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## THE ISIS CRISIS AND THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

*Johan D. van der Vyver\**

### ABSTRACT

*This Article is focused on efforts to accommodate, within the confines of international humanitarian law, militant responses to acts of cross-border terror violence, as exemplified in most recent times by atrocities committed by the Islamic State of Iraq and Levant (ISIL) and its successor, the Islamic State in Iraq and Syria (ISIS). Since World War I (1914-1918), the international community of States sought to commit itself to settle international disputes by peaceful means and not through the power of the sword. The Charter of the United Nations (U.N. Charter) seemingly confined legitimate armed interventions to those authorized by the Security Council to bring to an end situations that constitute a threat to the peace, a breach of the peace, or an act of aggression (Article 42), and instances of self-defense where a Member State has been attacked (Article 51). However, over time jus ad bellum has extended legitimate armed interventions well beyond the confines of the U.N. Charter to also include armed interventions authorized by the General Assembly in very special circumstances—wars of liberation, pre-emptive self-defense action, and humanitarian intervention. It has also come to be accepted that a government confronted by insurgents can invite other States to come to its assistance. Iraq has indeed done so, and therefore the airstrikes against ISIS strongholds by, for example, American forces in Iraq, are lawful under the norms and customs of contemporary international humanitarian law.*

*However, the United States has also launched airstrikes against al-Qaeda and ISIS targets in Syria while not having been requested by the Syrian government to do so. In order to afford legality to those airstrikes, members of the Obama Administration have proposed a new rule of humanitarian law, the “unwilling or unable rationale,” proclaiming that armed forces of State A can take military action against terrorist groups located in State B if the government of State B is either unwilling or unable to prevent its territory from*

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*being a launching pad for acts of terror violence. Although some proponents of the unwilling or unable rationale attempted to bring the legality of such military action within the confines of self-defense action or humanitarian intervention, this Article argues that the unwilling or unable rationale does not fit the standard conditions of legitimate self-defense or the essential objectives of humanitarian intervention. The Article concludes that the unwilling or unable rationale is a new norm of jus ad bellum in the making.*

*A side issue of the Article addresses the question of why spokespersons of the Obama Administration persist in referring to ISIL in spite of the fact that the organization in June 2014 changed its name to ISIS. It is noted that al-Qaeda was part of ISIL but is not part of ISIS, that the Obama Administration did not receive congressional approval for the airstrikes in the Middle East, and that the Obama Administration relies on congressional approval of the post 9/11 war against terror that was focused on the Taliban and al-Qaeda forces in Afghanistan and the 2003 invasion of Iraq to afford constitutional legality to the airstrikes in Iraq and Syria. Since al-Qaeda was part of ISIL but not of ISIS, referring to ISIL is most likely intended to bring these airstrikes within the reach of the congressional approvals of yesteryear.*

## INTRODUCTION

The international community was shocked in the extreme in recent years by acts of profound barbarism committed by a militant Muslim group, initially called the Islamic State of Iraq and the Levant (ISIL) but who changed its name in June 2014 to the Islamic State in Iraq and Syria (ISIS).<sup>1</sup> The organization is committed to the dictates of a certain brand of the Sunni faction of Islam and strives toward bringing most traditionally Muslim-inhabited States—besides Iraq and Syria—under its political control, including Jordan, Israel, Palestine, Lebanon, Cyprus, and Southern Turkey.<sup>2</sup> It acquired considerable financial resources by gaining control of oil fields in the eastern province of Deir-al-Zour in Iraq, taking control of bank institutions and

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<sup>1</sup> For the history, goals, and evil deeds of ISIL/ISIS, see *Islamic State in Iraq and the Levant (ISIL)*, ENCYCLOPEDIA BRITANNICA (Nov. 16, 2015), <http://www.britannica.com/topic/Islamic-State-in-Iraq-and-the-Levant>; *Syria Iraq: The Islamic State Militant Group*, BBC NEWS (Aug. 2, 2014), <http://www.bbc.com/news/world-middle-east-24179084>;

<sup>2</sup> See Anne Allmeling, *Isis Threatening to Redraw Mideast Borders*, DEUTSCHE WELLE (July 28, 2014), <http://www.dw.com/en/isis-threatening-to-redraw-mideast-borders/a-17811889>; Daniella Peled, *What is ISIS? The Rise of a Military Islamic 'Caliphate,'* HAARETZ (Nov. 23, 2015, 2:41 PM), <http://www.haaretz.com/middle-east-news/isis/1.687819>.

allocating to itself large sums of money, and receiving generous funding from wealthy donors in predominantly Sunni countries of the Persian Gulf.<sup>3</sup> It lured into its ranks thousands of foreign volunteers, including some from the United States (U.S.) and the United Kingdom.<sup>4</sup> In order to achieve its political objectives, the organization has embarked on horrific acts of terror violence.<sup>5</sup>

A key question for purposes of this survey is what military action can be taken by the international community of States, or by individual sovereignties, to combat the threat emanating from the crime of aggression and the acts of terror violence committed by proponents of ISIL/ISIS. We shall see that existing norms of *jus ad bellum* do not unconditionally authorize military intervention across national borders against ISIS strongholds. However, international humanitarian law is currently in the making of what has come to be denoted as the “unwilling or unable” paradigm, which is aimed at authorizing military action by State A against terrorist groups located in State B if the government of State B is either unwilling or unable to prevent its territory from being used as a launching pad for acts of terror violence.<sup>6</sup> Although proponents of the unwilling or unable paradigm sought to bring the military response against the perpetrators of terror violence under the rubric of the right to self-defense,<sup>7</sup> this Article will show the implementation of the paradigm is not confined to situations that warrant defensive military action.

A particular focus of this Article is airstrikes by military forces of the United States against selected targets in Iraq and Syria, which have come to be justified on the basis of the unwilling or unable paradigm. There are very special reasons why (a) the American airstrikes are not only confined to ISIS strongholds in Iraq but also include al-Qaeda targets in Syria, and (b) spokespersons of the Obama Administration continue to refer to ISIL, as the

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<sup>3</sup> See FIN. ACTION TASK FORCE, FINANCING OF THE TERRORIST ORGANISATION ISLAMIC STATE IN IRAQ AND THE LEVANT (ISIL) 5, 13, 18–19 (Feb. 2015), <http://www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf>.

<sup>4</sup> See, e.g., Peter R. Neumann, *Foreign Fighter Total in Syria/Iraq Now Exceeds 20,000; Surpasses Afghanistan Conflict in the 1980s*, INT’L CTR. FOR STUDY RADICALISATION & POL. VIOLENCE (Jan. 26, 2015), <http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/>; Mary Anne Weaver, *Her Majesty’s Jihadists*, N.Y. TIMES MAG. (Apr. 14, 2015), <http://www.nytimes.com/2015/04/19/magazine/her-majestys-jihadists.html>; Robert Windrem, *ISIS By the Numbers: Foreign Fighter Total Keeps Growing*, NBC NEWS (Feb. 28, 2015, 8:50 AM), <http://www.nbcnews.com/storyline/isis-terror/isis-numbers-foreign-fighter-total-keeps-growing-n314731>.

<sup>5</sup> E.g., Peled, *supra* note 2.

<sup>6</sup> See, e.g., Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483, 486 (2012).

<sup>7</sup> See *id.* at 492–93.

terror group called itself before it changed its name to ISIS in June 2014. It will be argued in this Article that both (a) and (b) stem from the fact that the Obama Administration did not obtain congressional approval for the airstrikes in the Middle East as required by the U.S. Constitution and maintained that the airstrikes are covered by, amongst other things, the congressional approval of a military response to the terror attacks of September 11th orchestrated by al-Qaeda. From this Article, it will emerge that al-Qaeda was a component of ISIL but not of ISIS, and therefore the Obama Administration had to include armed attacks against al-Qaeda, and kept on referring to ISIL, to afford credence to its reliance on the congressional approval of an armed response to the War on Terror sparked by the acts of terror violence of 9/11.

Following a brief historical synopsis in Part I of this Article on the emergence of ISIL/ISIS and of its evil deeds, we shall in Part II deal with the current dictates of *jus ad bellum* signifying the confines of lawful armed interventions. It will be pointed out that the Charter of the United Nations (U.N. Charter) confined the use of armed force to (a) U.N. Security Council authorizations of action by air, sea, or land forces as a means of maintaining or restoring international peace and security (Article 42),<sup>8</sup> and (b) individual and collective self-defense if an armed attack occurs (Article 51).<sup>9</sup> However, this Article argues that efforts to confine armed conflicts to the instances specified in the U.N. Charter have fallen behind the times, and the international community of States has consequently come to afford legality to the use of armed force in situations other than those specified in Articles 42 and 51, such as preemptive self-defense measures, wars of liberation, and humanitarian interventions.

In Part III, this Article pays special attention to the ISIS crisis and the shortcomings of international humanitarian law in counteracting terrorism of the kind and on the scale orchestrated by ISIS. This Part focuses especially on: (a) the airstrikes by U.S. armed forces against al-Qaeda and ISIS targets in Iraq and Syria; (b) problems affording legality to those airstrikes within the confines of U.S. constitutional law and of *jus ad bellum*; and (c) the evolution of a rule of international humanitarian law to accommodate an offensive against the perpetrators of terror violence if the government of the country from which they operate is either unwilling or unable to take action to combat the acts of terror violence.

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<sup>8</sup> U.N. Charter art. 42.

<sup>9</sup> *Id.* art. 51.

## I. HISTORICAL BACKGROUND

The history of the Sunni insurgent group, commonly referred to as the “Islamic State” (IS), or more precisely over time as the “Islamic State of Iraq and Syria” (ISIS), the “Islamic State of Iraq and Levant” (ISIL), or DAESH (an abbreviation of the Arab name of ISIL), can be traced back to 2004, the year in which it originated under the name of *Jama’at al-Tawhid wal-Jihad*,<sup>10</sup> a forerunner of *Tanzim Al Qaeda fi Bilad al-Rafidayn*, commonly known as al-Qaeda in Iraq.<sup>11</sup> The organization made great progress in 2006 when it joined other Sunni insurgent groups to form the Mujahideen Shura Council, which over time consolidated into the Islamic State of Iraq, and had acquired a substantial presence in Al Anbar, Nineveh, and Kirkut.<sup>12</sup> In 2013, the group changed its name to ISIL.<sup>13</sup> ISIL made great progress under the leadership of Abu Bakr al-Baghdadi, largely due to political practices that many of its followers regarded as discrimination against the Sunni faction of Islam.<sup>14</sup> Until February 2014, ISIL had close ties with al-Qaeda, but following a power struggle, al-Qaeda cut all ties with the group.<sup>15</sup> On June 29, 2014, ISIL, absent al-Qaeda support, was renamed to ISIS.<sup>16</sup>

ISIL/ISIS strictly imposes Islamic punishments such as amputations, beheadings, and crucifixions, and it has become notorious on account of innumerable acts of extreme terror violence.<sup>17</sup> The beheadings of American journalist James Foley, American/Israeli journalist Steven Sotloff, British

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<sup>10</sup> Aaron Y. Zelin, *The War Between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement*, RESEARCH NOTES (The Wash. Institute for Near East Policy, Washington, D.C.), June 2014, at 1.

<sup>11</sup> See Robert G. Rabil, *The ISIS Chronicles: A History*, NAT’L INT. (July 17, 2014), <http://nationalinterest.org/feature/the-isis-chronicles-history-10895>.

<sup>12</sup> Bill Roggio, *The Rump Islamic Emirate of Iraq*, LONG WAR J. (Oct. 16, 2006), [http://www.longwarjournal.org/archives/2006/10/the\\_rump\\_islamic\\_emi.php](http://www.longwarjournal.org/archives/2006/10/the_rump_islamic_emi.php); Test Tube, *What is ISIS and What Do They Want in Iraq?*, CARTOGRAPHY (June 19, 2014), <http://cartogracy.com/conflict/islamic-state/watch/103>.

<sup>13</sup> *Syria Iraq: The Islamic State Militant Group*, *supra* note 1.

<sup>14</sup> See Bobby Gosh, *ISIS: A Short History*, ATLANTIC (Aug. 14, 2014), <http://www.theatlantic.com/international/archive/2014/08/isis-a-short-history/376030/> (detailing ISIL’s growth under al-Baghdadi’s command); see also Lina Khatib, *The Islamic State’s Strategy: Lasting and Expanding*, CARNEGIE MIDDLE E. CTR. (June 29, 2015), <http://carnegie-mec.org/2015/06/29/islamic-state-s-strategy-lasting-and-expanding/ib5x> (detailing the perceived discrimination against Sunnis after the United States’ invasion of Iraq); *Mapping Militant Organizations: The Islamic State*, STAN. U., <https://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/1> (last updated May 15, 2015).

<sup>15</sup> Oliver Holmes, *Al Qaeda Breaks Link with Syrian Militant Group ISIL*, REUTERS (Feb. 3, 2013, 8:33 AM), <http://www.reuters.com/article/us-syria-crisis-qaeda-idUSBREA120NS20140203>; Zelin, *supra* note 10.

<sup>16</sup> *Mapping Militant Organizations: The Islamic State*, *supra* note 14.

<sup>17</sup> See, e.g., Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>.

humanitarian aid worker David Haines, American humanitarian aid worker Peter Kassig, British taxi driver and humanitarian aid worker Alan Henning, and Japanese journalist Kenji Goto,<sup>18</sup> and the burning to death of Jordanian pilot Moath al-Kasasbeh,<sup>19</sup> were videotaped and displayed on the Internet for the world to see. On February 15, 2015, ISIS publicly displayed the beheading in Libya of twenty-one Egyptian Coptic Christian fishermen.<sup>20</sup> On March 29, 2015, a video was released showing the beheading of eight men said to be Shiite Muslims.<sup>21</sup> ISIS was also responsible for the destruction of valuable religious shrines and works of art that were of special significance to rival Islamic factions.<sup>22</sup>

In August 2014, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, deplored and condemned “in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continuous gross, systematic and widespread abuses of human rights and violations of international humanitarian law.”<sup>23</sup> In September 2014, the European Parliament in a similar vein condemned “the atrocities threatened or committed by ISIS against various groups not sharing their convictions, above all religious and ethnic minorities such as Christians, Yezidi, Shabak and Turkmen, but also Shiites and Sunnis,” and denounced “the odious assassination by ISIS of two American journalists and a British aid worker.”<sup>24</sup>

ISIL/ISIS was proclaimed a terrorist organization by the United States (on December 17, 2004),<sup>25</sup> Australia (on March 2, 2005),<sup>26</sup> Canada (on August 20,

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<sup>18</sup> Nadia Khomami, *Mohammed Emwazi: Who Were His Victims?*, GUARDIAN (Nov. 13, 2015, 7:15 AM), <http://www.theguardian.com/uk-news/2015/nov/13/mohammed-emwazi-who-were-his-victims>.

<sup>19</sup> *Jordan Pilot Hostage Moaz al-Kasasbeh ‘burned alive,’* BBC NEWS (Feb. 3, 2015), <http://www.bbc.com/news/world-middle-east-31121160>.

<sup>20</sup> John J. Xenakis, *Worldview: Egypt in Mourning as ISIS-Linked Terrorists Kill Coptic Christians in Libya*, BREIBART (Feb. 16, 2015), <http://www.breitbart.com/national-security/2015/02/16/world-view-egypt-in-mourning-as-isis-linked-terrorists-kill-coptic-christians-in-libya/>.

<sup>21</sup> William M. Welch, *Islamic State Beheads 8, Led to Death by Teens*, USA TODAY (Mar. 30, 2015, 7:30 AM), <http://www.usatoday.com/story/news/world/2015/03/29/islamic-state-beheads-eight-men/70635014/>.

<sup>22</sup> See, e.g., Susannah Cullinane et al., *Tracking a Trail of Historical Obliteration: ISIS Trumpets Destruction of Nimrud*, CNN (Apr. 13, 2015, 8:43 PM), <http://www.cnn.com/2015/03/09/world/iraq-isis-heritage/>.

<sup>23</sup> S.C. Res. 2170, ¶ 1 (Aug. 15, 2014).

<sup>24</sup> Motion for a Resolution to Wind Up the Debate on the Statement by the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy Pursuant to Rule 123(2) of the Rules of Procedure on the Situation in Iraq and Syria and the ISIS Offensive (2014/2843(RSP)), EUR. PARL. DOC. B8-0110/2014 (2014).

<sup>25</sup> *Foreign Terrorist Organizations*, U.S. DEP’T ST., <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Mar. 3, 2016).

2012),<sup>27</sup> Turkey (in October 2013),<sup>28</sup> Saudi Arabia (on March 7, 2014),<sup>29</sup> the United Kingdom (in June 2014),<sup>30</sup> Indonesia (on August 1, 2014),<sup>31</sup> the United Arab Emirates (on August 20, 2014),<sup>32</sup> Israel (on September 3, 2014),<sup>33</sup> Malaysia (on September 24, 2014),<sup>34</sup> Egypt (on November 30, 2014),<sup>35</sup> India (on December 16, 2014),<sup>36</sup> the Russian Federation (on December 29, 2014),<sup>37</sup> Kyrgyzstan (on March 16, 2015),<sup>38</sup> and Pakistan (on August 29, 2015).<sup>39</sup> ISIS is furthermore banned in Germany (since September 2014)<sup>40</sup> and Switzerland (since October 2014).<sup>41</sup> Switzerland's ban prohibits propaganda in favor of, and financial support for, ISIS in Switzerland.<sup>42</sup> The terrorist acts of ISIS in

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<sup>26</sup> *Listed Terrorist Organizations*, AUSTRALIAN NATIONAL SECURITY, <http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx> (last visited Mar. 3, 2016).

<sup>27</sup> *Currently Listed Entities*, PUBLIC SAFETY CAN. (Dec. 2, 2015), <http://www.publicsafety.gc.ca/cnt/ntnl-scrtr/cntr-trrrsm/lstd-ntts/crrmt-lstd-ntts-eng.aspx#2005>.

<sup>28</sup> Ceylan Ozbudak, *Resolving the ISIS Crisis from a Turkish Viewpoint*, AL ARABIYA NEWS (Sept. 6, 2014), <http://english.alarabiya.net/en/views/news/middle-east/2014/09/06/Resolving-the-ISIS-crisis-from-a-Turkish-perspective.html>.

<sup>29</sup> Rania El Gamal, *Saudi Arabia Designates Muslim Brotherhood Terrorist Group*, REUTERS (Mar. 7, 2014, 12:48 PM), <http://www.reuters.com/article/us-saudi-security-idUSBREA260SM20140307>.

<sup>30</sup> *Proscribed Terrorist Organisations*, U.K. GOV'T HOME OFF., [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/472956/Proscription-update-20151030.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472956/Proscription-update-20151030.pdf) (last visited Jan. 20, 2016).

<sup>31</sup> *BNPT Declares ISIS a Terrorist Organization*, TEMPO.CO (Aug. 2, 2014), <http://en.tempo.co/read/news/2014/08/02/055596766/BNPT-Declares-ISIS-a-Terrorist-Organization>.

<sup>32</sup> *List of Terror Groups Published by UAE*, GULF NEWS (Nov. 16, 2014, 4:01 PM), <http://gulfnnews.com/news/uae/government/list-of-terror-groups-published-by-uae-1.1413219>.

<sup>33</sup> Michelle Grossman, *Islamic State Officially Outlawed in Israel*, JERUSALEM POST (Mar. 9, 2014, 9:23 PM), <http://www.jpost.com/Arab-Israeli-Conflict/Islamic-State-officially-outlawed-in-Israel-374348>.

<sup>34</sup> Zakir Hussain & Shannon Teoh, *ISIS Fighters from M'sia, Indonesia Form Military Unit*, JAKARTA POST (Sept. 26, 2014, 11:34 AM), <http://www.thejakartapost.com/news/2014/09/26/isis-fighters-msia-indonesia-form-military-unit.html>.

<sup>35</sup> Adham Youssef, *Court Affirms ISIS' 'Terrorist Group' Designation*, DAILY NEWS EGYPT (Nov. 30, 2014), <http://www.dailynewsegyp.com/2014/11/30/court-affirms-isis-terrorist-group-designation/>.

<sup>36</sup> *India Bans Islamic State Terror Group*, HINDU (Dec. 16, 2014), <http://www.thehindu.com/news/national/indian-government-bans-islamic-state-terror-organisation/article6698369.ece>.

<sup>37</sup> *Russia Calls on All States to Put Islamic State, Jabhat al-Nusra on Terrorist Lists*, TASS RUSS. NEWS AGENCY (Dec. 29, 2014), <http://tass.ru/en/world/769912>.

<sup>38</sup> Joanna Paraszczuk, *Kyrgyzstan Bans IS, Designates it as Terror Group*, RADIO FREE EUR. RADIO LIBERTY (Mar. 25, 2015), <http://www.rferl.org/content/kyrgyzstan-bans-islamic-state/26920328.html>.

<sup>39</sup> Zahid Gishkori, *Islamic State Listed Among Proscribed Outfits*, EXPRESS TRIB. (Aug. 29, 2015), <http://tribune.com.pk/story/946859/banned-organisations-is-listed-among-proscribed-outfits/>.

<sup>40</sup> Melissa Eddy, *Germany Bans Support for Isis*, N.Y. TIMES (Sept. 12, 2014), [http://www.nytimes.com/2014/09/13/world/europe/germany-bans-support-of-isis.html?\\_r=0](http://www.nytimes.com/2014/09/13/world/europe/germany-bans-support-of-isis.html?_r=0).

<sup>41</sup> *Switzerland Bans ISIL*, ANADOLU AGENCY (Oct. 8, 2014), <http://aa.com.tr/en/world/switzerland-bans-isis/112768>.

<sup>42</sup> *Id.*

Iraq were also condemned by Syria,<sup>43</sup> while Jordan in February 2015 made its condemnation of the organization known by launching airstrikes against ISIS targets.<sup>44</sup>

It is perhaps important to note at the outset that although the militant group, absent al-Qaeda support, changed its name from ISIL to ISIS in June 2014, President Barack Obama and other spokespersons of the U.S. Department of State persist in referring to the group as ISIL.<sup>45</sup> This is probably not due to lack of information on the part of spokespersons of the American government, but it can most likely be attributed to a special problem of the Obama Administration, namely that it has not received congressional approval for the airstrikes in the Middle East but relied on the congressional approval of the War on Terror that was sparked by the terrorist attacks of September 11th, which were orchestrated by al-Qaeda.<sup>46</sup> Relying on congressional approval for the War on Terror and consequently referring to ISIL instead of ISIS will be alluded to later on in this Article.

## II. *JUS AD BELLUM*

“The history of humankind has been the history of wars.”<sup>47</sup> This assessment of human history by Benjamin Ferencz, Chief Prosecutor in the *Einsatzgruppen Case* at Nuremberg in which twenty-two high-ranking Nazi officials were prosecuted and convicted for slaughtering more than a million innocent men, women, and children,<sup>48</sup> can unfortunately not be faulted. As noted by Theodor Meron in his analysis of the (futile) attempts to apply human rights principles in situations of armed conflict: “To genuinely humanize

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<sup>43</sup> H. Zain & M. Ismael, *Syria Condemns Terrorist Acts in Iraq, Expresses Solidarity with Iraqi Government, Army and People*, SYRIAN ARAB NEWS AGENCY (June 11, 2014), <http://sana.sy/en/?p=2988>.

<sup>44</sup> *Jordan Continues Their Revenge on ISIS Carrying Out Airstrikes Against the Terror Group*, NEWS.COM.AU (Feb. 6, 2015, 10:09 AM), <http://www.news.com.au/world/middle-east/jordan-continues-their-revenge-on-isis-carrying-out-airstrikes-against-the-terror-group/news-story/b0dce593af0f349aff96e737ae4afbe>.

<sup>45</sup> Adam Withnall, *Iraq Crisis: ISIS Declares its Territories a New Islamic State With ‘Restoration of Caliphate’ in Middle East*, INDEPENDENT (June 30, 2014), <http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-al-baghdadi-as-emir-removing-iraq-and-9571374.html>.

<sup>46</sup> Charles Stimson, *A Framework for an Authorization for Use of Military Force Against ISIS*, HERITAGE FOUND. (Sept. 24, 2014), <http://www.heritage.org/research/reports/2014/09/a-framework-for-an-authorization-for-use-of-military-force-against-isis>.

<sup>47</sup> Benjamin B. Ferencz, *Illegal Armed Force as a Crime Against Humanity* (June 2015), <http://www.benferencz.org/2010-2015.html#illegalarmed>.

<sup>48</sup> “*The Einsatzgruppen Case*,” in 4 TRIALS OF THE WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW No. 10, at 3–596 (1951).

humanitarian law, it would be necessary to put an end to all kinds of armed conflicts. But wars have been a part of the human condition since the struggle between Cain and Abel, and regrettably they are likely to remain so.”<sup>49</sup> In more recent times, however, international humanitarian law was set on a course to limit the use of armed force as a means of settling international disputes as much as possible.

#### A. *Limitation of the Use of Armed Force*

Following World War I, the French Minister of Foreign Affairs, Aristide Briand, took the initiative in proposing a bilateral agreement between the United States and France to outlaw war between those two countries.<sup>50</sup> U.S. President Calvin Coolidge and Secretary of State Frank B. Kellogg proposed instead that France and the United States take the lead in inviting all nations to join them in outlawing war between States.<sup>51</sup> It was understood that the pact would only apply to acts of aggression and not to military actions taken in self-defense.<sup>52</sup> On August 27, 1928, fifteen nations signed the Kellogg-Briand Pact, also known as the Pact of Paris.<sup>53</sup> Besides France and the United States, the signatory States included Australia, Belgium, Canada, Czechoslovakia, Germany, India, Ireland, Italy, Japan, New Zealand, Poland, South Africa, and the United Kingdom.<sup>54</sup> The signatories condemned recourse to war for the solution of international controversies and undertook to settle all disputes, without exception, by pacific means.<sup>55</sup>

Frank Kellogg received the Nobel Peace Prize in 1929 for his contribution to the signing of the Pact of Paris.<sup>56</sup> However, most regrettably, the pact did not achieve its noble objective. The 1931 Japanese invasion of Manchuria in mainland China denoted the first crack in the wall of peace, and the aggressive expansionism of Germany and Italy within that same time frame eventually

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<sup>49</sup> Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 240 (2000).

<sup>50</sup> Office of the Historian, *The Kellogg-Briand Pact, 1928*, DEP’T ST., <https://history.state.gov/milestones/1921-1936/kellogg> (last visited Jan. 20, 2016) [hereinafter Office of the Historian].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> General Treaty for Renunciation of War as an Instrument of National Policy arts. 1–2, Aug. 27, 1928, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact]; Office of the Historian, *supra* note 50.

<sup>54</sup> Kellogg-Briand Pact, *supra* note 53, pmb.; Office of the Historian, *supra* note 50.

<sup>55</sup> Kellogg-Briand Pact, *supra* note 53, arts. 1–2.

<sup>56</sup> Office of the Historian, *supra* note 50.

culminated in World War II (1939-1945).<sup>57</sup> Following World War II, renewed efforts emerged to maintain peace and security in the world.

The United Nations was founded in 1945 “to save succeeding generations from the scourge of war” and to that end, to unite the strength of its Members “to maintain international peace and security” and to ensure “that armed force shall not be used, save in the common interest.”<sup>58</sup> It called on Member States to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>59</sup> It recorded in Article 2, paragraph 4 of the U.N. Charter a commitment of all Member States to “refrain . . . from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”<sup>60</sup> Those purposes include a resolve

[t]o maintain international peace and security, and to that end: to take effective collective measures . . . for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means . . . adjustment or settlement of international disputes or situations which might lead to a breach of the peace.<sup>61</sup>

In terms of the U.N. Charter, “parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”<sup>62</sup>

The U.N. General Assembly and the Security Council have continuously reiterated the commitment of Member States to international peace and security. The U.N. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations of 1970 recalled “the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State.”<sup>63</sup> In 1999, the General Assembly adopted a Declaration

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<sup>57</sup> *Id.*

<sup>58</sup> U.N. Charter pmb1.

<sup>59</sup> *Id.* art. 2, ¶ 3.

<sup>60</sup> *Id.* art. 2, ¶ 4.

<sup>61</sup> *Id.* art. 1, ¶ 1.

<sup>62</sup> *Id.* art. 33.

<sup>63</sup> G.A. Res. 2625 (XXXV), pmb1. (Oct. 24, 1970).

on a Culture of Peace, which was to be achieved through education, sustainable economic and social development, the promotion of human rights and securing equality between women and men, fostering democratic principles and practices, advancing understanding, tolerance, and solidarity in society, supporting the free flow of information and knowledge, and general and complete disarmament.<sup>64</sup> In 2004, the General Assembly published a report on challenges that confronted the international community in creating a more secure world, and it listed certain strategies for meeting those challenges, including better international regulatory frameworks and norms (mentioning by name the International Criminal Court as a strategy that might deter parties from committing crimes against humanity and war crimes), better information and analysis to facilitate early-warning indications of threatening conditions, preventive diplomacy and mediation, and early (preventive) deployment of peacekeeping forces.<sup>65</sup> Earlier, the Security Council proclaimed the year 2000 to be the “International Year for the Culture of Peace.”<sup>66</sup> The Security Council added its voice to the pursuit of peace by calling on U.N. Member States to support and develop a conflict prevention strategy, instructing the Secretary-General to convey to the Council his assessment of threats to international peace and security, and to keep potential conflict situations under close review so as to take early and effective action to prevent armed conflict.<sup>67</sup> The Security Council reminded Member States of their obligation to settle their disputes by peaceful means.<sup>68</sup>

It is fair to conclude that, “in the present development stage of international law, the prohibition to use force has established itself as a generally recognized customary and binding principle.”<sup>69</sup> The U.N. Charter authorizes armed intervention in only two instances:

- (1) Collective armed intervention under auspices of the Security Council as a means of putting an end to a situation that constitutes a threat to the peace, a breach of the peace or an act of aggression;<sup>70</sup> and

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<sup>64</sup> G.A. Res. A/53/243B, art. 3 (Oct. 6, 1999).

<sup>65</sup> Rep. of the Secretary-General’s High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565, at 35–38 (Dec. 2, 2004).

<sup>66</sup> G.A. Res. 52/15 (Nov. 20, 1997).

<sup>67</sup> S.C. Res. 1366, ¶¶ 3–6 (Aug. 30, 2001).

<sup>68</sup> *Id.* ¶ 9.

<sup>69</sup> Umberto Leanza, *The Historical Background, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 3, 4 (Mauro Politi & Giuseppe Nesi eds., 2004).

<sup>70</sup> See U.N. Charter arts. 39, 42.

(2) Individual or collective self-defense in cases where an armed attack occurred against a Member State of the United Nations.<sup>71</sup>

This raises the question whether armed interventions other than those mentioned in the U.N. Charter are still, or have become, lawful within the confines of contemporary international humanitarian law.

### *B. Authorization of Armed Interventions Not Mentioned in the U.N. Charter*

Convincing arguments can be presented for concluding that the U.N. Charter does not deal comprehensively with all instances of lawful armed interventions. The United Nations itself has gone beyond its own Charter provisions by affording legitimacy to instances of armed intervention not mentioned in the Charter, such as (a) affording to the General Assembly the competence to authorize armed interventions in very special circumstances, and (b) supporting the legitimacy of wars of liberation.

#### *1. The Uniting for Peace Resolution*

In 1950, when the Cold War was still in its infancy, the General Assembly adopted the Uniting for Peace Resolution, which provides:

[I]f the Security Council, because of lack of unanimity of the Permanent Members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or an act of aggression the use of armed force when necessary, to maintain or restore international peace and security.<sup>72</sup>

The Resolution was adopted as a result of Russian responses to the Resolution of the Security Council that authorized an armed intervention to resolve the Korean crisis and culminated in the Korean War (1950-1953).<sup>73</sup>

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<sup>71</sup> See *id.* art. 51. In cases of collective self-defense, the State for whose benefit this right is used must declare itself to be the victim of an armed attack. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27). The victim State must furthermore request the assistance of the other State or States participating in the collective defense of the victim State. *Id.* ¶ 199.

<sup>72</sup> G.A. Res. 377 (V) A, ¶ 1 (Nov. 3, 1950).

<sup>73</sup> See CHRIS TOMUSCHAT, *UNITING FOR PEACE 1* (2008); Rep. of the S.C., *Security Council Deadlocks and Uniting for Peace: An Abridged History* (Oct. 2013), <http://www.securitycouncilreport.org/atf/cf/>

The Resolution was adopted in the absence of a representative of the Union of Soviet Socialist Republics (Soviet Union), which boycotted the meeting of the Security Council to protest allowing Taiwan to represent China within the U.N.'s structures.<sup>74</sup> In August 1950, after the return of the Soviet representative to the Security Council, the Soviet Union exercised its veto power to impede all further resolutions.<sup>75</sup> Western countries, under the leadership of the United States, thereupon initiated the Uniting for Peace Resolution against the resistance of the Eastern Bloc to permit the General Assembly to resolve situations constituting “a threat to the peace, [a] breach of the peace, or [an] act of aggression.”<sup>76</sup> Thus far, the Resolution has been invoked on ten occasions, mostly by the Security Council, to authorize “Emergency Special Sessions” of the General Assembly to deal with a variety of crisis situations.<sup>77</sup> Although the authorization of armed force is legalized under the Uniting for Peace Resolution in cases of a breach of the peace or an act of aggression (not if the situation merely constitutes a threat to the peace), this power has thus far not been used by the General Assembly.<sup>78</sup>

## 2. *Wars of Liberation*

Wars of liberation are confined to an armed struggle against colonial rule, foreign domination, and racist regimes, and the legitimacy of these (and only

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%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Security\_Council\_Deadlocks\_and\_Uniting\_for\_Peace.pdf [hereinafter *Security Council Deadlocks and Uniting for Peace*].

<sup>74</sup> TOMUSCHAT, *supra* note 73, at 1.

<sup>75</sup> *Id.*

<sup>76</sup> *See id.*; *Security Council Deadlocks and Uniting for Peace*, *supra* note 73.

<sup>77</sup> The first Emergency Special Session of the General Session (Emergency Special Session) was convened at the request of the Security Council in 1956 to deal with a crisis in the Middle East following the annexation of the Suez Canal by Egypt; the second Emergency Special Session was convened at the request of the Security Council in 1956 to deal with a crisis in Hungary following its invasion by the Soviet Union; the third Emergency Special Session was convened at the request of the Security Council in 1958 to deal with a crisis in the Middle East in consequence of the deployment of foreign troops in Lebanon and Jordan; the fourth Emergency Special Session was convened at the request of the Security Council in 1960 to deal with the situation in the Democratic Republic of the Congo; the fifth Emergency Special Session was convened at the request of the Soviet Union and the General Assembly in 1967 to deal with measures taken by Israel to change the status of east Jerusalem; the sixth Emergency Special Session was convened at the request of the Security Council in 1980 to deal with a crisis in Afghanistan; the seventh Emergency Special Sessions was convened at the request of Senegal in 1980 to deal with the situation in Palestine; the eighth Emergency Special Session was convened at the request of the Zimbabwe in 1981 to deal with the situation in Namibia; the ninth Emergency Special Session was convened at the request of the Security Council in 1982 to deal with the situation in occupied Arab territories; the tenth Emergency Special Session was convened at the request of Qatar for its first session in 1997 to deal with illegal Israeli action in occupied East Jerusalem and the rest of the occupied territories. *See Security Council Deadlocks and Uniting for Peace*, *supra* note 73.

<sup>78</sup> TOMUSCHAT, *supra* note 73, at 3; *Security Council Deadlocks and Uniting for Peace*, *supra* note 73.

these) instances of militant action have also been endorsed by the General Assembly.<sup>79</sup> The General Assembly was quite explicit in saying that the “legitimate struggle” includes the armed struggle of liberation movements.<sup>80</sup> When Resolution 3314 (XXIX) of December 14, 1974 was adopted to define acts of aggression as guidance for the Security Council when called upon to exercise its Chapter VII powers, the General Assembly took special precautions not to adversely implicate wars of liberation. Article 7 of Resolution 3314 (XXIX) thus provides:

Nothing in this definition . . . could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter [of the United Nations], of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.<sup>81</sup>

The Resolutions of the General Assembly could find support in Protocol I to the Geneva Conventions of August 12, 1949, which proclaimed that wars of liberation—“armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination”—will be governed by the rules of international humanitarian law applying to international armed conflicts.<sup>82</sup>

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<sup>79</sup> See, e.g., G.A. Res. 3163 (XXVIII), ¶ 5 (Dec. 14, 1973) (proclaiming “the legitimacy of the struggle of the people under colonial and alien domination to exercise their right to self-determination and independence by all . . . necessary means”); G.A. Res. 3411 (XXX) G, ¶ 5 (Dec. 10, 1975) (proclaiming the legitimacy of the struggle against a racist regime “by all means possible”); G.A. Res. 35/206A, ¶ 1 (Dec. 16, 1980); G.A. Res. 36/172A, ¶ 13 (Dec. 17, 1981); see also S.C. Res. 437, ¶ 4 (June 13, 1980) (proclaiming the legitimacy of the struggle of the South African people for the elimination of apartheid); Stephen M. Schwebel, *Wars of Liberation—As Fought in U.N. Organs*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 446, 449 (John Norton Moore ed., 1974).

<sup>80</sup> See, e.g., G.A. Res. 37/69A, ¶ 16 (Dec. 9, 1982); G.A. Res. 38/39A, ¶ 4 (Dec. 5, 1983).

<sup>81</sup> G.A. Res. 3314 (XXIX), at 142 (Dec. 14, 1974).

<sup>82</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1, ¶ 4, U.N. Doc. A/32/144, 1125 U.N.T.S. 3 (1977).

C. *Other Instances of Armed Intervention Authorized by Contemporary International Humanitarian Law*

The question whether the U.N. Charter provisions deal comprehensively with legally permissible armed interventions has mostly been debated in the context of (a) pre-emptive self-defense action, and (b) humanitarian intervention.

1. *Pre-Emptive Self-Defense Action*

Article 51 of the U.N. Charter provides in part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”<sup>83</sup>

Since Article 51 confines the right of Member States of the United Nations to take individual or collective self-defense action “if an armed attack occurs,”<sup>84</sup> the question whether this provision precludes pre-emptive self-defense is in itself problematic.<sup>85</sup> It stands to reason, though, that a State need not wait for the other side to strike the first blow if it is abundantly clear and absolutely certain that an armed attack is imminent.<sup>86</sup> As noted by Sir Humphrey Waldock: “Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.”<sup>87</sup>

Some analysts maintain that the reference in Article 51 to “the *inherent right* of individual or collective self-defense” could arguably include pre-

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<sup>83</sup> U.N. Charter art. 51. In cases of collective self-defense, the State for whose benefit this right is used must declare itself to be the victim of an armed attack. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 196 (June 27). The victim State must furthermore request the assistance of the other State or States participating in the collective defense of the victim State. *Id.* ¶ 199.

<sup>84</sup> U.N. Charter art. 51.

<sup>85</sup> See STANIMIR A. ALEXANDROV, *SELF-DEFENCE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 165 (1996); Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense* 5 (Am. Soc’y Int’l L. Task Force on Terrorism Paper, 2002), <http://www.comw.org/qdr/fulltext/02oconnell.pdf> (interpreting Article 51 to mean that “[a]n attack must be underway or must have already occurred in order to trigger the right to unilateral self-defense”).

<sup>86</sup> See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 *HOUS. J. INT’L L.* 3, 17 (1999); see also ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 186 (1993) (stating that “[w]ith the demise of Article 2(4), it is reasonable to assume that this preexisting right [to pre-emptive self-defense] would be rehabilitated”).

<sup>87</sup> C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, in *RECUEIL DES COURS* 451, 498 (1952).

emptive action.<sup>88</sup> The inherent right to self-defense includes more than merely taking defensive action after an attack has occurred; reference to individual or collective self-defense “if an attack occurs” was intended “to list [merely] one situation in which a state could clearly exercise that right.”<sup>89</sup>

The General Assembly of the United Nations endorsed a right to pre-emptive self-defense action, proclaiming, “a threatened State, according to established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.”<sup>90</sup> In its National Security Strategy of 2002, the United States also endorsed the right to pre-emptive self-defense action:

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 the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>91</sup>

It should be noted, though, that whereas the United States used the concepts of “pre-emptive” and “anticipatory” action interchangeably,<sup>92</sup> the General Assembly made a distinction, defining the former concept as action “against an imminent or proximate threat” and the latter as action “against a non-imminent or non-proximate one.”<sup>93</sup> Even though it could be argued “that the potential harm from some threats (e.g., terrorist armed with a nuclear weapon) is so great that one simply cannot risk waiting until they become imminent, and that less harm may be done (e.g., avoiding a nuclear exchange or radioactive fallout from a reactor destruction) by acting earlier,”<sup>94</sup> international law requires “that if there are good arguments for preventive military action, with good evidence

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<sup>88</sup> AREND & BECK, *supra* note 86, at 72–73 (emphasis added); see also Mary Ellen O’Connell, *Review Essay: Re-leashing the Dogs of War*, 97 AM. J. INT’L L. 446, 453 (2003); O’Connell, *supra* note 85, at 12.

<sup>89</sup> AREND & BECK, *supra* note 86, at 73.

<sup>90</sup> Rep. of the Secretary General’s High-level Panel on Threats, Challenges and Change, *supra* note 65, ¶ 188.

<sup>91</sup> OFFICE OF THE PRESIDENT OF THE U.S., THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 15 (2002), [http://www.au.af.mil/au/awc/awcgate/nss/nss\\_sep2002.pdf](http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf).

<sup>92</sup> *Id.* Note that the author of this Article has also in the past used the two terms interchangeably. See Johan D. van der Vyver, *Ius Contra Bellum and American Foreign Policy*, 20 S. AFR. Y.B. INT’L L. 1, 4–5 (2003).

<sup>93</sup> Rep. of the Secretary General’s High-level Panel on Threats, Challenges and Change, *supra* note 65, ¶ 189.

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

to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”<sup>95</sup> And what if the Security Council, for whatever reason, should not authorize anticipatory defensive action? Then, said the General Assembly, “there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option.”<sup>96</sup>

It is commonly accepted that pre-emptive self-defense must be confined to the circumstances specified by former U.S. Secretary of State Daniel Webster in a diplomatic communiqué to his British counterpart, Lord Ashburton, following the *Caroline* affair which resulted from the following fact scenario.<sup>97</sup> During the nineteenth century, a group of rebels from Upper Canada (currently Ontario) revolted against British colonial rule.<sup>98</sup> The rebels were forced to leave the country and took refuge on Navy Island on the American side of the Niagara Falls.<sup>99</sup> Sympathizers with their cause within the United States supplied the rebels with money, provisions, and arms that were conveyed to Navy Island by *SS Caroline*, which was owned by a U.S. citizen.<sup>100</sup> On December 29, 1837, a group of British and Canadian loyalists crossed the border between Canada and the United States, seized *SS Caroline* in American waters, chased away its crew, set the ship alight, and left it adrift over the Niagara Falls.<sup>101</sup> In the exchange of diplomatic notes, Lord Ashburton, while apologizing for the invasion of United States territory, maintained that the destruction of *SS Caroline* was justified by the necessity of self-defense.<sup>102</sup> Secretary Webster responded that it would be up to Her Majesty’s Government “to show, upon what state of facts, and what rules of international law, the destruction of the ‘*Caroline*’ is to be defended,” and in particular “to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>103</sup>

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<sup>95</sup> *Id.* ¶ 190.

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

<sup>97</sup> See, e.g., Michael J. Kelly, *Time Warp To 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT’L L. & POL’Y 1, 25 (2003).

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

<sup>101</sup> See *The Caroline Case*, in 2 DIGEST OF INTERNATIONAL LAW 1, 409–10, 412 (John Bassett Moore ed., 1906).

<sup>102</sup> See *id.* at 411.

<sup>103</sup> Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), in 2 JOHN MOORE DIGEST OF INTERNATIONAL LAW 411–12 (1906).

It has thus come to be accepted that pre-emptive self-defense action must be confined to cases in which the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”<sup>104</sup> Jordan Paust has pointed out that the *Caroline* incident was not actually a matter of pre-emptive self-defense since it occurred in the process of continued attacks on the government of Canada by insurgents.<sup>105</sup> That may be the case, but it is equally true that *Caroline* has come to be regarded as the decisive norm governing pre-emptive military action.<sup>106</sup> It was, for example, quoted by the Nuremberg Military Tribunal in the context of preventive armed intervention.<sup>107</sup> Pre-emptive self-defense must therefore remain confined to “situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential for self-preservation.”<sup>108</sup> It must also comply with the test of proportionality.<sup>109</sup>

## 2. *Humanitarian Intervention*

Humanitarian intervention denotes instances of armed conflict where State A takes military action against State B to protect the citizens of State B against severe atrocities committed by the powers that be of State B.<sup>110</sup> It owes its origin to the writings of Grotius.<sup>111</sup> Military intervention against ISIS has

<sup>104</sup> *Id.*

<sup>105</sup> Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 535 (2002).

<sup>106</sup> See Reisman, *supra* note 86, at 47, 48–49; Waldock, *supra* note 87, at 498.

<sup>107</sup> *United States v. Göring*, in 1 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE MILITARY TRIBUNAL 171, 207 (1947).

<sup>108</sup> Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984).

<sup>109</sup> See AREND & BECK, *supra* note 86, at 165.

<sup>110</sup> An example of this is the invasion of Uganda in 1979 by Tanzanian forces to rescue the peoples of Uganda from the brutal reign of terror of President Idi Amin. See U.O. Umozurike, *Tanzania's Intervention in Uganda*, in 20 ARCHIV DES VÖLKERRECHTS 301, 312–13 (1982). Justification for the military action of NATO forces in 1999 within Kosovo to put an end to the repression of the peoples of that region by the Serbian governmental authorities can also find no other possible justification than humanitarian intervention. See Richard B. Bilder, *Kosovo and the “New Interventionism”: Promise or Peril?*, 9 J. TRANSNAT'L L. & POL'Y 153 (2000).

<sup>111</sup> In his seminal work on the law of war and peace, Grotius posed the question of “[w]hether there may be a just cause for undertaking war on behalf of the subjects of another ruler, in order to protect them from wrong at his hands.” HUGO GROTIUS, 2 DE JURE BELLI ET PACIS 438 (William Whewell trans., 2011) (“*Est et illud controversum, an justa sit belli causa pro subditis alienis, ut ab eis arceatur imperantis injuria.*”). He answered the question in the positive, provided the wrong inflicted by the ruler on his own subjects is obvious, explaining: “In conformity with this principle Constantine took up arms against Maxentius and Lucinius, and other Roman emperors either took up arms against the Persians, or threatened to do so, unless these should check their persecutions of the Christians on religious grounds.” *Id.* at 440 (“*Sic in Maxentium et in Licinium*

brought *jus ad bellum* relating to humanitarian intervention in contention and therefore requires special attention in the context of the present survey.

There are those who bluntly deny the legality of humanitarian intervention without Security Council endorsement.<sup>112</sup> Arguments in support of the continued legality, or the moral legitimacy, of humanitarian intervention have been wide-ranging.<sup>113</sup> Justifications of humanitarian intervention can be reduced to three distinct approaches: (1) the literalist approach, (2) the flexible and teleological approach, and (3) the emergency mechanism argument.

The literalist approach, represented by Julius Stone (1907-1985), the Challis Professor of Jurisprudence and International Law at the University of Sydney (1942-1974) and thereafter Distinguished Professor of Jurisprudence and International Law at the Hastings College of Law of the University of California, maintained that Article 2(4) of the U.N. Charter does not forbid the threat or use of force *simpliciter*, but only the threat or use of force for specific unlawful purposes, namely “against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>114</sup> Therefore, since humanitarian intervention does not seek to change territorial borders of the State under attack or to challenge the political independence of that State, it falls outside the scope of the Charter’s proscription.<sup>115</sup> Furthermore, one cannot, according to Stone, reconcile a blanket prohibition of the threat or use of force with the provisions of Article 2(3) of the U.N. Charter, which calls upon Member States to settle international disputes by peaceful means and in such a manner that international peace “and justice” are not endangered.<sup>116</sup>

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*Constantinus, in Persas alii Romanorum Imperatores arma ceperunt, aut capere minati sunt, nisi vim a Christianis religionis nomine arcerent.”*)

<sup>112</sup> See, e.g., Ilias Bantekas, *Defences in International Criminal Law*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 263, 278–79 (Dominic McGoldrick et al. eds., 2004) (maintaining that lawful armed intervention is confined to those sanctioned by Articles 42 and 51 of the U.N. Charter and that anticipatory self-defense is not legitimate); Muhammad Aziz Shukri, *Will Aggressors Ever Be Tried Before the ICC?*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 32, 34–35 (Mauro Politi & Guiseppa Nesi eds., 2004).

<sup>113</sup> See Richard B. Lillich, *A United States Policy of Humanitarian Intervention and Intercession*, in *HUMAN RIGHTS AND AMERICAN FOREIGN POLICY* 278, 288–89 (Donald P. Kommers & Gilbert D. Loescher eds., 1979) [hereinafter Lillich, *A United States Policy*]. For a critical analysis of the following classification, see GERHARD KEMP, *INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION* 64–68 (2010).

<sup>114</sup> JULIUS STONE, *AGGRESSION AND WORLD ORDER* 95 (1958). *Contra* Schachter, *supra* note 108, at 1633.

<sup>115</sup> STONE, *supra* note 114, at 95. *Contra* Schachter, *supra* note 108, at 1633.

<sup>116</sup> STONE, *supra* note 114, at 95, 98–101.

The flexible and teleological approach,<sup>117</sup> represented by Michael Reisman, the Myres S. McDougal Professor of International Law at Yale Law School, argued that the prohibition of the threat or use of force must be read in conjunction with the overarching human rights concerns of the United Nations as recorded in several provisions of the U.N. Charter<sup>118</sup> and of which humanitarian intervention is a logical extension.<sup>119</sup>

The emergency mechanism argument, represented by Richard Baxter (1921-1980),<sup>120</sup> Professor of Law at Harvard University (1954-1979) and Judge in the International Court of Justice (1979-1980), and Richard Lillich (1933-1996),<sup>121</sup> Professor of International Law at the University of Virginia, based the justification for humanitarian intervention on a necessity deriving from the inability of the Security Council, due to the veto powers of the Permanent Members and the (then) prevailing Cold War, to execute its primary function of maintaining international peace and security. Under this theory, there is a need for humanitarian intervention exactly because the Security Council has been immobilized by the veto power of the Permanent Members.<sup>122</sup> This presupposes that humanitarian intervention is to be “deactivated” should the Security Council ever begin to function smoothly.<sup>123</sup>

Although humanitarian intervention remains “a murky area of law and morality,”<sup>124</sup> there does seem to be the need for “‘a form of collective intervention’ beyond a veto-bound Security Council,”<sup>125</sup> but then under strict conditions relating, first, to the circumstances that would justify military action

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<sup>117</sup> See Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217–18 (John Norton Moore ed., 1974) [hereinafter Brownlie, *Humanitarian Intervention*].

<sup>118</sup> U.N. Charter pmb., arts. 1, 55–56.

<sup>119</sup> Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in 1 *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167, 177–78 (Richard B. Lillich ed., 1973); see also Adam Roberts, *The So-Called ‘Right’ of Humanitarian Intervention*, 3 *Y.B. INT’L HUMANITARIAN L.* 3, 8 (2000).

<sup>120</sup> See *The Present*, in 1 *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 54 (Richard B. Lillich ed., 1973) (statement by Richard Baxter, discussant in conference proceedings) (“It is almost as if we were thrown back on customary international law by a breakdown of the Charter system.”).

<sup>121</sup> Lillich, *A United States Policy*, *supra* note 113, at 289; see also Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 *IOWA L. REV.* 325, 335, 345–51 (1968); Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229, 230 (John Norton Moore ed., 1974).

<sup>122</sup> See Lillich, *A United States Policy*, *supra* note 113, at 289.

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

<sup>124</sup> Thomas W. Smith, *Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism*, 39 *INT’L POL.* 175, 189 (2002).

<sup>125</sup> Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 *AM. J. INT’L L.* 824, 828 (1999).

in a given situation, and second, to the manner in which it is to be executed. Humanitarian intervention will only be warranted in exceptional circumstances of extreme and ongoing violations of human rights;<sup>126</sup> as to the execution of an armed intervention, collective rather than unilateral action must be the norm. Humanitarian intervention has thus been defined as “the use of military force—consensual or otherwise—by regional and international bodies to stop massive and systematic human rights violations.”<sup>127</sup> Human Rights Watch has emphasized that nonconsensual military intervention would be justified “only when it is the last feasible option to avoid genocide or comparable mass slaughter,” and added that “given the risk to life inherent in any military action, only the most severe threats to life should warrant consideration of an international military response.”<sup>128</sup>

A number of prominent international lawyers, on the other hand, maintain that humanitarian intervention is decidedly illegal but might, in special circumstances, derive a certain morally-defined justification, basing their reluctance to subscribe to the legality of humanitarian intervention on its potential abuse.<sup>129</sup> Richard Falk, for example, argues that the legitimacy, if not the legality, of retaliation—and the same, it is submitted, would apply to humanitarian intervention—derives from the “acceptability” of the use of force in the special circumstances that prompted its use.<sup>130</sup> According to Falk:

The assumption underlying such an approach is that the primary role of international law is to help governments plan *how* to act, rather than to permit some third-party judge to determine whether contested action is legal or not. In fact the function of the third-party judge can be performed properly only by attempting to assess *in what respects* and *to what extent* the governmental actor “violated” community norms of a prescriptive nature.<sup>131</sup>

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<sup>126</sup> Dino Kritsiotis, *Arguments of Mass Confusion*, 15 EUR. J. INT’L L. 233, 273 (2004) (noting that “states have reserved the right of humanitarian intervention for extreme situations of acute or aggravated humanitarian need. . .”).

<sup>127</sup> Mahmood Monshipouri & Claude E. Welch, *The Search for International Human Rights and Justice: Coming to Terms with the New Global Realities*, 23 HUM. RTS. Q. 370, 378 (2001); see also Smith, *supra* note 124, at 178.

<sup>128</sup> See generally HUMAN RIGHTS WATCH, WORLD REPORT (2000), <https://www.hrw.org/legacy/wr2k/Front.htm#TopOfPag>.

<sup>129</sup> Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT’L L. 1005, 1020–21 (1998); Smith, *supra* note 124, at 183.

<sup>130</sup> See Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT’L L. 415, 425 (1969) (arguing that “certain behavior might be ‘acceptable’ though not legal”).

<sup>131</sup> *Id.* at 442.

Jonathan Charney, commenting on the Kosovo bombings, likewise maintained that “keeping such intervention illegal and requiring states to break the law in extreme circumstances may be the best and most likely way to limit its abuse, despite not being a perfect solution.”<sup>132</sup> The moral appeal of the use of force “would tend to mitigate or even overcome any perceived ‘illegality’” of such action.<sup>133</sup>

Ian Brownlie also proceeded on the assumption that humanitarian intervention is illegal,<sup>134</sup> though it might be morally defensible in certain circumstances. To proclaim humanitarian intervention lawful if confined to those circumstances would still leave its application open to abuse.<sup>135</sup> Referring to euthanasia as presenting an analogous dilemma, Brownlie argued that one’s responses to instances where humanitarian intervention would be justified by “higher considerations of public policy and moral choice”<sup>136</sup> should be conditioned by “moderation” while leaving the principle of its illegality intact: “[m]oderation in application does not necessarily display a legislative intent to cancel the principle so applied.”<sup>137</sup>

### III. THE ISIS CRISIS

The atrocities committed by ISIL/ISIS referred to above<sup>138</sup> raise the question of what military action can be taken by the international community of States or by individual sovereignties to combat the threat emanating from the crime of aggression and the acts of terror violence. Part III argues that existing norms of *jus ad bellum* do not unconditionally authorize military intervention across national borders against ISIS strongholds. Several States have nevertheless launched airstrikes against ISIS targets in Iraq and in Syria.

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<sup>132</sup> Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT’L L. 834, 838 (1999); see also Wolfgang G. Friedman, *Comment 4.*, in LAW AND CIVIL WAR IN THE MODERN WORLD 574, 578–79 (John Norton Moore ed., 1974) (maintaining that concepts such as humanitarian intervention have “at best attained the level of accepted international morality rather than law”).

<sup>133</sup> Falk, *supra* note 130, at 439 (also proclaiming that “[a] rule of conduct isolated from context is often too abstract to guide choice of action”).

<sup>134</sup> Brownlie, *Humanitarian Intervention*, *supra* note 117, at 226.

<sup>135</sup> *Id.* at 223, 225; see also Ian Brownlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139, 147–48 (Richard B. Lillich ed., 1973) [hereinafter Brownlie, *Thoughts*]; Schachter, *supra* note 108, at 1629.

<sup>136</sup> Brownlie, *Thoughts*, *supra* note 135, at 146.

<sup>137</sup> *Id.*

<sup>138</sup> See *supra* Part II.A.

The airstrikes were not authorized by the Security Council of the United Nations. The Security Council in a Resolution of August 15, 2014 called on Member States

to take all measures as may be necessary and appropriate and in accordance with their obligations under international law to counter incitement of terrorist acts motivated by extremism and intolerance perpetrated by individuals or entities associated with ISIL, ANF [Al Nusrah Front] and Al-Qaida and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters.<sup>139</sup>

Although “measures as may be necessary and appropriate” could be taken to include armed force, it was generally understood that the Resolution was not intended to authorize an armed intervention. The representative of the Russian Federation, who supported the Resolution, stated quite emphatically that “it should not be taken as approval for military action.”<sup>140</sup> The Syrian representative, who also supported the Resolution, which was adopted unanimously, called upon the Security Council “in the future, to consult with his country and others in the region in order to make its actions against terrorism effective.”<sup>141</sup> The legality of airstrikes in Iraq and Syria can therefore not be based on Security Council authorization under its Chapter VII powers.

The military intervention by Western States in Iraq and Syria can also not be justified on the basis of humanitarian intervention. Humanitarian intervention is essentially conducted against the armed forces of a State and is aimed at the toppling of a repressive government.<sup>142</sup> ISIS does not comprise the armed forces of a State and is not the government of any State. Nor can it be brought within the confines of pre-emptive self-defense action, as will be noted more specifically hereafter.

The judgment of the International Court of Justice (ICJ) in the case of *Nicaragua v. United States* is clear authority for the proposition that a government may seek military assistance from other governments to repress a militant uprising within its borders, but military support by a foreign

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<sup>139</sup> S.C. Res. 2170, ¶ 6 (Aug. 15, 2014).

<sup>140</sup> See Press Release, Security Council, Security Council Adopts Resolution 2170 (2014) Condemning Gross, Widespread Abuse of Human Rights by Extremist Groups in Iraq, Syria, U.N. Press Release SC/11520 (Aug. 15, 2014), <http://www.un.org/press/en/2014/sc11520.doc.htm> (quoting statement by Petr V. Ilichev, Russian Federation Representative).

<sup>141</sup> *Id.* (quoting statement by Bashar Ja’afari, Syrian Representative).

<sup>142</sup> See *supra* Part II.C.2.

government of the insurgent forces constitutes an infringement of state sovereignty and a violation of international law.<sup>143</sup> Iraq has therefore, within the framework of contemporary international humanitarian law, requested military support from the United Kingdom, the United States, and a number of other Western allies, in its armed struggle against ISIS.

On September 26, 2014, the British House of Commons adopted, by 524 votes to 43, the following motion:

That this House condemns the barbaric acts of ISIL against the peoples of Iraq including the Sunni, Shia, Kurds, Christians and Yazidi and the humanitarian crisis this is causing; recognizes the clear threat ISIL poses to the territorial integrity of Iraq and the request from the Government of Iraq for military support from the international community and the specific request to the UK Government for such support; further recognizes the threat ISIL poses to wider international security and the UK directly through its sponsorship of terrorist attacks and its murder of a British hostage; acknowledges the broad coalition contributing to military support of the Government of Iraq including countries throughout the Middle East; further acknowledges the request of the Government of Iraq for international support to defend itself against the threat ISIL poses to Iraq and its citizens and the clear legal basis that this provides for action in Iraq; notes that this motion does not endorse UK air strikes in Syria as part of this campaign and any proposal to do so would be subject to a separate vote in Parliament; accordingly supports Her Majesty's Government, working with allies, in supporting the Government of Iraq in protecting civilians and restoring its territorial integrity, including the use of UK air strikes to support Iraqi, including Kurdish, security forces' efforts against ISIL in Iraq; notes that Her Majesty's Government will not deploy UK troops in ground combat operations; and offers its wholehearted support to men and women of Her Majesty's armed forces.<sup>144</sup>

It is important to note that authorization by the House of Commons was confined to an armed intervention in the requesting State only.<sup>145</sup> Confining British military support to operations in Iraq was based on the fact that Syria

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<sup>143</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195–98 (June 27).

<sup>144</sup> 26 Sept. 2014, Parl Deb HC (2014) col. 1255 (UK); *see also* DEFENCE COMMITTEE, THE SITUATION IN IRAQ AND SYRIA AND THE RESPONSE TO AL-DAWLA AL-ISLAMIYA FI AL-IRAWAL-SHAM (DAESH), 2014-15, HC 690, at 15 (UK) [hereinafter DAESH Report].

<sup>145</sup> *See* DAESH Report, *supra* note 144, at 15 (noting that the House of Commons authorized air strikes in Iraq).

has not requested the United Kingdom to attack ISIS strongholds in that country. However, on December 2, 2015, the House of Commons approved, by 397 votes to 223, airstrikes against ISIS targets in Syria.<sup>146</sup>

On March 30, 2015, the Canadian House of Commons approved by majority vote a government proposal to extend the military campaign in Iraq for up to one year and to authorize airstrikes in Syria.<sup>147</sup> Initially confining British military support to operations in Iraq was based on the fact that Syria had not requested the United Kingdom (or Canada or the United States) to attack ISIS strongholds in that country.<sup>148</sup> However, the United States did launch air attacks against al-Qaeda targets in Syria.<sup>149</sup>

Even though the U.S. Constitution requires congressional approval before going to war,<sup>150</sup> President Obama initially did not request the consent of Congress for the military interventions in Iraq and Syria.<sup>151</sup> He essentially based the legality of the airstrikes on the 2001 Authorization for Use of Military Force, which authorized the President to use “all necessary and appropriate force” against those whom he determined “planned, authorized, committed or aided” the September 11 attacks,<sup>152</sup> and the 2002 Authorization for Use of Military Force against Iraq, which authorized the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”<sup>153</sup>

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<sup>146</sup> See Patrick Winour, *Britain Carries Out First Syria Airstrikes After MPs Approve Action Against Isis*, GUARDIAN (Dec. 3, 2015), <http://www.theguardian.com/world/2015/dec/02/syria-airstrikes-mps-approve-uk-action-against-isis-after-marathon-debate>.

<sup>147</sup> Mark Kennedy, *Parliament Votes 149-129 to Widen Canada’s Mission Against ISIS to Syria and Extend It for a Year*, NAT’L POST (Mar. 31, 2015), <http://news.nationalpost.com/news/canada/canadian-politics/parliament-votes-149-129-to-widen-canadas-mission-against-isis-to-syria-and-extend-it-for-a-year>.

<sup>148</sup> See DAESH Report, *supra* note 144, at 16 (noting that the U.K.’s authorization was based on the Iraqi government’s request for intervention).

<sup>149</sup> See, e.g., *Syria: US Begins Air Strikes on Islamic State Targets*, BBC NEWS (Sept. 23, 2014), <http://www.bbc.com/news/world-middle-east-29321136>.

<sup>150</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>151</sup> See Stimson, *supra* note 46, at 1.

<sup>152</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 STAT. 224 (2001); see also KEN GUDE, CTR. FOR AM. PROGRESS, UNDERSTANDING AUTHORIZATIONS FOR THE USE OF MILITARY FORCE 1 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/09/UnderstandingAUMFs.pdf>; Stimson, *supra* note 46 (noting that the Administration believes that the 2001 Authorization for Use of Military Force offers “sufficient legal authority”).

<sup>153</sup> Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498 (2002); see also GUDE, *supra* note 152, at 3.

Suffice it to say that it requires quite a stretch of the imagination to construe a link between the bombing campaign against ISIS (or ISIL, as American spokespersons prefer to call it) and the terrorist attack of September 11th or the invasion of Iraq in 2003.

Nevertheless, there might after all be some merit in this madness. Since the Obama Administration based the legality of the airstrikes against ISIS targets under municipal law on the 2001 authorization by Congress of the War on Terror ignited by al-Qaeda on September 11 and on the 2002 authorization by Congress of the invasion of Iraq, and those armed attacks did not involve ISIS at all, current airstrikes against al-Qaeda targets were in all likelihood intended to afford a degree of credence to relying on the 2001 and 2002 congressional authorizations for the airstrikes of 2014 and thereafter against ISIS. Relying on the 2001 and 2002 congressional authorizations in any event remains farfetched.

Referring to ISIL instead of ISIS by American spokespersons is probably insisted upon in order to justify reliance for the current bombing campaign in Iraq on the 2001 Authorization for Use of Military Force.<sup>154</sup> Al-Qaeda was part of ISIL but is not part of ISIS.<sup>155</sup> That, too, is probably the reason why the United States has not confined its armed attacks to ISIS targets in Iraq but has also engaged in airstrikes against al-Qaeda targets in Syria.

So, why not simply obtain congressional authorization for the current airstrikes targeting ISIS? It is quite likely that the Obama Administration feels constrained because Congress may decline to authorize those airstrikes. Concerns have been raised by several members of Congress that airstrikes in the Middle East without the backing of U.S. soldiers on the ground would be futile.<sup>156</sup> Furthermore, there are clear indications that a substantial number of Republicans will oppose any action triggered by an Obama initiative by virtue of their strong opposition to his administration, irrespective of the merits of those initiatives.<sup>157</sup> It might be noted that the Obama Administration did on

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<sup>154</sup> See Withnall *supra* note 45; see also Stimson, *supra* note 46, at 3.

<sup>155</sup> See Holmes, *supra* note 15; *Mapping Militant Organizations: The Islamic State*, *supra* note 14; Zelin, *supra* note 10.

<sup>156</sup> See David Martosko, *Boehner Says US Might 'have no choice' But to Send Combat Troops to Fight Against ISIS*, DAILY MAIL (Sept. 29, 2014), <http://www.dailymail.co.uk/news/article-2773747/Boehner-says-US-no-choice-send-combat-troops-fight-against-ISIS.html>.

<sup>157</sup> See, e.g., Russell Berman, *The War Against ISIS Will Go Undeclared*, ATLANTIC (Apr. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-war-against-isis-will-go-undeclared/390618/>; Amber Phillips, *President Obama's Push for Military Authorization to Fight ISIS Won't Go Anywhere in Congress*.

February 12, 2015 submit a proposal to Congress for the authorization of “ground combat operations in other, more limited circumstances,” including rescue operations and special forces operations to “take military action against ISIL leadership.”<sup>158</sup> However, the legality of the current military intervention in Iraq and Syria under the municipal law of the United States is beyond the reach of this survey. This present Article is concerned with the legality of the airstrikes under the prevailing norms of customary international law.

Within the confines of international humanitarian law, the airstrikes in Iraq by United States and other national armed forces are clearly lawful because they were approved, and indeed requested, by the government of Iraq. The airstrikes in Syria are most likely not lawful under the existing laws and practices of international humanitarian law because they were not invited by the government of Syria. The judgment of the ICJ in *Nicaragua v. United States* can be cited in support of these assessments.<sup>159</sup> The United States allegedly informed Syria of its intended airstrikes and requested the Syrian government not to intervene<sup>160</sup>—and Syria as a matter of fact did not intervene. Could this be interpreted as implied consent? Probably not!

As noted earlier, the airstrikes were not authorized by the U.N. Security Council,<sup>161</sup> and also cannot be justified as a matter of humanitarian intervention, since they were not designed to topple a repressive government.<sup>162</sup> It would seem, therefore, that the legality of the airstrikes in Syria do not come within the confines of existing rules of *jus ad bellum*. However, a new rule of international humanitarian law is currently in the making, which can be called the “unwilling or unable” paradigm.

#### A. *The “Unwilling or Unable” Rationale*

International humanitarian law is currently in the making of what has come to be denoted as the “unwilling or unable” paradigm, which is aimed at

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*Here’s Why*, WASH. POST (Dec. 7, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/12/07/3-reasons-congress-wont-authorize-obamas-use-of-force-against-the-islamic-state/>.

<sup>158</sup> Letter from U.S. President Barack Obama to Congress (Feb. 11, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>.

<sup>159</sup> See *supra* text accompanying note 142.

<sup>160</sup> Sam Dagher et al., *Syria Says U.S. Told it of Coming Airstrikes Against Islam State*, WALL ST. J. (Sept. 23, 2014), <http://www.wsj.com/articles/u-s-arab-allies-launch-airstrikes-against-islamic-state-targets-in-syria-1411467879>.

<sup>161</sup> See *supra* notes 139–41 and accompanying text.

<sup>162</sup> See *supra* Part II.C.2.

authorizing military action by State A against terrorist groups located in State B if the government of State B is either unwilling or unable to prevent its territory from being used as a launching pad for acts of terror violence.<sup>163</sup> Although some proponents of the unwilling or unable paradigm sought to bring the military response against the perpetrators of terror violence under the rubric of the right to self-defense,<sup>164</sup> it will appear that its implementation is not confined to situations that will warrant pre-emptive defensive military action as required by contemporary international humanitarian law.

The newly devised justification for militant self-defense and humanitarian action—the unwilling or unable rationale—first appeared in a letter from Ambassador Samantha Power, representative of the United States of America to the United Nations, to the Secretary-General of the United Nations, dated September 23, 2014. In the letter she justified the airstrikes in Syria along the following lines:

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 [o]f 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.<sup>165</sup>

Although Ambassador Power sought to bring the military action resorted to under the rubric of the unwilling or unable rationale as a matter of self-defense so as to bring it within the confines of the prevailing norms of *jus ad bellum*, it must again be emphasized that the United States was neither attacked nor under threat of an imminent attack by ISIS. Given the restricted circumstances under which a U.N. Member State can invoke the right to self-defense,<sup>166</sup> it should be evident that an armed intervention against terrorists operating from

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<sup>163</sup> See, e.g., Deeks, *supra* note 6, at 486.

<sup>164</sup> See, e.g., Philip Alston, *The CIA and Targeted Killings Beyond Borders* 17–18 (N.Y. Univ. Sch. of Law, Pub. Law Research Paper No. 11-64, 2011) (noting that the use of force by State A in the territory of State B will be lawful if State A has a right to use force in self-defense under international law and State B “is unwilling or unable to stop armed attacks” against State A).

<sup>165</sup> Jens David Ohlin, *The Unwilling or Unable Doctrine Comes to Life*, OPINIO JURIS (Sept. 23, 2014), <http://opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/> (citing the letter from Samantha J. Power to Ban Ki-moon).

<sup>166</sup> See *supra* Part II.A.

within the borders of a State whose government is unwilling or unable to counteract their evil deeds is not confined to a self-defense justification.

On the domestic front, the unwilling or unable rationale was also endorsed by several prominent state officials. John Brennan, Assistant to the President for Homeland Security and Counterterrorism, in remarks addressed to the Program on Law and Security of Harvard Law School in 2011, stressed the need to strengthen the security of the United States while upholding the values embedded in the laws of the country.<sup>167</sup> He emphasized that while the United States will uphold legal principles of state sovereignty and the laws of war, it “reserve[s] the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.”<sup>168</sup> Attorney-General Eric Holder, speaking at Northwestern University School of Law in 2012, had this to say:

[T]here are instances where our government has a clear authority—and, I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force . . . . This does not mean that we can use military force whenever and wherever we want. International legal principles, including respect for another nation’s sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved—or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.<sup>169</sup>

In December 2001, the International Commission on Intervention and State Sovereignty published a report, *The Responsibility to Protect*, which can be identified as the original source of the unwilling or unable rationale for an armed intervention.<sup>170</sup> The Commission proclaimed in summary: “Where a population is suffering serious harm, as a result of internal war, insurgency,

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<sup>167</sup> See John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, *The White House Strengthening Our Security and Adhering to Our Values and Laws* (Sept. 16, 2011), <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

<sup>168</sup> *Id.*; see Rosa Brooks, *Lessons for International Law from the Arab Spring*, 28 AM. U. INT’L L. REV. 713, 727 (2013).

<sup>169</sup> Brooks, *supra* note 168, at 727; see also Eric Holder, Attorney Gen., U.S. Dep’t of Justice, *Attorney General Eric Holder Speaks at Northwestern University School of Law* (Mar. 5, 2012), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>.

<sup>170</sup> See generally INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”<sup>171</sup>

The Commission drew a distinction between “the responsibility to protect” and “the right to intervene,” giving preference to protection rather than intervention: “[I]t is only if the state is unable or unwilling to fulfill this responsibility [to protect], or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.”<sup>172</sup> It is important that the international community comes to accept a “culture of prevention” rather than a “culture of reaction.”<sup>173</sup> The right to take military action in the event of unwillingness and inability of the state in question can manifest itself on two fronts: self-defense and humanitarian intervention. The Commission thus proposed the extension of the right to self-defense within the confines of Article 51 of the U.N. Charter “to include the right to launch punitive raids into neighboring countries that had shown themselves unwilling or unable to stop their territory being used as a launching pad for cross-border armed raids or terrorist attacks.”<sup>174</sup> As far as humanitarian intervention is concerned, the Commission identified an “emerging principle” of international humanitarian law that affords legality to “intervention for human protection purposes, including military intervention in extreme cases . . . when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.”<sup>175</sup> The Commission emphasized, though, that humanitarian intervention by armed forces must remain “an exceptional and extraordinary measure” that can only be resorted to if “serious and irreparable harm . . . to human beings” is occurring, or is likely to occur imminently.<sup>176</sup> Military intervention for humanitarian protection purposes is, in the opinion of the Commission, justified in two “broad sets of circumstances” only,

namely in order to halt or avert:

*large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or*

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<sup>171</sup> *Id.* at XI, ¶ (1)(B).

<sup>172</sup> *Id.* ¶ 2.29.

<sup>173</sup> *Id.* ¶ 3.42.

<sup>174</sup> *Id.* ¶ 2.10.

<sup>175</sup> *Id.* ¶ 2.25.

<sup>176</sup> *Id.* ¶ 4.18.

*large scale 'ethnic cleansing,' actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.*<sup>177</sup>

The Commission maintained that these conditions are in conformity with the “just cause” component of a decision to intervene.<sup>178</sup> The acts of terror violence executed by ISIS clearly come within the confines of these indisputable components of a just cause.

Bringing the unwilling or unable paradigm of armed intervention within the fold of humanitarian intervention is problematic, since humanitarian intervention as currently perceived is aimed at toppling a repressive government.<sup>179</sup> Military intervention by State A against terrorist groups in State B in cases where State B is unwilling or unable to repress the acts of terrorism committed or orchestrated within its borders is directed against the terrorist groups.<sup>180</sup> It does not aim at toppling the unwilling or unable government.<sup>181</sup>

Basing the legality of military action against terrorists operating from within a territory under the rule of a government that is unwilling or unable to repress the acts of terror violence orchestrated from within its border on the right to self-defense proclaimed in Article 51 of the U.N. Charter is also problematic. Countries such as the United States, the United Kingdom, the Russian Federation, and Canada, that have been executing airstrikes against ISIS strongholds in Iraq and Syria have not been attacked by ISIS, and such attacks are also not imminent as required by contemporary international humanitarian law to afford legality to pre-emptive self-defense action within the confines stipulated in the *Caroline* affair. It is fair to conclude, therefore, that the unwilling or unable paradigm cannot be justified under existing norms of international humanitarian law but is a new rule of *jus ad bellum* in the making.

#### CONCLUDING OBSERVATIONS

In June 2001, the U.N. Secretary-General submitted a report to the General Assembly at the request of the Security Council, the Prevention of Armed

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<sup>177</sup> *Id.* ¶ 4.19 (emphasis in original).

<sup>178</sup> *Id.*

<sup>179</sup> JOHAN D. VAN DER VYVER, ACTS OF AGGRESSION AND PROSECUTING THE CRIME OF AGGRESSION 115 (2015).

<sup>180</sup> See Deeks, *supra* note 6, at 486; VAN DER VYVER, *supra* note 179.

<sup>181</sup> VAN DER VYVER, *supra* note 179.

Conflict, in which it aspired towards moving “the international community from a culture of reaction to a culture of prevention.”<sup>182</sup> Past experiences have shown

that the earlier the root causes of a potential conflict are identified and effectively addressed, the more likely it is that the parties to a conflict will be ready to engage in a constructive dialogue, address the actual grievances that lie at the root of the potential conflict and refrain from the use of force to achieve their aims.<sup>183</sup>

The report identified as “root causes” of armed conflicts, “socio-economic inequities and inequalities, systematic ethnic discrimination, denial of human rights, disputes over political participation or long-standing grievances over land and other resource allocation.”<sup>184</sup> It asserted that “the primary responsibility for conflict prevention rests with national Governments and other local actors,”<sup>185</sup> whose “long-term effective preventive strategies” can include “political, developmental, humanitarian and human rights programmes [*sic*],”<sup>186</sup> as well as “investment in sustainable development.”<sup>187</sup>

Among the many sustainable strategies that should be pursued in order to achieve long-term prevention of armed conflict is “a focus on strengthening respect for human rights and addressing core issues of human rights violations, wherever [they] occur.”<sup>188</sup> Special mention is made of the “vital role” that the International Criminal Court will have “in deterring the most flagrant violation of human rights through the enforcement of international criminal responsibility.”<sup>189</sup> Looking at world events that followed the compilation of this noble report, one cannot but cry in despair.

This Article is not focused on the causes as such of armed conflicts, but rather on the military responses to acts of orchestrated violence. In this regard, it would seem that international humanitarian law always lags behind the times. Conventions regulating the conduct of armed conflicts are drafted with past experiences in mind, and are, as far as means and methods of conducting

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<sup>182</sup> See U.N. Secretary-General, Prevention of Armed Conflict, ¶¶ 1, 24, U.N. Doc. A/55/985-S/2001/574 (June 7, 2001).

<sup>183</sup> *Id.* ¶ 167.

<sup>184</sup> *Id.* ¶ 7.

<sup>185</sup> *Id.* ¶ 6.

<sup>186</sup> *Id.* ¶ 9.

<sup>187</sup> *Id.* ¶ 10.

<sup>188</sup> *Id.* ¶ 94.

<sup>189</sup> *Id.* ¶ 97.

armed interventions are concerned, almost invariably outdated at the time of their adoption. The Geneva Conventions of August 12, 1949 were designed with a view to the perceptions of armed conflict that were evidenced by World War II at a time when armed conflicts of that kind were no longer common. Protocols were added to the 1949 Conventions in 1977 with a view toward including guerilla warfare in the concept of armed conflict, but again this was at a time when belligerents embarked on other means and methods of conducting hostilities. Further, the international community of States is yet to come to grips with modern technology as a means of combat, as exemplified by newly devised strategies of cyber warfare.

The unwilling and unable rationale bypassed international conventions as a source of international humanitarian law in order to cope, as a matter of great urgency, with acts of terrorism as a means of conducting hostilities. I would suggest that if States were to take action that is not authorized by international law, the rationale of such action can become a new norm of customary international law, provided two conditions are satisfied, namely: (a) the action taken is not expressly prohibited by international law, and (b) the action taken receives general approval of a cross section of the international community of States.<sup>190</sup> It seems evident that the unwilling and unable paradigm complies with these criteria.

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<sup>190</sup> VAN DER VYVER, *supra* note 179, at 107–08.