted a radical departure from the traditional view that a State's legal personality, rights, and responsibilities do not evaporate when it loses control over parts of its territory, as during periods of civil war, insurgency, or governmental collapse.[261] The United States quickly recognized that the failed state argument would prove problematic to U.S. interests and global stability. A new rule of customary international law that would allow states to invade their neighbors whenever they deem that "state failure" has occurred would create a "legion of loopholes" in the U.N. Charter,[262] and create substantial potential for abuse.

This is because, according to the Fund for Peace, which publishes the annual "Fragile States Index," there are some fifteen countries in addition to Syria that could be considered failed or failing States based on extensive areas within their borders outside government control.[263] These include Sudan, South Sudan, Somalia, Central African Republic, Congo, Chad, Yemen, Afghanistan, Guinea, Haiti, Pakistan, Iraq, Nigeria, Ivory Coast, and Zimbabwe.[264] The U.S. argument would have constituted a virtual license for neighboring States to invade these countries.

3. Hot Pursuit

Perhaps the most ill-conceived of the U.S. arguments was put forth by Secretary of State John Kerry, who testified before the Senate that since ISIS attacks Iraq from and then retreats to Syria, a "right of hot pursuit" could provide a basis for military force against ISIS in Syria.[265]

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260. *See* Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 166 (2000).

261. Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 435 (1999) (noting that lack of effective control over territory does not imply loss of statehood).

262. Ben N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT'L & COMP. L. REV. 453 (2004), *available at* http://lawdigitalcommons.bc.edu/iclr/vol27/iss2/9 [https://perma.cc/S9FB-9CZS] (last visited Dec. 20, 2015).

263. *Fragile State Index: Fragility in the World 2015*, FUND FOR PEACE, http://fsi.fundforpeace.org/map/2015heatmap.png [https://perma.cc/HKW6-GLZL] (last visited Dec. 18, 2015).

264. *Id.*

265. Associated Press, *Would US have right of hot pursuit in Syria?*, DAILY MAIL (Sept. 23, 2014, 7:56 AM), http://www.dailymail.co.uk/wires/ap/article-2766592/Would-US-right-hot-pursuit-Syria.html [https://perma.cc/7WRA-W9ST].

While there is a recognized right of hot pursuit to pursue ships escaping in international waters, there is no authority for application of the doctrine to forces on land.[266] Nevertheless, the United States has made the argument in the past, for example in relation to Maj. Gen. John Pershing's expeditionary force of 4,800 troops "to pursue Mexican revolutionary Pancho Villa in 1916 into Mexican territory," in relation to the bombing of Cambodia and Laos in 1969 to pursue Viet Cong who crossed into their territory from Vietnam, and in relation to pursuing Taliban forces from Afghanistan into Pakistan in 2007.[267]

Notably, these historic incidents were met with widespread protest and condemnation. In addition, the International Court of Justice implicitly rejected the hot pursuit argument in holding in the *Congo Case* that Ugandan forces acting under "Operation Safe Haven" could not lawfully cross into the Democratic Republic of the Congo to hunt down anti-Ugandan rebel groups that had taken refuge there.[268] Moreover, if accepted, this land-based hot pursuit rationale could create a slippery slope, leading to frequent border violations by many other states around the globe.[269]

Thus, the United States ultimately settled on the argument that use of force against ISIS in Syria could be justified because Syria was unable to control the threat ISIS posed to Iraq and other countries, including the United States. The argument was significantly strengthened by events in late 2015.

E. 2015: The Grotian Moment comes to Fruition

In the aftermath of the ISIS bombing of a Russian jetliner over the Sinai desert on October 31, 2015, and ISIS attacks on a Paris stadium and concert hall on November 13, 2015, the U.N. Security Council unanimously adopted Resolution 2249, which determined that ISIS is "a global and unprecedented threat to international peace and security," and called for "all necessary measures" to "eradicate the safe haven [ISIS] established" in Syria.[270]

The October 31 and November 13 ISIS attacks were a game changer, killing and injuring over 824 nationals of Russia, France, and twenty-two other countries. They showed that ISIS—the richest and

266. *Id.*

267. *Id.*

268. *Armed Activities*, *supra* note 8, at ¶¶ 162-165.

269. Lionel Beehner, *Backgrounder, The Right of Hot Pursuit to Hunt Rebels*, COUNCIL ON FOREIGN RELATIONS (June 7, 2007), http://www.cfr.org/iraq/can-states-invoke-hot-pursuit-hunt-rebels/p13440 [https://perma.cc/XP8U-U3YB] (last visited Dec. 20, 1015).

270. S.C. Res. 2249 (Nov. 20, 2015).

most technologically advanced terrorist organization in the world—was no longer confining its objectives to territorial acquisition in Syria and Iraq, but had adopted the tactics of other terrorist groups, focusing on attacking vulnerable targets outside the Levant. Moreover, Russia was now just as much a target as the West.

Resolution 2249 did not provide a new stand-alone legal basis or authorization for use of force against ISIS in Syria.[271] Unlike past Security Council resolutions that have authorized force, Resolution 2249 does not mention Article 42, or even Chapter VII, of the U.N. Charter, which is the Article and Chapter under which the Security Council can permit States to use force as an exception to Article 2(4) of the U.N. Charter. Nor does the Resolution use the word "authorizes" or even "decides" in relation to use of force. These textual differences led Mark Weller, Professor of International Law at the University of Cambridge, to conclude that "this language suggests that the resolution does not grant any fresh authority for states seeking to take action."[272]

But the resolution does stand as a confirmation by the Security Council that use of force against ISIS in Syria is permissible. Importantly, the French Security Council Representative, who had sponsored Resolution 2249, stated in his explanation of vote on the resolution that "collective action could now be based on Article 51 [self-defense] of the United Nations Charter."[273] With a unanimous confirmation, Resolution 2249 will play an important role in crystallizing the new rule of customary international law regarding use of force in self-defense against non-state actors—a phenomenon colorfully described by Professor David Koplow of Georgetown as "helping to midwife the development of new norms of customary international law."[274]

Any doubt of the importance of the Security Council Resolution was dispelled when a few days after its adoption the UK parliament voted on December 2, 2015 to approve (397-223) airstrikes against

271. Arabella Lang, *Legal Basis for UK Military Action in Syria*, *House of Commons Library Briefing Paper No. 7404*, Dec. 1, 2015, at 3, *available at* https://www.voltairenet.org/IMG/pdf/CBP-7404.pdf [https://perma.cc/FH4P-NPMH].

272. *Id.* at 8.

273. *Security Council "Unequivocally" Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses "Unprecedented" Threat*, U.N. Press Release, (Nov. 20, 2015), http://www.un.org/press/en/2015/sc12132.doc.htm [https://perma.cc/2B2L-CJPF] (last visited Dec. 20, 2015).

274. David Kaplow, *International Legal Standards and the Weaponization of Outer Space*, in SPACE: THE NEXT GENERATION—CONFERENCE REPORT, 31 MARCH-1 APRIL 2008, UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH 162 (2008).

ISIS in Syria despite the earlier views of many MPs that such action could not be legally justified.[275] Immediately thereafter, the UK joined the United States in bombing ISIS targets throughout Syria.[276]

V. CONCLUSION

This article has examined whether the use of force against al-Qaeda and ISIS during the past fourteen years has given rise to a so-called Grotian Moment: an instance of rapid formation of a new rule of customary international law, in this case recognizing the right of States to attack non-state actors when the territorial State is unable or unwilling to suppress the threat they pose. Such a right would constitute a radical change from the prior-existing rule, which had required effective control of the non-state actors by the territorial State as a pre-condition to the use of force against them.

Ordinarily, customary international law takes many decades to crystallize. In this context, fourteen years would constitute almost instant custom. Historically, there has been a series of other instances of so-called Grotian Moments, where a context of fundamental change served as an accelerating agent, enabling customary international law to form much more rapidly, and with less State practice, than is normally the case. Each represented a radical legal development. In each, the development was ushered in by the urgency of dealing with fundamental change. In some cases the change was the advent of new technology, as with offshore drilling and outer space flight. In others it was in the form of pervasive moral outrage regarding shocking revelations of crimes against humanity, as preceded the establishment of the Nuremberg Tribunal and the creation of the Yugoslavia Tribunal.

Both al-Qaeda and ISIS are widely viewed as representing a new kind of threat, in which a non-state actor possesses many of the attributes of a State: massive wealth, sophisticated training and organization, and access to destructive weaponry. To respond to the fundamental change presented by these uber-terrorist groups, the United States has argued that it is now lawful to attack such non-state actors when they are present in States that are unable or unwilling to curb them. In light of the Security Council approval of the 2001 invasion of Afghanistan to dislodge al-Qaeda and the absence of significant protest of the subsequent drone strikes against al-Qaeda leaders and operatives in Pakistan, Somalia, Iraq, and

275. Steven Erlanger & Stephen Castle, *British Jets Hit ISIS in Syria After Parliament Authorizes Airstrikes*, N. Y. TIMES, Dec. 3, 2015, A16, *available at* http://www.nytimes.com/2015/12/03/world/europe/britain-parliament-syria-airstrikes-vote.html?_r=0 [https://perma.cc/N472-2RB6] (last visited Dec. 18, 2015).

276. *Id.*

Yemen, international law seemed to be moving rapidly toward adoption of the "unable and unwilling" principle of self-defense. But in the 2004 *Wall* and 2005 *Congo* cases, the International Court of Justice reaffirmed that international law permits extraterritorial attacks against non-state actors only when their actions are attributable to the territorial state, utilizing an effective control standard. Despite widespread criticism of these holdings, including from some of the ICJ's most respected members, these judicial decisions unquestionably set back the evolving customary international law of self-defense against non-state actors.

This article concludes that the international community's response to ISIS in Syria has provided the final push necessary to bring the Grotian Moment to fruition. The initial diversity of arguments articulated by the United States to justify its airstrikes was not a good start, and UN Security Council Resolution 2249 does not clearly endorse a particular legal justification. Despite its ambiguity, Resolution 2249 will likely be viewed as confirming that use of force in self-defense is now permissible against non-state actors where the territorial state is unable to suppress the threat that they pose. In the words of the Institute of International Law, "where a rule of customary law is (merely) emerging or there is still some doubt as to its status" a unanimous non-binding resolution of the General Assembly or Security Council "can consolidate the custom and remove doubts which might have existed."[277]

The implication of this newly accepted change in the international law of self-defense is that any State can now lawfully use force against non-state actors (terrorists, rebels, pirates, drug cartels, etc.) that are present in the territory of another State if the territorial State is unable or unwilling to suppress the threat posed by those non-state actors. The number of candidates for such action is quite large. The U.S. Department of State maintains a list of terrorist organizations that pose a significant threat to the United States and its allies around the world, which includes fifty-eight terrorist groups headquartered in thirty-five different countries (in addition to ISIS in Syria/Iraq).[278] Importantly, the right to use force against such non-state actors is subject to several limitations which will impede the possibility of abuse. First, the individual or aggregate actions of the non-state actors must amount to the equivalent of an armed attack to

277. Committee On Formation Of Customary (General) International Law, *Conference Report London*, INT'L L. ASS'N 25 (2000), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/30 [https://perma.cc/QG73-RLMH].

278. Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE, *available at* http://www.state.gov/j/ct/rls/other/des/123085.htm [https://perma.cc/U85H-7XRC] (last visited, December 24, 2015).

trigger the right to use force in self-defense. Second, the use of force must be targeted against the non-state actors and not the State or its military unless the State is found to be in effective control of the non-state actors. Third, military action must still meet the principles of necessity, proportionality, and discrimination. Further limitations are likely to develop in relation to international reaction to State invocation and application of the new rule.